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CHILD CUSTODY

- Court Erred in Requiring Joinder of Evaluator for Purpose of Determining Reasonable Compensation for His Services (see Page 138)

CHILD AND SPOUSAL SUPPORT

- In this month's Point of View, Kathryn Kirkland discusses the meaning of the term "income available for support" and distinguishes it from "cash flow" and "income" (see Page 137)

CHILD SUPPORT

- Court May Order Parent to Pay Reasonable Childcare Costs Incurred by Other Parent for Training Unrelated to Requesting Parent's Current Employment (see Page 141)

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- Existence of Criminal Protective Order Did Not Prevent Court from Issuing Domestic Violence Restraining Order (see Page 142)
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Premarital Agreements

Finding that Waiver of Spousal Support Is Unconscionable Cannot Be Based on Circumstances Arising after Time of Enforcement

By Carol Rothstein, J.D.*

In *In re Marriage of Miotke* (No. H040611, H040972; Ct. App., 6th Dist., 5/28/19) 35 Cal. App. 5th 849, __ Cal. Rptr. 3d __, 2019 Cal. App. LEXIS 494, the Sixth District Court of Appeal held that a private judge properly upheld the validity of a premarital agreement that incorporated a waiver of spousal support and that the family court properly denied the wife's request to set aside the private judge's decision.

In the opinion by Justice Greenwood (Grover, Danner, JJ., concurring), the appeals court further held that a finding that a premarital agreement is unconscionable cannot be based on circumstances that occur after the time of enforcement of the agreement, which in this case was the date of the trial before the private judge.

Facts and Procedure. Natalia and Peter were both trained architects. Natalia, who was Russian, moved to California in 1995 and became pregnant with the parties' child in December 1995.

After their child was born, Natalia and Peter decided to marry. Concerned that Natalia might be scamming him, Peter wanted to have a premarital agreement (PMA) so that he would not have to pay spousal support if Natalia moved back to Russia. The parties met with a paralegal and signed the PMA in October 1996. According to Peter, he brought a boilerplate agreement home for Natalia to review nine days before they met with the paralegal, but Natalia denied seeing the PMA before meeting with the paralegal to sign it.

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The PMA stated, in relevant part, “Both parties agree that in the case of separation or divorce there will be no spousal support owed by either of the parties to the other. Both parties are also in agreement that all children will remain in the custody of Natalia Zarubin upon separation or dissolution unless otherwise stipulated and agreed on by legal separation and/or dissolution of marriage.”

The parties separated in 2010, after 14 years of marriage. Natalia requested spousal support in the dissolution proceedings; in response, Peter asked the trial court to determine the validity of the PMA. The parties stipulated to retain a private judge, the Hon. Catherine Gallagher, to resolve the issue. Both parties were represented at the hearing. Natalia claimed that she didn’t execute the PMA voluntarily, that the PMA was unconscionable given Natalia’s medical and financial circumstances, that the disclosures between the parties were inaccurate, unfair and unreasonable, that the PMA was the product of duress and undue influence, and that the PMA was unenforceable because Natalia wasn’t represented by counsel when it was signed.

In her written ruling (Trial Decision), Judge Gallagher found that Natalia voluntarily executed the PMA, which was not unconscionable when executed. Judge Gallagher found that Natalia was not credible regarding the circumstances surrounding the signing of the PMA and that Peter’s testimony was “much more consistent, reliable and credible.” Judge Gallagher found that Natalia was capable of understanding the terms and effect of the PMA, that there was no evidence that Natalia signed the PMA as a result of trick or deception, that the parties had negotiated the waiver provision, and that the PMA expressed the

parties' desires at the time of execution. Judge Gallagher found that there was no significant inequality in the parties' bargaining party, as their disclosures did not reveal a significant disparity in their income or assets at the time they entered into the PMA, although Natalia was not working at the time. Judge Gallagher further found that the independent counsel and seven-day waiting period requirements of Family Code sections 1612(c) and 1615(c) were inapplicable because they were enacted after the parties executed the PMA and did not apply retroactively. Judge Gallagher concluded that the PMA was enforceable.

Natalia filed a motion to set aside the Trial Decision, in which she argued that the PMA was "unconscionable" and "inequitable" and alleged that there was no disclosure of financial information prior to her signing the PMA and no compliance with the statutory requirement of a seven-day waiting period [*see* Fam. Code § 1615(c)(2)]. Although Natalia cited Family Code section 2120(b) (support award inequitable when made due to nondisclosure or other misconduct); Code of Civil Procedure section 473(b) (court may relieve party from judgment due to mistake, inadvertence, surprise or excusable neglect); and Family Code section 3691(a) (time limit for motion to set aside order based on actual fraud), she did not discuss in any detail how these statutes applied to the facts cited in support of motion. Natalia also filed two declarations, in which she discussed the circumstances at time she signed PMA, the parties' disclosures before they signed the PMA, and the history of their relationship. However, she did not discuss how this information supported the set-aside motion.

The case was assigned to the Honorable Margaret Johnson, who gave Natalia an opportunity to further brief her request, which she failed to do. On the day of the hearing, Natalia filed another declaration that indicated that she was admitted to the hospital on

May 2013 for a mental health disability, which her doctors determined had started in July 2012. Natalia argued that she was mentally ill in September 2012 and could not "withstand the trial" before Judge Gallagher. Natalia asked the court to set aside the Trial Decision under Code of Civil Procedure section 473.

Judge Johnson sustained Peter's objection to the trial court considering Natalia's new allegations, which had not been pled in the initial pleading. She denied the set-aside request with prejudice, noting that Natalia could have notified Peter and the trial court before the hearing that she was having trouble obtaining the evidence she needed to support her request. Natalia filed a notice of her appeal of Judge Johnson's order denying the set aside motion.

Trial on all reserved issues was conducted before the Honorable James Towery, who stated that the Trial Decision was the "law of the case" as to issues concerning the validity of the PMA and that spousal support was not an issue, given Judge Gallagher's

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ruling that the spousal support waiver was valid. Nonetheless, on the second day of trial, Natalia argued Judge Towery should order spousal support because her waiver of support was unconscionable at the time of enforcement [*see* Fam. Code § 1612(c)]. Judge Towery denied Natalia's request for spousal support, stating that any issues related to Family Code section 1612(c), which concerns premarital agreements, should have been litigated before Judge Gallagher. In a written judgment on reserved issues, Judge Towery indicated that jurisdiction over spousal support was terminated as to both parties. Natalia appealed.

Natalia's Argument on Appeal. Natalia contended that the trial court erred in enforcing the PMA because it made her dependent on public assistance. In essence, Natalia was arguing that the PMA was unconscionable based on circumstances that arose after Judge Gallagher entered the Trial Decision. In support of her argument, Natalia cited legal authority that the trial court must consider whether the PMA is unconscionable at the time of enforcement. According to Natalia, the "time of enforcement" was the February 2014 trial before Judge Towery, not the September 2012 trial before Judge Gallagher.

Unjust Enforcement of Spousal Support Waivers. The appeals court stated that Family Code section 1612(c), which requires the trial court to consider whether a PMA was "unconscionable at time of enforcement," does not apply to a PMA entered before January 1, 2002. Although the California Supreme Court has indicated that circumstances at the time of enforcement of a pre-2002 support waiver "might make enforcement unjust" [*In re Marriage of Pendleton and Fireman* (2000) 24 Cal. 4th 39, 53, 99 Cal. Rptr. 2d 278, 5 P.3d 839], Natalia did not cite any case that actually concluded that enforcing a spousal support waiver would be unconscionable "based solely on circumstances existing at the time of enforcement." The appeals court distinguished *In re Marriage of Facter* (2013) 212 Cal. App. 4th 967, 981, in which the court found a waiver unconscionable at time of enforcement, but did so only after it determined the waiver to have been unconscionable at the time of execution.

Effective Enforcement Date Was September 2012. The appeals court stated that even if the trial court could have considered unconscionability at the

time of enforcement, the time of enforcement was the September 2012 trial before Judge Gallagher, and not the trial before Judge Towery on reserved issues. A court may separately try an issue before trial of the other issues if resolution of the bifurcated issues "is likely to simplify the determination of the other issues" [Cal. Rules of Ct, Rule 5.390(b)]. In this case, determining the validity of the PMA before considering other issues was intended to simplify the determination of those issues, a goal that would not be served if Natalia could argue that the date of enforcement of the PMA was after the date of the bifurcated trial. As Natalia did not raise the issue of unconscionability at the time of the September 2012 trial, she could not raise the issue on appeal.

Judge Towery Properly Adopted Trial Decision in Judgment. Natalia argued, without legal authority, that circumstances arising after Judge Gallagher's Trial Decision rendered the waiver of support unconscionable and that Judge Towery should have reconsidered or modified Judge Gallagher's order.

The appeals court rejected this argument, stating that Judge Towery properly adopted Judge Gallagher's order. The court compared the waiver of spousal support in a PMA to similar provisions in marital settlement agreements. A trial court can modify a permanent spousal support order on a showing of a material change in circumstances, unless the parties have agreed that the order may not be modified. In that situation, the court may not modify support, even if intervening circumstances render the parties' agreement unfair [*citing In re Marriage of Hibbard* (2013) 212 Cal. App. 4th 1007, 1011]. Moreover, once the trial court has terminated its jurisdiction over spousal support, it lacks authority to reinstate its jurisdiction based on the parties' circumstances.

The appeals court stated that there was no legal basis to distinguish between enforcement of premarital and postmarital agreements to waive spousal support. Parties are entitled to reach agreements about spousal support and as long as the circumstances surrounding the formation of the agreement are not unconscionable or illegal, courts will not intervene based on unintended consequences. A change in circumstances after Judge Gallagher determined that the PMA was enforceable would not allow Judge Towery to override Judge Gallagher's decision,

the court stated. Accordingly, the appeals court found that Judge Towery properly denied Natalia's request for spousal support.

Commentary

Dawn Gray

The main takeaway from this case for practitioners is the effect of the bifurcation of the issue of the agreement's validity on the subsequent litigation of the remaining issues. The parties signed their PMA before the 2002 amendments to the Uniform Premarital Agreement Act (UPAA) that imposed additional requirements for the validity of premarital and agreements and provided that a waiver of spousal support was not enforceable if "unconscionable at the time of enforcement." Natalie argued that the amendments applied, but case law is clear that they do not apply retroactively to agreements entered into prior to their effective date [see, e.g., *In re Marriage of Howell* (2011) 195 Cal.App.4th 1062, 126 Cal.Rptr.3d 539; *In re Marriage of Melissa* (2012) 212 Cal.App.4th 598, 611, 151 Cal.Rptr.3d 608]. Noting this, the panel said that it was "unclear" whether the court was required to consider unconscionability at the time of enforcement because those amendments did not apply in the case. Natalie found no cases so holding and the appellate panel confirmed that, even if the court could have considered unconscionability, the "time of enforcement" of the agreement was the date on which the bifurcated trial on its validity occurred, which makes perfect sense.

The opinion says that Natalie did not raise the unconscionability issue at the bifurcated trial, so she waived the issue on appeal. The lesson: raise all possible issues, including the issue of unconscionability of a premarital agreement at *both* the time of execution *and* the time of enforcement. This case certainly does not preclude a trial court from considering both with regard to a pre-2002 agreement.

Judge Towery considered the private judge's decision upholding the agreement to be "the law of the case," or *res judicata* on the issues, including Natalia's request for spousal support, which she waived in the agreement. The appellate panel affirmed his approach, noting that there was no legal authority "confirming" that he would have had the power to reconsider or modify that decision.

Once the agreement waiving support is upheld, it cannot be further requested in the case, no matter how long it takes to try the remaining issues.

Also, the trial court found that Natalie's testimony was somewhat unreliable and that she lacked credibility, which is a very important element in the inevitable "he said, she said" of a dispute over a premarital agreement. It found that Peter's testimony was much more "consistent, reliable and credible." We always want to be the attorney for *that* client, even if it takes a lot of trial preparation, rehearsing and coaching to be the best witness they can be.

Commentary

Stacy D. Phillips and Erica Swenson

Marriage of Miotke is important for two reasons: (i) it reinforces the concept that an order validating a waiver of spousal support and termination of jurisdiction over same in an enforceable premarital agreement is binding even if circumstances later render the termination unfair; and (ii) the time for determining the enforceability of a waiver of spousal support in a premarital agreement is the time of trial, whether a final trial on all issues, or a bifurcated early trial on the issue of whether or not the premarital agreement is enforceable. If the issue of unconscionability was not raised at the time of trial, it will not be entertained by the court and subsequent circumstances will not affect the termination of the court's jurisdiction to modify spousal support after the final order has been rendered.

Miotke is also important because it reinforces something we know from prior case law: unconscionable and unfair are not the same thing. A waiver of spousal support in a prenuptial agreement may later seem "unfair" by events that occur because of the passage of time (*i.e.* one party wins the lottery or suffers a disability). This "unfair" agreement will be allowed to stand so long as it was conscionable at the time of the agreement and the time of enforcement. "In finding the parties' agreement precluded modification, the court noted that such agreements could prevent modification even in 'intervening, possibly unfair' circumstances, and warned parties agreeing to nonmodifiable support to 'be particularly mindful of all possible circumstances that might warrant a modification of cessation of spousal support, and

plan accordingly” [Marriage of Miotke (*quoting* Marriage of Hibbard (2013) 212 Cal. App. 4th 1007, 1015)].

In *Miotke*, Wife had left the “second bite of the apple” far behind—every time she encountered a new proceeding or new judicial officer, she attempted to have the waiver of support in the premarital agreement re-litigated—she wanted the whole apple. The ruling that the premarital agreement was valid became the “law of the case.” The time for her to argue that the agreement was unconscionable was at the time of the first trial. Her failure to make that argument was effectively a waiver of the issue.

This case is a reminder that we cannot know the future and must counsel our clients to consider any non-modifiable provision carefully; in other words, *voir dire* your clients before they sign a waiver of spousal support. It is not always pleasant to remind clients that they may face infirmity or disability, or not have the funds they hoped for in the future, but it is our job to fully advise them before they execute a non-modifiable agreement.

Commentary

Marshall S. Zolla

Natalia and Peter, both trained architects, designed and framed a new and interesting case regarding enforcement of a premarital agreement, waiver of spousal support, and use of a private judge to determine enforceability. The dates are always important: The PMA was signed with the assistance of a paralegal on October 26, 1996; the parties married on November 14, 1996. They separated in December 2010, after 14 years of marriage. They hired a retired judge to determine the validity and enforceability of the PMA. A bifurcated trial was held in September 2012, and a ruling upholding the PMA and the spousal support waiver was issued in May 2013.

Natalia then moved to set aside the private judge’s ruling on the grounds that she was mentally ill during the 2012 bifurcated enforcement trial. That set-aside motion was heard in 2013 and was denied. A trial on reserved issues was held in 2014. In her subsequent appeal, the trial court’s denial of the set-aside request regarding the private judge’s ruling was affirmed and the determination of the private judge upheld.

The substantive portion of the opinion held that the September 2012 trial before the private judge was the time of enforcement of the PMA and the spousal support waiver. Because this was a 1996 PMA, it predated enactment of Family Code section 1612(c). *In re Marriage of Facter* (2013) 212 Cal. App. 4th 967, held that the 2002 amendment of Family Code section 1612 does not apply to PMAs entered into prior to January 1, 2002. Even if the court could have considered unconscionability at the time of enforcement in evaluating the spousal support waiver, the effective enforcement date would have been the September 2012 trial before the private judge, not the later 2014 trial on reserved issues. The court also acted properly in determining that if spousal support is waived in a PMA, even a material change in circumstances cannot affect that agreement and permit a modification [*citing* *In re Marriage of Hibbard* (2013) 212 Cal. App. 4th 1007].

Interestingly, while we have numerous cases dealing with enforcement and interpretation of PMAs, there is a scarcity of cases dealing with Postnuptial Agreements which, of course, are not governed by specific statutory mandates. There is dicta in the *Miotke* opinion where the appellate court says “We see no legal basis to distinguish between the enforcement of a premarital agreement to waive spousal support, and a postmarital agreement to do the same. Parties prior to marriage or in dissolution proceedings are entitled to reach agreements about spousal support, and so long as the circumstances surrounding the formation of the agreement are conscionable and lawful, courts will not intervene in the unintended consequences to the parties in the future.” Some commentators have observed that Family Code section 1620 can be viewed as restricting Postnuptial Agreements to property matters and that spousal support waivers in Postnuptial Agreements do not have judicial or legislative support. The *Miotke* observation, although dicta, lends some credence and weight to the legitimacy of including such waivers, in proper circumstances, in postnuptial as well as premarital agreements. So the separating Miotkes laid a foundation upon which to construct future legal arguments.

References: CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, 2nd ed., §§ 50.05 (waiver of spousal support duty), 201.10 (essential elements for premarital agreements).