Loyola of Los Angeles Law Review

Volume 33
Number 4 *Symposium on New Directions in Federalism*

Article 1

6-1-2000

If It Ain't Broke, Don't Fix It: Premarital Agreements and Spousal Support Waivers in California

Charlotte K. Goldberg

"IF IT AIN'T BROKE, DON'T FIX IT": PREMARITAL AGREEMENTS AND SPOUSAL SUPPORT WAIVERS IN CALIFORNIA

*Charlotte K. Goldberg**

I. INTRODUCTION

Although California was the first state to enact the Uniform Premarital Agreement Act (UPAA),[1] it did not adopt wholeheartedly

* Professor of Law, Loyola Law School. Thanks to Professor Jan Costello for her comments on an earlier draft. Also thanks to Ashley Silberfeld for research assistance.

1. UNIF. PREMARITAL AGREEMENT ACT, 9B U.L.A. 369 (1983); *see* Act of Jan. 1, 1985, ch. 1315, 1985 Cal. Stat. 1315 (codified at CAL. CIV. CODE §§ 5300-5317, now CAL. FAM. CODE §§ 1600-1617 (West 1998)). To date, 25 states and the District of Columbia have adopted the UPAA in various forms. North Dakota and Virginia also adopted the UPAA in 1985. *See* N.D. CENT. CODE §§ 14.03.1-01 to -09 (2000); VA. CODE ANN. §§ 20-147 to -155 (Michie 1999). In 1987, the following states enacted the UPAA: Arkansas, Hawaii, Maine, Montana, North Carolina, Oregon, Rhode Island, and Texas. *See* ARK. CODE ANN. §§ 9-11-401 to -413 (Michie 1999); HAW. REV. STAT. §§ 572D-1 to -11 (1999); ME. REV. STAT. ANN. tit. 19-A, §§ 601-611 (West 1998); MONT. CODE ANN. §§ 40-2-601 to -610 (1999); N.C. GEN. STAT. §§ 52B-1 to -11 (1999); OR. REV. STAT. §§ 108.700-.740 (1997); R.I. GEN. LAWS §§ 15-17-1 to -11 (1999); TEX. FAM. CODE ANN. §§ 4.001-.010 (West 1999). Kansas and New Jersey enacted the UPAA in 1988. *See* KAN. STAT. ANN. §§ 23-801 to -811 (1998); N.J. STAT. ANN. §§ 37:2-31 to -41 (West 1999). Illinois, Nevada and South Dakota enacted the UPAA in 1989. *See* 750 ILL. COMP. STAT. ANN. 10/1-11 (West 1999); NEV. REV. STAT. §§ 123A.010-.100 (2000); S.D. CODIFIED LAWS §§ 25-2-16 to -25 (Michie 2000). Arizona and Iowa followed in 1991. *See* ARIZ. REV. STAT. §§ 25-201 to -205 (1999); IOWA CODE §§ 596.1 -.12 (1997). Nebraska and Utah then enacted the UPAA in 1994. *See* NEB. REV. STAT. ANN. §§ 42-1001 to -1011 (Michie 1999); UTAH CODE ANN. §§ 30-8-1 to -9 (1999). Connecticut, the District of Columbia, Idaho and New Mexico enacted the UPAA in 1995. *See* CONN. GEN. STAT. §§ 46b-36a to -36j (1999); D.C. CODE ANN. §§ 30-141 to -150 (1999); IDAHO CODE §§ 32-921 to -929 (1999); N.M. STAT. ANN. §§ 40-3A-1 to -10 (Michie 2000). Lastly, Delaware and Indiana enacted it in 1996 and 1997, respectively. *See* DEL.

the "freedom of contract"[2] philosophy evinced by that Act. The legislature omitted the UPAA section dealing with spousal support when it adopted the California Premarital Agreement Act (CPAA).[3] By this omission, the legislature, in effect, prohibited prospective spouses from contracting "with respect to . . . the modification or elimination of spousal support."[4] In a recent decision of the California Court of Appeal, *Pendleton v. Fireman*,[5] Justice Miriam A. Vogel held that the omission of that section signified something very different.[6] "It is clear, therefore, that the legislature deleted the express authorization for spousal support waivers because they recognized that the enforceability of such waivers is a question for the courts, not the legislature."[7]

Under this reasoning, Justice Vogel was able to pose the question of whether "spousal support waivers in premarital agreements violate any public policy . . . ."[8] Here she was referring to the catch-all phrase in both the UPAA and the CPAA which allows prospective spouses to contract respecting "any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty."[9] Concluding that both the

---

CODE ANN. tit. 13, §§ 321-328 (1999); IND. CODE ANN. §§ 31-11-3-1 to -10 (Michie 1999).

2. "'Subsection (b) undergirds the freedom allowed the parties by making clear that the terms of the agreement respecting maintenance and property disposition are binding upon the court unless those terms are found to be unconscionable.'" UNIF. PREMARITAL AGREEMENT ACT § 6 cmt., 9B U.L.A. at 377 (quoting Commissioner's Note to § 306 of Uniform Marriage and Divorce Act).

3. *See* Act of Jan. 1, 1985, ch. 1315, 1985 Cal. Stat. 1315 (codified at CAL. CIV. CODE §§ 5300-5317, now CAL. FAM. CODE §§ 1600-1617 (West 1998)).

4. UNIF. PREMARITAL AGREEMENT ACT § 3(a)(4), 9B U.L.A. at 373. The Legislature also omitted UPAA § 6(b), which states that "[i]f a provision of a premarital agreement modifies or eliminates spousal support . . . ." Obviously, if the California Act does not allow contracting regarding spousal support, the need for § 6(b) is obviated.

5. 72 Cal. Rptr. 2d 840 (Ct. App. 1998), *review granted*, 957 P.2d 867, 76 Cal. Rptr. 2d 177 (1998).

6. *See id.* at 843.

7. *Id.*

8. *Id.*

9. UNIF. PREMARITAL AGREEMENT ACT § 3(a)(8), 9B U.L.A. at 373; CAL. FAM. CODE § 1612(a)(7) (West 1998).

times and the law have changed,[10] she stated that "a system of laws . . . should not per se prohibit premarital spousal support waivers or limitations"[11] and that "[f]or those who choose to control their own destiny to the extent permitted by law, there no longer exists any reason to per se prohibit spousal support waivers or limitations."[12]

The *Pendleton* case has been accepted for review by the California Supreme Court. One threshold argument concerns who should decide—the courts or the legislature—whether spousal support may be waived via premarital agreement. The view of this author is that setting policy on this issue should be a legislative decision.[13] No matter who decides, the *Pendleton* case spotlights the need to reexamine California policy regarding spousal support waivers[14] in premarital agreements.

First, if prospective spouses may arrange all their property rights during marriage and at divorce via premarital agreement, is there any good reason to prohibit their agreeing prior to marriage to waive spousal support in the event of divorce? Are there fundamental differences between property rights and spousal support that account for differences in treatment in the formation of premarital agreements? This author views the prohibition of spousal support waivers to be

---

10. Justice Vogel was referring to the increased use of premarital agreements by marital couples and the elimination of fault divorce and the equality in both division and management of community property. *See Pendleton*, 72 Cal. Rptr. 2d at 844-45; *see, e.g.*, David E. Rovella, *Pre-nups No Longer Just for the Wealthy*, NAT'L L.J., Sept. 6, 1999, at A1.

11. *Pendleton*, 72 Cal. Rptr. 2d at 845.

12. *Id.* at 848.

13. In another context, this author has counseled court deference to the legislature stating that "[i]f a court determines that an inequity exists under the current law, the correct action is to still follow that law but point out that the inequity should be remedied by the legislature." Charlotte K. Goldberg, Estate of Castiglioni*: Spousal Murder and the Clash of Joint Tenancy and Equity in California Community Property Law*, 33 IDAHO L. REV. 513, 532 (1997). Candace Pendleton argues that dramatic policy change should be left to the legislature where "the potential for a diversity of interests and positions among members of the public" can be weighed. Respondent—Petitioner's Opening Brief on the Merits at 39, Pendleton v. Fireman, 72 Cal. Rptr. 2d 840 (Ct. App. 1998) (No. B113293).

14. This Article addresses primarily waivers of spousal support after dissolution. The issue of waiving spousal support during marriage and between separation and dissolution is beyond the scope of this Article. A brief discussion of these issues is found *infra* note 64.

salutary despite changes in attitudes toward premarital agreements and in the law of premarital agreements. Although it is thought that premarital agreements encourage couples to marry and clarify property rights upon divorce, the appropriateness of spousal support should still be decided on a case-by-case basis by the courts. In other words, if we have a clear rule that is not "broken," let us keep it.

Second, if the California Supreme Court or the California legislature should decide to change the law to allow spousal support waivers in premarital agreements, even Justice Vogel admits, the parties may need protection against unconscionable provisions in a premarital agreement.[15] Generally, a premarital agreement may be challenged as unconscionable either at the time of execution or at dissolution. However, under the UPAA, a premarital agreement will not be enforced if the agreement was unconscionable when executed and disclosure of the property or financial obligations was inadequate.[16] The UPAA "unconscionable" requirement strongly supports certainty in enforcement—the burden of proof is on the "party against whom enforcement is sought," the agreement must be unconscionable "at the time of execution" not at dissolution, unconscionable is left to the courts to define, and the agreement must also be lacking in fair disclosure.[17] California adopted this UPAA section and Justice Vogel noted regarding the unconscionable requirement that "our decision in this case suggests a need for legislative

15. *See Pendleton*, 72 Cal. Rptr. 2d at 845 n.9.

16. *See* UNIF. PREMARITAL AGREEMENT ACT § 6(a)(2), 9B U.L.A. 376 (1987). Alternatively, under § 6(a)(1), a premarital agreement will not be enforced if it was not executed voluntarily. *See id.* § 6(a)(1). Some states have modified the UPAA to permit unconscionability at dissolution. *See infra* note 106.

17. UNIF. PREMARITAL AGREEMENT ACT § 6(a), 9B U.L.A. at 376. "[T]he drafters of the U.P.A.A. seem to have so constrained the available challenges to antenuptial agreements that such agreements would survive in circumstances that the ordinary commercial contract would not." Barbara Ann Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127, 146 (1993). "[A]n agreement is unenforceable only if it is both procedurally unfair and substantively unfair (i.e., unconscionable). Unconscionability, standing alone, should be the basis for setting aside or at least modifying a premarital agreement, as is the case with ordinary contracts." Carol Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 276 (1994) (citations omitted).

reexamination of the enforcement issues . . . ."[18] Thus, spouses do need some protection regarding spousal support waivers.

Not all spousal support waivers are enforceable, even under the UPAA. Section 6(b) of the UPAA permits a court to order spousal support if the waiver or modification "causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution."[19] The California legislature omitted this section when it omitted spousal support waivers from the CPAA. If California changes the law to allow spousal support waivers, this section must also be added to at least "provide very limited relief to a party who would otherwise be eligible for public welfare."[20] In addition, relief from spousal support waivers must be considered in tandem with the present standards regarding spousal support awards.[21] For instance, spousal support awards in California are set based on the marital standard of living, not on an amount that would keep the supported spouse off of public assistance.[22] Also, the major thrust of recent California spousal support legislation is to enable a former spouse to become self-supporting and not rely on support from either the state or an ex-spouse.[23]

If California decides to permit spousal support waivers, courts should be given the opportunity to examine whether the waiver should be enforced at dissolution. Two formulations which allow courts discretion at dissolution deserve consideration. First, the Illinois and Indiana Premarital Agreement Acts specify that if waiver or modification causes one party to the agreement "undue

18. *Pendleton*, 72 Cal. Rptr. 2d at 845 n.9.

19. UNIF. PREMARITAL AGREEMENT ACT § 6(b), 9B U.L.A. at 376. California did not adopt this UPAA section. If spousal support waivers are prohibited, there is no need for this section.

20. *Id.* § 6 cmt., 9B U.L.A. at 377.

21. *See infra* text accompanying notes 64-76.

22. "[T]he court shall consider all of the following circumstances: (a) The extent to which the earning capacity of each party is sufficient to maintain the *standard of living* established during the marriage . . . ." CAL. FAM. CODE § 4320(a) (West 1998) (emphasis added). "In a proceeding for dissolution of marriage or for legal separation of the parties, the court shall make specific factual findings with respect to the *standard of living during the marriage* . . . ." *Id.* § 4332 (emphasis added).

23. *See id.* §§ 4320(k), 4330(b).

hardship"[24] or "extreme hardship"[25] considering circumstances "not reasonably foreseeable at the time of the execution of the agreement," a court is permitted to order support to avoid the hardship. These provisions allow a court to examine the agreement at the time of dissolution and to determine exactly what is undue or extreme hardship under the circumstances. Under these criteria, a former spouse need not be at the level of requiring public assistance to obtain spousal support.

Second, the New Jersey Premarital Agreement Act defines an "unconscionable premarital agreement"[26] as an agreement, either due to lack of property or unemployability:

(1) Which would render a spouse without reasonable support;
(2) Which would make a spouse a public charge; or
(3) Which would provide a standard of living far below that which was enjoyed before the marriage.

This provision gives the courts discretion to order spousal support despite a waiver in the premarital agreement. Thus the New Jersey Premarital Agreement Act allows parties to contract regarding the waiver of spousal support, but also allows the courts a supervisory role at the time of enforcement. If California allows spousal support waivers, it should adopt either of the above formulations. Either provision would assure that spousal support waivers will be enforced in all but the most egregious cases. However, this author returns to her initial contention that a clear rule prohibiting spousal support waivers leaves the courts with only one issue—whether spousal support is appropriate under the circumstances. On that issue, the California legislature has delineated clear guidelines on whether spousal support is necessary in a particular case.

Part II describes the *Pendleton v. Fireman* court of appeal decision and explores the bases for prohibiting spousal support waivers. Part III examines other options for dealing with the unforeseen economic inequities that can result when a spouse waives spousal support. Part IV discusses whether "substantive unconscionability"

24. 750 ILL. COMP. STAT. 10/7(b) (West 1999).
25. IND. CODE ANN. § 31-11-3-8(b)(2) (Michie 1999).
26. N.J. STAT. ANN. § 37:2-32(c) (West 1999).

is a workable standard to prevent economic inequities that result from a waiver of property and spousal support in a premarital agreement. The author recommends that the present prohibition on spousal support waivers be retained. If spousal support waivers are permitted, however, the courts should be allowed to examine whether the waiver should be enforced if it would impose extreme hardship or render a spouse without reasonable support upon divorce.

II. *PENDLETON V. FIREMAN* AND SPOUSAL SUPPORT WAIVERS

Pendleton v. Fireman arose from the dissolution of the marriage of two wealthy individuals, Candace Pendleton and Barry Fireman. Barry's wealth far exceeded Candace's—at the time of dissolution Candace's monthly gross income was estimated at almost $9000, while Barry's was almost $83,000.[27] During the four-year marriage, they lived a lavish lifestyle that was funded primarily from Barry's resources.[28] Although conventional wisdom dictated that spousal support waivers in premarital agreements were prohibited,[29] the couple signed an agreement that stated "both parties now and forever waive, in the event of a dissolution of the marriage, all rights to any type of spousal support . . . from the other . . . ."[30] Candace challenged the spousal support waiver, claiming that it was unenforceable because it was against public policy, and sought substantial spousal support.[31] The trial court agreed, concluding that all

27. *See* Appellant—Respondent's Answer Brief on the Merits at 3, Pendleton v. Fireman, 72 Cal. Rptr. 2d 840 (Ct. App. 1998) (No. B113293).

28. *See* Respondent—Petitioner's Opening Brief on the Merits at 9, Pendleton v. Fireman, 72 Cal. Rptr. 2d. 840 (Ct. App. 1998) (No. B113293).

29. *See* WILLIAM P. HOGOBOOM & DONALD B. KING, CALIFORNIA PRACTICE GUIDE: FAMILY LAW ch. 6-B (1998); 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW § 16, at 26 (9th ed. 1990).

30. Appellant—Respondent's Answer Brief on the Merits at 2, Pendleton v. Fireman, 72 Cal. Rptr. 2d. 840 (Ct. App. 1998) (No. B113293). The agreement was drafted by Candace's attorney and both parties were represented by separate counsel. *See id.* The California Premarital Agreement Act (CPAA) is explicit that "[t]he right of a child to support may not be adversely affected by a premarital agreement." CAL. FAM. CODE § 1612(b) (West 1998).

31. *See Pendleton*, 72 Cal. Rptr. 2d at 840 (1998).

premarital spousal support waivers are void and unenforceable.[32] Barry was ordered to pay spousal support.[33]

On appeal, Justice Vogel noted that "41 states and the District of Columbia now permit premarital waivers of spousal support . . . ."[34] She then discussed California's omission of spousal support from the permitted subjects of a premarital agreement, concluding that the "reason for this omission is clear."[35] According to the legislative history, the omission was to "allow California case law to continue to prevail on the issue of spousal support in premarital agreements."[36] To Justice Vogel, this signaled that "enforceability of such waivers is a question for the courts, not the Legislature."[37] Although this interpretation of the legislative history allowed Justice Vogel to revisit the subject of premarital spousal support waivers, it was a novel and arguably incorrect interpretation.

It is true that the California legislature could have added language that explicitly stated that spousal support waivers were prohibited. Both the Iowa and New Mexico versions of the UPAA state that a premarital agreement may not "adversely affect" spousal support rights.[38] In effect, those legislatures have specifically precluded prospective spouses from predetermining spousal support upon divorce. Although the CPAA is not as clear as the Iowa and New

32. *See id.*

33. *See id.*

34. *Id.* at 841 n.3.

35. *Id.* at 842.

36. *Id.* at 843 (quoting ASSEMBLY SUBCOMMITTEE ON ADMINISTRATION OF JUSTICE, REPORT ON SEN. BILL NO. 1143 FOR THE AUG. 19, 1985 HEARING 3).

37. *Id.*

38. *See* IOWA CODE ANN. § 596.5(2) (West 1997) (stating that "[t]he right of a spouse or child to support shall not be adversely affected by a premarital agreement"); N.M. STAT. ANN. § 40-3A-4(B) (Michie 2000) (stating that "[a] premarital agreement may not adversely affect the right of a child or spouse to support"). In South Dakota, the legislature also omitted spousal support as a subject of a premarital agreement. *See* S.D. CODIFIED LAWS § 25-2-18 (Michie 2000). Waivers of spousal support violate public policy. *See* Connolly v. Connolly, 270 N.W.2d 44, 46 (S.D. 1978) (quoting Reiling v. Reiling, 474 P.2d 327, 328 (Or. 1970) (post-divorce obligation of support cannot be waived because "conditions which affect alimony entitlement cannot accurately be foreseen")); Greene v. Morgan, Theeler, Cogley, & Peterson, 575 N.W.2d 457, 458 (S.D. 1998) (attorney sued for legal malpractice for including spousal support waiver).

Mexico versions of the UPAA, the California legislature, by deleting spousal support as a proper subject of premarital agreements, intended to preclude predetermination of spousal support upon divorce.[39] The CPAA in essence "allow[ed] California case law to continue to prevail on the issue of spousal support in premarital agreements."[40] The legislative history also shows that the Bar opposed a change in the law prohibiting spousal support waivers. For instance, the Family Law Section of the State Bar of California opposed the bill if it would "legitimize a waiver of spousal support."[41] Allowing such waivers "would be a major change in California law, which still steadfastly holds that such provisions are contrary to the public policy of this state."[42] Similarly, the Women Lawyers' Association of Los Angeles opposed any change in "existing California law, which does not enforce premarital waivers of spousal support . . . ."[43] That California case law, as gleaned from the two Supreme Court decisions, *Marriage of Higgason*[44] and *Marriage of Dawley*,[45] held that a spousal support waiver in a premarital agreement is against public policy and therefore void. A premarital spousal support waiver is considered against public policy because it would encourage or promote dissolution.[46]

As Justice Vogel pointed out, this "public policy" originated in the days before no-fault divorce and when unequal control of community property prevailed.[47] The first case that articulated the policy was *Pereira v. Pereira*,[48] decided in 1909. The motivating idea was

---

39. *See supra* note 29.

40. *Pendleton*, 72 Cal. Rptr. 2d at 843 (citing ASSEMBLY SUBCOMMITTEE ON ADMINISTRATION OF JUSTICE REPORT, REPORT ON SEN. BILL NO. 1143 FOR THE AUG. 19, 1985 HEARING 3).

41. Letter from Margaret L. Anderson to Assemblyman Lloyd G. Connelly (Aug. 14, 1985) (on file with the *Loyola of Los Angeles Law Review*).

42. *Id.*

43. Letter from Mary-Lynne Fisher, Women Lawyers' Association of Los Angeles, to Senator Robert Beverly (June 6, 1985) (on file with the *Loyola of Los Angeles Law Review*).

44. 10 Cal. 3d 476, 516 P.2d 289, 110 Cal. Rptr. 897 (1973).

45. 17 Cal. 3d 342, 551 P.2d 323, 131 Cal. Rptr. 3 (1976).

46. *See id.* at 352, 551 P.2d at 329, 131 Cal. Rptr. at 9.

47. *See* Pendleton v. Fireman, 72 Cal. Rptr. 2d 840, 843 (Ct. App. 1998), *review granted*, 957 P.2d. 867, 76 Cal. Rptr. 2d 177 (1998).

48. 156 Cal. 1, 103 P. 488 (1909).

that a spouse cannot escape punishment for marital fault by a premarital waiver of an obligation at divorce.[49] With the advent of no-fault divorce came equal division of community property;[50] spouses were given equal management and control of community property during marriage.[51] Thus Justice Vogel concluded that: "A system of laws that has abandoned fault-based divorce and unequal control of community property in favor of a statutory scheme imposing mutual and androgynous support obligations . . . should not per se prohibit premarital spousal support waivers or limitations."[52] Justice Vogel neglects the reality that legal equality for women has not yet produced economic equality with men, particularly upon divorce.[53]

The question then becomes whether, in light of legal equality of spouses, there is reason to prohibit spousal support waivers today. This question can be rephrased: Should a spouse, through a premarital agreement, be able to escape all monetary obligations that flow from marriage? This is particularly pertinent since there is universal agreement that spouses may opt out of the community property scheme through a premarital agreement.[54] Thus, one could

---

49. *See id.* at 4, 103 P. at 489.

> The real effect of the contract to pay the ten thousand dollars, so far as the husband is concerned, would be to provide against liability for a contemplated wrong to be subsequently inflicted by him upon his wife, and to liquidate such liability in advance of the commission of the wrong.

Id.

50. "[T]he court shall . . . divide the community estate of the parties equally." CAL. FAM. CODE § 2550 (West Supp. 2000).

51. "[E]ither spouse has the management and control of the community personal property . . . ." *Id.* § 1100(a).

52. Pendleton v. Fireman, 72 Cal. Rptr. 2d 840, 843 (Ct. App. 1998), *review granted*, 957 P.2d. 867, 76 Cal. Rptr. 2d 177 (1998).

53. *See* Leah Guggenheimer, *A Modest Proposal: The Feminomics of Drafting Premarital Agreements*, 17 WOMEN'S RTS. L. REP. 147, 148-51 (1996) (describing the economic inequality of men and women). "It is widely known that women are second-class citizens compared to men in the economic arena." *Id.* at 148.

54. "Parties to a premarital agreement may contract with respect to all of the following: (1) The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located." CAL. FAM. CODE § 1612(a)(1) (West 1998).

argue that if opting out of community property obligations is not against public policy, then neither is opting out of spousal support.

The "encouraging divorce" public policy basis for prohibiting spousal support waivers is subject to doubt, as pointed out in the Oregon Supreme Court case of *Unander v. Unander*.[55] According to the court, "the provision for no alimony may work to preserve a marriage as much as to destroy it."[56] The premise of the "encouraging divorce" public policy is that a spousal support waiver would encourage an economically superior spouse to divorce because that spouse would have no obligation to support the economically inferior spouse. The premise is faulty, according to the *Unander* court, because a premarital waiver of spousal support may also encourage an economically inferior spouse to remain in the marriage, knowing that a spousal support award would not be forthcoming at dissolution.[57]

The approval of premarital agreements regarding arrangement of property rights at divorce also demonstrates the flaw in the "encouraging divorce" public policy basis. The *Unander* court noted that "such agreements can be a cause of divorce as much as an agreement on alimony . . . though such agreements have been favored in law."[58] A property provision benefiting the economically superior spouse allows that spouse to divorce without suffering economic disadvantage and could encourage divorce. The reciprocal effect would be to encourage the economically inferior spouse to stay in the marriage since the premarital agreement would exacerbate the economic detriment of divorce. This leads to the following conclusion—because property and spousal support provisions would have the same reciprocal effects regarding divorce, it is logical to treat them the same

---

55. 506 P.2d 719, 720 (Or. 1973).
56. *Id.* at 721.
57. *See id.*
58. *Id.*

> An argument can be made that any antenuptial agreement concerning the disposition of property upon . . . divorce may result in one of them ultimately being put in a position where he or she is not adequately provided for, and, therefore, insofar as public policy is concerned, antenuptial agreements concerning alimony and property should be treated similarly.

Reiling v. Reiling, 474 P.2d 327, 329 (Or. 1970) (holding the alimony waiver void as against public policy).

way. They should both be permitted subjects of premarital agreements.[59]

However, premarital spousal support waivers may be distinguished from property provisions in two ways. "[T]he state has an interest in the support of its citizens and one spouse's duty to support the other cannot be nullified by private agreement."[60] First, the state prefers that an ex-spouse be supported by the other ex-spouse rather than from state coffers. This is primarily to protect the state fisc when a person may have to resort to welfare assistance for support. On this point, the UPAA agrees. Although the UPAA included spousal support waivers as a proper subject of premarital agreements, it also recognized that spousal support should not be eliminated or modified to the point that it would cause "one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution."[61] The duty to support after divorce also derives from the premise that the economic benefits bestowed on married couples by the state carry with them concomitant economic obligations. These exist beyond the end of the marital union where one ex-spouse cannot be self-supporting.

Second, fairness demands different treatment of spousal support from property rights because of the unpredictability of the spouses' economic circumstances at the time of dissolution. The discretion of the courts to award spousal support mitigates the economic disparities that can result when one spouse suffers unexpected illness or devotes significant time to child rearing.[62] California opted to deal

59. *See* Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 135 (1998) (suggesting that because monetary and non-monetary contributions to marriage are not treated equally, premarital agreements governing monetary issues of property division and spousal support should not be enforced or should at least be reviewed with extreme skepticism).

60. *Unander*, 506 P.2d at 721; *see also* Silbaugh, *supra* note 59, at 83-86 (discussing this policy rationale).

61. UNIF. PREMARITAL AGREEMENT ACT § 6(b), 9B U.L.A. 376 (1987).

62. "It is not unrealistic to recognize that the health and employability of the spouse may have so deteriorated during a marriage that to enforce the maintenance provisions of an antenuptial agreement would result in the spouse becoming a public charge." Newman v. Newman (*In re* Marriage of Newman), 653 P.2d 728, 735 (Colo. 1982).

[A] spouse should be given the opportunity to prove, through clear and

with these unforeseen circumstances by omitting waivers of spousal support as a subject of premarital agreements.[63]

The duty to support a spouse during marriage has never been in doubt.[64] However, if the marriage contract is treated as an ordinary

---

convincing evidence, that the amount of time and energy necessary for that spouse to shelter and care for the children of the marriage has rendered the terms of a prenuptial agreement inequitable, and unjust and thus, avoidable.

Simeone v. Simeone, 581 A.2d 162, 171 (Pa. 1990) (McDermott, J., dissenting).

63. *See* CAL. FAM. CODE § 1612 (West 1998). "[T]he rule prohibiting antenuptial agreements concerning alimony gives courts the ability to allow the wife and society a measure of protection and still leaves the parties to the marriage as much freedom as possible to contract concerning their affairs." Reiling v. Reiling, 474 P.2d 327, 329 (Or. 1970).

64. "Husband and wife contract toward each other obligations of mutual respect, fidelity, and *support.*" CAL. FAM. CODE § 720 (emphasis added). "[A] married person is personally liable for . . . necessaries of life of the person's spouse while the spouses are living together." *Id.* § 914(a)(1).

The UPAA § 3(a)(4) allows spouses to contract "with respect to . . . the modification or elimination of spousal support." UNIF. PREMARITAL AGREEMENT ACT § 3(a)(4), 9B U.L.A. at 369. The plain language indicates that the waiver is not limited to spousal support after dissolution of the marriage and could include spousal support at least between the time of separation and dissolution or resolution of all issues. Those states that have considered the issue are split. Recent cases have allowed premarital waivers of alimony *pendente lite. See* Darr v. Darr, 950 S.W.2d 867, 871 (Mo. Ct. App. 1997) (holding that antenuptial agreement denying *pendente lite* alimony was not unconscionable where a wife was provided with a share of the marital property); Clanton v. Clanton, 592 N.Y.S.2d 783, 784 (N.Y. App. Div. 1993) (holding that antenuptial agreement renouncing all claims to support, including maintenance *pendente lite* is enforceable where wife is capable of self-support); Musko v. Musko, 697 A.2d 255, 256 (Pa. 1997) (finding that prenuptial agreement precluding a claim to "money or property or alimony or support" included alimony *pendente lite* is subject to enforcement). Older cases refuse to uphold premarital agreements that waive alimony *pendente lite. See* Belcher v. Belcher, 271 So. 2d 7, 9-10 (Fla. 1972) (holding that the right of support prior to dissolution of the marriage cannot be waived by antenuptial agreement); Fernandez v. Fernandez, 710 So. 2d 223, 225 (Fla. Dist. Ct. App. 1998) (stating that because perceptions have changed, the issue is one of great public importance that may require review); Warren v. Warren, 523 N.E.2d 680, 683-84 (Ill. App. Ct. 1988) (finding that antenuptial agreement waiving all rights to maintenance is unfair due to wife's financial circumstances); Eule v. Eule, 320 N.E.2d 506, 510 (Ill. App. Ct. 1974) (holding that an antenuptial agreement may not waive temporary alimony unless the agreement guarantees an equitable financial settlement); McAlpine v. McAlpine, 679 So. 2d 85, 90-91 (La. 1996) (upholding antenuptial agreement that waived permanent alimony but

contract, once the contract has ended the parties should have no further obligations to each other.[65] Especially when the rationales of fault and gender inequality were undermined, the duty of support after divorce "had no theory to explain it."[66] Despite the lack of legal theory, spousal support is still awarded, especially in long-term marriages where one spouse was a homemaker, or in shorter duration marriages where there were young children in the care of one spouse.[67] The ostensible basis is "need," but the difficulty of defining that term has led to confusion.[68] More recently, there has been a shift to short-term spousal support awards to provide a transition for a financially dependent spouse.[69] The purpose of these limited-duration awards is to enable the spouse to become self-supporting

---

distinguished alimony *pendente lite*); Holliday v. Holliday, 358 So. 2d 618, 620 (La. 1978) (finding that an antenuptial agreement that waives right to alimony *pendente lite* is null and void as against public policy); Mulvey v. Mulvey, No. 95-11-2507, 1996 WL 724759, at *3 (Ohio Ct. App. 1996) (stating that temporary support may be awarded despite antenuptial agreement to the contrary); Gregory S. Alexander, *The New Marriage Contract and the Limits of Private Ordering*, 73 IND. L.J. 503, 508-09 (1998); Laura P. Graham, Comment, *The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage*, 28 WAKE FOREST L. REV. 1037, 1038-44 (1993).

65. In California, once separation has occurred, the property earned by each spouse is separate property. *See* CAL. FAM. CODE § 771 (West 1998); *In re* Marriage of Baragry, 73 Cal. App. 3d 444, 448, 140 Cal. Rptr. 779, 781 (1977) ("The question is whether the parties' conduct evidences a complete and final break in the marital relationship."). However, a spouse is obligated for common necessaries up until the time of dissolution. *See id.* §§ 914(a)(2), 2623(a). As far as support is concerned, *pendente lite* spousal support is routinely granted until the actual support award is determined. *See id.* § 3600.

66. AMERICAN LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 4 (Proposed Final Draft, Part I, 1997).

67. *See id.* at 5.

68. *See id.* at 5-6.

69. *See id.* at 4-5.

> Thirty years ago when most domestic practitioners in the United States thought of spousal support, they envisioned an award of permanent monthly payments until the death or the remarriage of the recipient . . . [t]oday, when domestic practitioners in most states think of spousal support, they envision an award of monthly payments for a specific term of years.

Brett R. Turner, *Rehabilitative Alimony Reconsidered: The "Second Wave" of Spousal Support Reform*, 10 DIVORCE LITIG. 185, 185 (1998).

within a reasonable period of time.[70] Under California Family Code section 4320(k), "a reasonable period of time" is considered "one-half the length of the marriage."[71]

In California, the shift to limited-duration awards preceded enactment of section 4320(k) in 1996. Especially in short-term marriages, spousal support is appropriate "for assisting an economically disadvantaged spouse to make an orderly and less traumatic transition to self-supporting status."[72] Even in long-term marriages, the goal is for the ex-spouse to become self-supporting. In the recent case *Marriage of Schaffer*,[73] the California Court of Appeal affirmed termination of spousal support, reasoning that fifteen years was sufficient opportunity for the wife to become self-supporting.[74] The marriage had been a long one, twenty-four years, and the wife, who was sixty-three years old, suffered from numerous health problems and was unable to find employment.[75] Yet the trial court's decision that "enough was enough" was affirmed, albeit with a vigorous dissent.[76]

---

70. *See* CAL. FAM. CODE § 4320(k) (West 1998).

71. *Id.*

72. *In re* Marriage of Prietsch, 190 Cal. App. 3d 645, 656 n.3, 235 Cal. Rptr. 587, 590 n.3 (1987); *see In re* Marriage of Hebbring, 207 Cal. App. 3d 1260, 1266-67, 255 Cal. Rptr. 488, 491 (1989) (retaining jurisdiction where marriage is short, spouse is in good health and has permanent employment is reversible error, although six months of spousal support is appropriate).

73. Schaffer v. Schaffer (*In re* Marriage of Schaffer), 69 Cal. App. 4th 801, 81 Cal. Rptr. 2d 797 (1999); *see also In re* Marriage of Rising, 76 Cal. App. 4th 472, 478-79 n.9, 90 Cal. Rptr. 2d 380, 385 n.9 (1999) ("Indeed, the Family Code now presumes the supported spouse should be self-supporting within a period equal to one-half the length of the marriage.").

74. *See Schaffer*, 69 Cal. App. 4th at 812, 81 Cal. Rptr. 2d at 804.

75. *See id.* at 803, 81 Cal. Rptr. 2d at 798.

76. *See id.* at 812-17, 81 Cal. Rptr. 2d at 804-07 (Sonenshine, J., dissenting). In 1999, the California Legislature amended section 4320(k) of the California Family Code concerning long marriages. The section now states that "[e]xcept in case of a marriage of long duration as described in Section 4336, a 'reasonable period of time' for purposes of this section generally shall be one-half the length of the marriage." CAL. FAM. CODE § 4320(k) (West Supp. 1999). Under section 4336 of the California Family Code, "there is a presumption . . . that a marriage of ten years or more, from the date of marriage to the date of separation, is a marriage of long duration." CAL. FAM. CODE § 4336 (West 1998).

The shift from open-ended spousal support to limited-duration spousal support also affects premarital agreements. If the present rule barring spousal support waivers is retained, a wealthy spouse could be assured that under current law, any spousal support obligation would be short-term. *Marriage of Huntington*[77] illustrates the results under present spousal support guidelines. John Huntington, who is heir to the Huntington railroad fortune,[78] was married to his wife Ann for almost four years.[79] They had a premarital agreement providing that their property was to remain separate.[80] John's net worth was in excess of $15 million.[81] Ann was twenty-eight at the time of their marriage and had been working as a dental hygienist earning about $30,000 a year before their marriage.[82] The trial court ordered spousal support of $5,000 per month for only six months.[83] Ann appealed.[84] The court of appeal affirmed both the amount and duration of the award.[85] Of particular importance were the trial court's conclusions:

> In any event, when analyzing the length of the marriage, the life style, the assets of the parties, the marketable skills of [appellant], the availability of her employment, the time in which it would take to get back into the work force and the reasonably full-time employed—that's something she doesn't want to do, but clearly has the ability to do it—constrains me to make the following orders with regards to spousal support.[86]

The court of appeal also noted that Ann had already received

77. Huntington v. Huntington (*In re* Marriage of Huntington), 10 Cal. App. 4th 1513, 14 Cal. Rptr. 2d 1 (1992).

78. The San Francisco railroad magnates, Colis P. Huntington, Leland Stanford, Charles Crocker, and Mark Hopkins, amassed fortunes in the late 1800s. Huntington died in 1900 with an estate estimated between $50 and $80 million. *See* GUSTAVUS MYERS, HISTORY OF THE GREAT AMERICAN FORTUNES 526-28 (1907).

79. *See Huntington*, 10 Cal. App. 4th at 1516, 14 Cal. Rptr. 2d at 2.

80. *See id.*

81. *See id.*

82. *See id.*

83. *See id.*

84. *See id.*

85. *See id.* at 1525, 14 Cal. Rptr. 2d at 8-9.

86. *Id.* at 1520-21, 14 Cal. Rptr. 2d at 5.

eighteen months of temporary support at $7,500 per month.[87] Thus the total would be $165,000 over a period of two years.[88] The court of appeal denied that the spousal support award was an abuse of discretion.[89]

If the Huntingtons' premarital agreement had included a spousal support waiver, which John would probably have insisted on and Justice Vogel thinks should be permitted, there would arguably have been no litigation and no spousal support award at all. However, under California's policy of assisting a spouse to become self-supporting, a spouse would still receive temporary support until actual dissolution of the marriage.[90] Yet, Ann may have been tempted to challenge the enforcement of the agreement against her under the CPAA enforcement provisions. According to the present provisions of the CPAA, Family Code section 1615, she would bear the burden of proving that the agreement was not entered into voluntarily or that it was unconscionable at the time of execution and that disclosure was inadequate.[91]

The question of "voluntariness" was recently examined in the divorce of Barry Bonds from his wife Susann (Sun).[92] Although the court of appeal focused on the premarital agreement's "procedural" aspects of adequate disclosure and availability of independent legal counsel rather than "substantive" fairness,[93] it noted that when Sun met Barry in 1987, his salary was $106,000, and at the time of the dissolution proceeding in 1996, his salary was $8 million per year.[94] The agreement provided that the earnings "from husband and wife during marriage shall be separate property of that spouse" but was

87. *See id.* at 1516, 14 Cal. Rptr. 2d at 2.

88. The court rejected Ann's request for attorney's fees and costs totaling $61,912.43. Earlier John had been ordered to pay $19,000 of Ann's attorney's fees. According to the trial court, "[a]ttorneys' fees in this case, to establish a support order for a healthy lady, after three-and-a-half-year marriage, are outrageous, in my judgment, for both sides . . . [it] is only as a consequence of the fact that Mr. Huntington has money . . . ." *Id.* at 1524, 14 Cal. Rptr. 2d at 7.

89. *See id.* at 1522, 14 Cal. Rptr. 2d at 6.

90. *See supra* note 65.

91. *See* CAL. FAM. CODE § 1615 (West 1998).

92. *See* Bonds v. Bonds (*In re* Marriage of Bonds), 83 Cal. Rptr. 2d 783 (Ct. App. 1999), *review granted*, 981 P.2d 40, 87 Cal. Rptr. 2d 410 (1999).

93. *See id. at* 796.

94. *See id.* at 787.

silent on the issue of spousal support.[95] The trial court awarded Sun $10,000 per month as spousal support for a period of four and one-half years.[96] Because the premarital agreement was declared invalid under the circumstances,[97] "Sun's economic status may be substantially changed."[98] This means that on remand, Sun may be entitled to one-half of all of Barry's earnings which, absent the agreement, would be considered community property.

If instead, the property provisions of the agreement had been declared valid, only the amount and duration of the spousal support award would have been considered. In this case, Sun is young but was also awarded primary physical custody of the couple's two children.[99] Before she married Barry, she had been attending beautician school.[100] After they married, she did not work outside the home.[101] The duration of the spousal support award by the trial court was more than one-half the duration of the marriage, which is considered reasonable under the statutory guideline. Also, the trial court has discretion to vary the duration which may be appropriate when the children are not yet in school full-time. Yet, it is doubtful that a spousal support award totaling $540,000[102] would be considered an abuse of discretion. Thus the economic disparity resulting from the property arrangement would be mitigated.

It must be noted that in long-term marriages and shorter-term marriages where there are young children, wives are still disadvantaged. Justice Lambden observed in *Bonds* that "women still have not achieved economic parity in the workplace and frequently have greater responsibility for sustaining the home; it is also undisputed that women generally earn less income than men."[103] The suggestion

95. *Id.* at 789.
96. *See id.* at 812.
97. *See id.* at 787. The court held that where an unrepresented party did not have the opportunity to obtain legal counsel, the premarital agreement is subject to "strict scrutiny." The court of appeals reversed the lower court's finding that the premarital agreement was valid and remanded on that issue. *Id.*
98. *Id.* at 815.
99. *See id.* at 813.
100. *See id.* at 787.
101. *See id.* at 789.
102. That would be $10,000 a month for 4.5 years.
103. *Id.* at 795; *see* Nicole M. Catanzarite, Note, *A Commendable Goal: Public Policy and the Fate of Spousal Support After 1996*, 31 LOY. L.A. L.

is that agreements that waive community property rights may disadvantage those whose contributions are in the home, whether men or women, and thus should be given greater scrutiny at the time of enforcement.[104] It is more likely that wives are the ones challenging the validity of premarital agreements. In an admittedly unscientific survey of appellate cases from 1997, of the twenty-four divorce cases involving challenges to premarital agreements, twenty were by wives, only four by husbands.[105] Although Justice Vogel is correct

---

REV. 1387, 1392-93 (1998).

104. *See Bonds*, 83 Cal. Rptr. 2d at 795; Silbaugh, *supra* note 59, at 92-101 (arguing that non-monetary contributions, particularly of women, are undervalued in legal doctrine).

105. The 1997 divorce cases were ones in which the *wife* challenged the validity of the agreement. In several Connecticut cases, the validity of premarital agreements was challenged by the wife. *See* Lord v. Lord, 689 A.2d 509, 510 (Conn. App. Ct. 1997) (stating that prenuptial agreement was unenforceable due to informality of agreement); Ehlert v. Ehlert, No. 354292, 1997 WL 53346, at *4 (Conn. Super. Ct. Jan. 30, 1997) (holding that the prenuptial agreement was void due to later oral agreement); Brooks v. Brooks, No. FA 9501430865, 1997 WL 297586, at *3 (Conn. Super. Ct. May 20, 1997) (finding that it was unfair to enforce terms of prenuptial agreement); Dattilo v. Forgione, No. FA9703415745, 1997 WL 374978, at *3 (Conn. Super. Ct. June 26, 1997) (holding the prenuptial agreement valid under New York and Connecticut law); Juliano v. Juliano, No. FA94039973, 1997 WL 576544, at *1 (Conn. Super. Ct. Sept. 5, 1997) (finding prenuptial agreement unenforceable due to coercion); Mehtar v. Mehtar, No. FA9600800075, 1997 WL 576540, at *2 (Conn. Super. Ct. Sept. 5, 1997) (upholding a South African antenuptial agreement). The validity of premarital agreements was also challenged in Delaware. *See* Coulbourn v. Coulbourn, 692 A.2d 411 (Del. 1997) (unpublished disposition) (setting aside premarital agreement). In several cases in Florida, Iowa, and Minnesota, the validity of premarital agreements was also challenged. *See* Eager v. Eager, 696 So. 2d 1235, 1236 (Fla. Dist. Ct. App. 1997) (upholding antenuptial agreement); *In re* Marriage of Gonzalez, 561 N.W.2d 94, 97 (Iowa Ct. App. 1997) (stating the prenuptial agreement was invalid because wife did not knowingly and voluntarily waive her rights); Edevold v. Edevold, No. C6-97-92, 1997 WL 309484, at *1 (Minn. Ct. App. June 10, 1997) (finding the antenuptial agreement invalid due to lack of disclosure). The validity of premarital agreements was also questioned in Missouri. *See* Darr v. Darr, 950 S.W.2d 867, 870 (Mo. 1997) (stating the antenuptial agreement was valid and the disclosure sufficient); McGilley v. McGilley, 951 S.W.2d 632, 637-38 (Mo. Ct. App. 1997) (holding the antenuptial agreement sufficiently clear to be enforced); Dardick v. Dardick, 948 S.W.2d 268, 269 (Mo. Ct. App. 1997) (finding the antenuptial agreement valid under California law). New York decisions also discussed the validity of premarital agreements. *See* Lombardi v. Lombardi, 652 N.Y.S.2d 549 (1997) (holding the prenuptial agreement enforceable finding no fraud, overreaching, or other mis-

that the law has changed regarding fault, the economic equality of women has yet to be achieved. This is especially true for those who marry with the expectation of a long, happy marriage as a homemaker and with children. To leave them without any recourse because of a premarital spousal support waiver is manifestly unfair.

III. OPTIONS AVAILABLE WHEN DEALING WITH ECONOMIC INEQUALITY RESULTING FROM SPOUSAL SUPPORT WAIVERS

To account for unforeseen circumstances at divorce, some states have departed from the original version of the UPAA by determining "unconscionability" of the premarital agreement not at the time of execution, but at the time of enforcement.[106] Traditionally,

---

conduct); Djavaheri-Saatchi v. Djavaheri-Saatchi, 654 N.Y.S.2d 653 (1997) (stating the challenge to the prenuptial agreement was time-barred); Rupert v. Rupert, 667 N.Y.S.2d 537, 538-39 (1997) (finding the antenuptial agreement valid as modified). Ohio also has a decision challenging the validity of a premarital agreement. *See* Parr v. Parr, No. 70300, 1997 WL 97231, at *3 (Ohio Ct. App. Mar. 6, 1997) (holding the antenuptial agreement void due to lack of full disclosure). Finally, Tennessee and Wisconsin decisions have also discussed the validity of premarital agreements. *See* Williams v. Kuykendall, No. 03A01-9705-CV-00167, 1997 WL 671925, at *4 (Tenn. Ct. App. Oct. 29, 1997) (finding the antenuptial agreement void due to duress and insufficient disclosure); Boone v. Boone, No. 02A01-9507-cH-00144, 1997 WL 142346, at *7 (Tenn. Ct. App. Mar. 7, 1997) (holding the antenuptial agreement valid); Seefeldt v. Seefeldt, 571 N.W.2d 924 (Wis. Ct. App. 1997) (unpublished disposition) (setting aside the prenuptial agreement because of inequality).

1997 divorce cases where the *husband* challenged the validity of the agreement include the following. In a Delaware case, the husband challenged the validity. *See* Tarburton v. Tarburton, No. CN96-6373, 1997 WL 878411, at *6 (Del. Fam. Ct. July 8, 1997) (holding the antenuptial agreement valid under Pennsylvania law); Knight v. Knight, No.CK93-3241, 1997 WL 878461 (Del. Fam. Ct. June 9, 1997) (stating the prenuptial agreement argument was waived). In a Minnesota case, the husband challenged the validity of the agreement. *See* Hestad v. Hestad, No. C1-97-386, 1997 WL 668218, at *5 (Minn. Ct. App. Oct. 28, 1997) (holding the antenuptial agreement valid). Lastly, in Texas, a husband also challenged the validity of the agreement. *See* Marsh v. Marsh, 949 S.W.2d 734, 740-41 (Tex. Ct. App. 1997) (finding the premarital agreement not unconscionable).

106. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-36g(a)(2) (West 1999); N.J. STAT. ANN. § 37:2-38(b) (West 1999); 750 ILL. COMP. STAT. 10/7(b) (West 1999) (stating that the modification or elimination of spousal support is examined at dissolution); IND. CODE ANN. § 31-11-3-8(b) (Michie 1999) (finding modification or elimination of spousal maintenance is examined at dissolu-

premarital agreements were permitted to be examined at divorce to account for changed circumstances that could not be foreseen at the time of execution of the agreement. For instance, the birth of children with disabilities or the ill health of one spouse could render a seemingly fair agreement at the time of the wedding grossly unfair at the time of dissolution. However, in the quest for certainty of enforcement, the UPAA opted to examine unconscionability only when the premarital agreement was executed. If the entire agreement were subject to judicial review at the time of dissolution the parties' original agreement may be undermined and may result in uncertainty that the UPAA sought to avoid. However, the present California scheme of prohibiting spousal support waivers would preserve the parties' intentions regarding their property rights while allowing discretion to adjust for gross unfairness resulting from unanticipated circumstances.

The unconscionability standard, even if applied at the time of dissolution, is difficult to meet. According to the Indiana Supreme Court, in the recent case of *Rider v. Rider*,[107] "[u]nconscionability involves a gross disparity."[108] In *Rider*, Leslie and Charles Rider married in 1988 and separated in 1992. Their premarital agreement specified that neither shall acquire property rights by virtue of the marriage and that neither shall have rights to claim support or alimony. Because Leslie's health had deteriorated during the course of

---

tion); Girard v. Girard, No. FA950710125, 1998 WL 345541, at *14 (Conn. Super. Ct. June 16, 1998) (finding a prenuptial agreement which eliminates an award of alimony for an undereducated, unskilled mother of three preschool children is unconscionable); Siegel v. Siegel, No. F9401411705, 1996 WL 222140, at *4 (Conn. Super. Ct. Apr. 8, 1998) (holding prenuptial agreement unenforceable where husband's assets had increased 40% from date of marriage); Brooks v. Brooks, 1997 WL 297586, at *3 (Conn. Super. Ct. May 20, 1997) (holding it is unfair to enforce prenuptial agreement where two young children and husband's assets are six times what they were at time of marriage); *see also* Melvin Aron Eisenberg, *The Limits of Cognition and The Limits of Contract*, 47 STAN. L. REV. 211, 254-58 (1995); Louis Parley, *Premarital Agreements in Connecticut: Where We Are and Where We Are Going*, 69 CONN. B.J. 495 (1995); Robert Roy, Annotation, *Enforceability of Premarital Agreements Governing Support or Property Rights Upon Divorce or Separation as Affected by Fairness or Adequacy of Those Terms—Modern Status*, 53 A.L.R. 4TH 161 (1988).

107. 669 N.E.2d 166 (Ind. 1996).

108. *Id.* at 164.

the marriage, rendering her unable to work, the trial court ordered Charles to pay Leslie $225 a month as maintenance. Yet, the court did not find the premarital agreement to be unconscionable. The court stated, "While we sympathize with her, and we understand that enforcement of this contract eventually may force her to sell her home, we cannot find enforcement . . . to be unconscionable."[109] The court reasoned that there was no "gross disparity" because Leslie had assets worth at least $65,000 while Charles had a modest gross income stream of $1,247 per month.[110] As a result, the trial court's maintenance award was not permitted. Thus the unconscionability standard, even if applied at dissolution, will not necessarily result in overturning a premarital waiver of spousal support. The *Rider* court suggested that an unconscionable situation would involve "one spouse . . . left with considerable assets while the other spouse is left virtually penniless, with no means of support."[111] The recent adoption of the UPAA in Indiana seems to have codified the *Rider* court's version of unconscionability by providing that only "extreme hardship under circumstances not reasonably foreseeable at the time of execution of the agreement" will allow a court to award spousal support.[112]

Applied to the *Pendleton* facts, it is clear that spousal support would not be appropriate even if California enacted an unconscionability at dissolution standard like Indiana's. Like the Rider situation, the Fireman marriage lasted only four years. However, both Barry and Candace are wealthy individuals, each owning "substantial assets and each earned thousands of dollars a month in investment income."[113] They lived a lavish lifestyle, funded primarily by Barry, who earned far more than Candace. "The trial court found his annual cash flow available for support to be more than six times the amount

109. *Id.*
110. *See id.*
111. *Id.*
112. IND. CODE ANN. § 31-11-3-8(b) (Michie 1999).
113. *See* Respondent-Petitioner's Opening Brief on the Merits at 9, Pendleton v. Fireman, 72 Cal. Rptr. 2d 840 (Ct. App. 1998) (No. B113293). Barry's monthly income was approximately $83,000; Candace's approximately $9,000. *See* Appellant—Respondent's Answer Brief on the Merits at 3, Pendleton v. Fireman, 72 Cal. Rptr. 2d 840 (Ct. App. 1998) (No. B113293).

available to her."[114] If the unconscionability standard is the gross disparity between the ex-spouses whereby one has considerable assets and the other is virtually penniless, then it would be correct to uphold a premarital agreement support waiver in a case like *Pendleton*.

On the other hand, if the trial court determined spousal support under present guidelines, then the court must make a determination based upon the marital standard of living. In the Pendleton—Fireman marriage, the standard of living was very high. However, the trial court must also only assure that the spouse seeking support will be able to become self-supporting in a reasonable period of time. Here, Candace would be self-sufficient without any support from Barry. Therefore, the result should have been the same with or without a premarital agreement support waiver—Candace would not receive spousal support.

The New Jersey definition of an unconscionable premarital agreement would also allow consideration of unforeseen circumstances. The New Jersey formulation is a combination of UPAA section 6(b) and the holding of the 1984 case of *Marschall v. Marschall*.[115] Under the New Jersey version of the UPAA,[116] an agreement is unconscionable if: (1) a spouse would become a public charge, or (2) a spouse would be left without reasonable support, or (3) a spouse would have a standard of living far below that enjoyed before the marriage. The *Marschall* case involved an older couple with grown children from prior marriages. The wife Reba, who sought *pendente lite* spousal support upon separation after four years of marriage, earned an annual income of about $20,000 and received Social Security benefits of $200 a month.[117] The husband, John, had a net worth estimated at $5 million with an annual income over $250,000.[118] Their premarital agreement included a separate property arrangement but also provided that if the marriage

114. Respondent—Petitioner's Opening Brief on the Merits at 9, Pendleton v. Fireman, 72 Cal. Rptr. 2d 840 (Ct. App. 1998) (No. B113293).
115. 477 A.2d 833 (N.J. Super. Ct. Ch. Div. 1984).
116. *See* N.J. STAT. ANN. § 37:2-32 (West 1999).
117. *Marschall*, 477 A.2d at 835.
118. *Id.*

terminated during John's lifetime, he would pay Reba $100,000 "in full satisfaction of all claims against him."[119]

The *Marschall* court was the first New Jersey court to face the question of the validity of premarital agreements, which in the past had been considered void as against public policy. The court followed the lead of the landmark Florida case, *Posner v. Posner*,[120] and held that "antenuptial agreement[s] fixing post divorce rights and obligations" should be held valid and enforceable.[121] However, the *Marschall* court also required that a premarital agreement be made with "full and complete disclosure."[122] Even with full disclosure, the court stated that "there must be some level of 'unconscionability' which would bar enforcement of an antenuptial agreement . . . ."[123] The court continued, "[a]n agreement which would leave a spouse a public charge or close to it, or which would provide a standard of living far below that which was enjoyed both before and during the marriage would probably not be enforced by any court."[124]

A premarital agreement would not be considered unconscionable, according to the *Marschall* court, "simply by showing a substantial difference between his or her rights under the agreement, and what might be awarded by a court in absence of the agreement."[125] In short, an agreement that may seem "unfair" would not necessarily be "unconscionable." Although spousal support is generally set based on the standard of living during the marriage, the court suggested that a premarital agreement that provided the ex-spouse a

119. *Id.*

120. 233 So. 2d 381 (Fla. 1970); *see* Eric Rasmussen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract,* 73 IND. L.J. 453 (1998); Allison A. Marston, Note, *Planning for Love: The Politics of Prenuptial Agreements,* 49 STAN. L. REV. 887 (1997). Professor Stake proposed that premarital agreements should be mandatory. *See* Jeffrey Evans Stake, *Mandatory Planning for Divorce,* 45 VAND. L. REV. 397 (1992). *See generally* Robert Roy, Annotation, *Modern Status of Views as to Validity of Premarital Agreements Contemplating Divorce or Separation,* 53 A.L.R. 4TH 22 (1988).

121. *Marschall,* 477 A.2d at 838; *see* Silbaugh, *supra* note 59, at 70-76 (giving a brief history of doctrine governing premarital agreements).

122. *Marschall,* 477 A.2d at 840.

123. *Id.* at 840.

124. *Id.* at 840-41.

125. *Id.* at 841.

lower standard of living would not bar enforcement of the agreement. If the agreement allowed the ex-spouse "to again live at the reasonably comfortable standard she had enjoyed prior to marrying . . . (albeit somewhat less affluently than she lived during the marriage) it is difficult to see why the agreement should not be enforced . . . ."[126] The court anticipated that such an agreement might be considered unconscionable where there is a lengthy marriage or one with children,[127] but not in the Marschalls' marriage.

In a later New Jersey case, *Jacobitti v. Jacobitti*,[128] the trial court followed the *Marschall* standards and found that the spouses' premarital agreement was unconscionable because "the divorce would leave [the husband] a wealthy man and [the wife] virtually penniless."[129] In that case, the marriage lasted sixteen years and the wife was wheelchair bound and suffering from progressively deteriorating multiple sclerosis. Although the husband was sixteen years older than the wife, he was in good health and had assets far exceeding those of the wife.[130] However, in *DeLorean v. DeLorean*,[131] decided soon after *Marschall*, the court found that the couple's separate property agreement was not unconscionable even though the result could be considered "small, inadequate or disproportionate."[132] Because the wife had substantial income from her position as a talk-show host and a life interest in a trust fund which had assets over $2 million, the agreement was not

126. *Id.* The court was unwilling to decide the question of enforceability until the question of full disclosure had been resolved. *See id.* Thus, the court denied the husband's motion for summary judgment and granted the wife's motion for *pendente lite* support. *See id.* at 842.

127. *See id.* at 841.

128. 623 A.2d 794 (N.J. Super. Ct. App. Div. 1993).

129. *Id.* at 796. One aspect of the decision was that the husband had not completely disclosed his net worth when the agreement was executed. *See id.*

130. The agreement stated that the husband had assets of over $1.3 million and an annual income of over $100,000, compared to the wife's assets of over $2000 and an income of $12,500. *Id.* It is not exactly clear what the agreement's provisions were at divorce, but the court stated that the wife would "receive nothing if the parties were separated or divorced at the time of plaintiff's death." *Id.*

131. 511 A.2d 1257 (N.J. Super. Ct. Ch. Div. 1986).

132. *Id.* at 1259.

unconscionable. The touchstone was that the wife would not become "destitute or as a public charge."[133]

If the New Jersey standards were applied to the *Pendleton* facts, Candace would receive no spousal support. Because of her substantial property which provided her income, she would neither become a public charge nor be rendered without a means of reasonable support. Concerning the standard of living under New Jersey law, the important point is that it refers to that which was enjoyed before the marriage. Although Candace would certainly not live at the standard which she enjoyed while living with Barry, her standard of living would be comparable to that enjoyed before the marriage.

Under the New Jersey standards, in the *Bonds* case, if there had been a spousal support waiver in addition to the separate property provisions, Sun would probably have received a spousal support award. Sun was caring for two minor children. Before her marriage, she had been attending beautician school. There would be two bases for considering the spousal support waiver unconscionable under the New Jersey statute. First, because she did not have property nor seemed to be employable, she would not have a "reasonable" means of support. Second, without a share of community property or spousal support, she would be relegated to a standard of living far below that which was enjoyed before the marriage. With the responsibility of the children, even with child support from Barry, she would have difficulty pursuing any realistic career options. Thus, a court could find the spousal support waiver under the New Jersey standard unconscionable even if it upheld the separate property provisions.

Thus the New Jersey unconscionability standard would uphold spousal support waivers in most cases but would provide additional protection in those situations where a long marriage or child care had reduced a spouse's ability to maintain the standard of living enjoyed before the marriage. If California were to follow states that permit spousal support waivers, the New Jersey formulation better protects against those circumstances that can adversely affect a spouse at dissolution.

133. *Id.* at 1260.

IV. SUBSTANTIVE UNCONSCIONABILITY AS A STANDARD TO PREVENT ECONOMIC INEQUALITY

Although the CPAA provides that an "unconscionable" premarital contract will be unenforceable,[134] the definition of "unconscionable" is "a matter of law" left to the courts.[135] In the context of premarital agreements, no California court decision has articulated the criteria for deciding whether a premarital agreement is unconscionable at divorce.[136] Under California Civil Code section 1670.5, which is identical to UCC section 2-302, courts may refuse to enforce an ordinary contract that is "unconscionable at the time it was made."[137] The legislative history explains that the purpose of the legislation was to prevent oppression, unfair surprise, and one-sided bargains.[138]

Most court decisions on the unconscionability issue have involved arbitration clauses in employment contracts. In the recent case of *Stirlen v. Supercuts, Inc.*,[139] the California Court of Appeal found that an arbitration clause was unconscionable and thus unenforceable. On the issue of "substantive" unconscionability,[140] the court used the "traditional standard of unconscionability—contract terms so one-sided as to 'shock the conscience.'"[141] That particular arbitration clause was so one-sided because it provided "the employer [with] more rights and greater remedies than would otherwise

134. CAL. FAM. CODE § 1615(a)(2) (West 1998).

135. *Id.*

136. In a pre-CPAA case involving a probate proceeding, a premarital agreement in which the wife waived all her marital rights including spousal support was considered invalid. *See* Estate of Nelson, 224 Cal. App. 2d 138, 142-43, 36 Cal. Rptr. 352, 354-55 (1964) (suggesting that a "shock the conscience" standard should be applied to determine unconscionability).

137. CAL. CIV. CODE § 1670.5(a) (West 1998).

138. *See* CAL. CIV. CODE § 1670.5 cmt. 1 (West 1998) (Legislative Committee Comment—Assembly).

139. 51 Cal. App. 4th 1519, 60 Cal. Rptr. 2d 138 (1997).

140. "Procedural" as well as "substantive" unconscionability are considered by California courts. The procedural standard has to do with inequality of bargaining power and lack of disclosure. *See id.* at 1532, 60 Cal. Rptr. 2d at 145. These "procedural requirements" are also embodied in CPAA at CAL. FAM. CODE § 1615 (West 1998), involving enforceability of premarital agreements. This discussion focuses only on the "substantive" standards.

141. *Stirlen*, 51 Cal. App. 4th at 1532, 60 Cal. Rptr. 2d at 145.

be available and concomitantly deprive[d] employees of significant rights and remedies they would normally enjoy."[142] Similarly, in the more recent case of *Kinney v. United Healthcare Services*,[143] the California Court of Appeal again found an arbitration clause to be unconscionable because only the employee was required to submit her claims to arbitration: "the unilateral obligation to arbitrate is itself so one-sided as to be substantively unconscionable."[144]

In the only case to consider the definition of unconscionability under the UPAA, the Texas Court of Appeals in *Marsh v. Marsh* also turned to commercial law.[145] On the issue of substantive unconscionability, the court used the standard of "whether the contract is oppressive or unreasonable."[146] There was a conflict between the testimony of the experts on that issue. The husband's expert testified that the agreement was unconscionable per se because the wife was the only one who had power over the trust created by the agreement and could exercise that power at any time. The wife's expert disagreed stating that fairness did not determine unconscionability but only an agreement "so far one-sided that no reasonable person could consider it to be an arm's length transaction."[147] The agreement in *Marsh* provided that the husband, Bill, would transfer one-half of his assets to a trust of which provided his wife, Juanita, was trustee and sole beneficiary. Bill and Juanita were income beneficiaries during their lives, but Juanita was set to receive the corpus of the trust upon Bill's death. The court rejected Bill's assertion that the one-sided nature of the agreement, although unfair, necessitated a finding of unconscionability.[148] Rejecting all of Bill's arguments, the court

142. *Id.* at 1542, 60 Cal. Rptr. 2d at 152.
143. 70 Cal. App. 4th 1322, 83 Cal. Rptr. 2d 348 (1999).
144. *Id.* at 1332, 83 Cal. Rptr. 2d at 354.
145. *See* Marsh v. Marsh, 949 S.W.2d 734 (Tex. Ct. App. 1997). "In the absence of clear guidance as to the definition of 'unconscionability' in marital property cases, courts have turned to the commercial context." *Id.* at 739-40. *See also* S. Christine Mercing, Comment, *The Uniform Premarital Agreement Act: Survey of Its Impact in Texas and Across the Nation*, 42 BAYLOR L. REV. 825, 830-31 (1990) ("One would assume that the Texas courts will follow commercial or contract law interpretations of unconscionability.").
146. *Marsh*, 949 S.W.2d at 740 (citing Wade v. Austin, 524 S.W.2d 79 (Tex. Ct. App. 1975)).
147. *Id.* at 742.
148. *See id.* at 741-42.

held that the agreement was not unconscionable as a matter of law.[149] The *Marsh* court's analysis confirms that unconscionability means more than unfairness but must be either grossly unfair or one-sided.

It is difficult to transfer the definition found in employment cases or those cases involving only property arrangements to the waiver of all rights at divorce via a premarital agreement. On the one hand, giving up all rights to community property and to spousal support upon divorce differs from giving up procedural rights once employment terminates. On the other hand, if one spouse will receive all the benefits of the marital union and the other spouse none, such a premarital agreement in some cases may be so one-sided that it shocks the conscience. The UPAA attempts to ameliorate the one-sided nature of such bargains, even if entered into voluntarily and with sufficient disclosure, by allowing courts discretion if one ex-spouse will be relegated to welfare.

The major question facing California courts and the legislature is how to prevent completely one-sided bargains even if they were voluntary bargains and if they were made after sufficient disclosure. At present, the legislative scheme prohibits spousal support waivers and thus prevents egregiously unfair bargains by leaving the courts with discretion to award spousal support. If spousal support waivers would be allowed and the present provisions regarding unconscionability are unchanged, egregiously one-sided premarital agreements cannot be challenged so long as they were voluntarily entered into and there was sufficient disclosure. That in itself "shocks the conscience." If the CPAA was amended to allow challenges based on unconscionability at divorce, courts would face increased litigation over the fairness of individual bargains. This would add another layer of issues to be decided in addition to whether and how long spousal support should be awarded. The purpose of the UPAA and CPAA was to provide certainty and enforceability of premarital agreements. The present system does just that. It is highly unusual for waivers of community property rights to be challenged because there is another remedy for a spouse disadvantaged by the marriage.

149. *See id.* at 743. The court also rejected Bill's other arguments regarding the circumstances and timing of the signing of the agreement, bargaining power of the parties, and the absence of independent counsel. *See id.* at 740-42.

The best solution seems to be to retain the present system rather than try to provide guidelines regarding unconscionability either through new legislative action or by court decision.

V. CONCLUSION

The *Pendleton* case demands re-examination of whether spousal support waivers should be allowed in premarital agreements. The present system of prohibiting those waivers allows courts to ameliorate economic disparities that occur at divorce through spousal support awards, yet retains the property arrangements agreed to prior to marriage. If spousal support waivers are permitted, under the present legislative scheme it would be extremely difficult to challenge agreements that result in vast differences in economic outcomes for the spouses at divorce. Although the CPAA could be amended to give courts discretion either to prevent an ex-spouse from falling to the level of welfare assistance or to allow for reasonable spousal support, this would lead to increased litigation on those particular issues. The optimum solution is to continue to treat spousal support differently from property arrangements and leave the spousal support issue in the hands of the courts.