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# For Richer, Not Poorer: Premarital Waivers of Spousal Support in California

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**FOR RICHER, NOT POORER:  
PREMARITAL WAIVERS OF SPOUSAL  
SUPPORT IN CALIFORNIA**

*J. Nicholas Marfori\**

*California law is fairly straightforward with respect to premarital agreements that seek to alter community property rights in the event of a divorce. But it is unclear and unsettled with respect to those agreements that seek to limit or waive spousal support. Although California prohibits courts from enforcing premarital waivers of spousal support if it would be unconscionable to do so at the time of enforcements, courts have not articulated a clear standard for what that means. California made its first attempt to do so in *In re Marriage of Facter*. This Article considers that decision in illustrating how current law, which does not clearly define unconscionability, allows courts to arbitrarily decide when such a waiver is fair. This Article argues that, instead, courts must consider the balance between freedom of contract and public policy embodied in the California Family Code. Finally, this Article concludes by proposing a set of policy-based guidelines that courts and the legislature can consider in determining the enforceability of such waivers under existing law.*

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## I. INTRODUCTION

California law has evolved to become fairly straightforward with regard to premarital agreements<sup>1</sup> that seek to alter community property rights in the event of divorce.<sup>2</sup> Prospective spouses are generally free to decide which spouse would get the house, the car, the dog, etc., if the marriage were to end in dissolution.<sup>3</sup> What remains unclear and unsettled, however, in California premarital agreement law, is the enforceability of those provisions that seek to limit or waive spousal support<sup>4</sup> upon dissolution of marriage.<sup>5</sup>

Section 1612(c) of the California Family Code<sup>6</sup> prohibits enforcement of premarital waivers of spousal support if it would be “unconscionable at the time of enforcement,”<sup>7</sup> but courts have yet to articulate a clear standard for what that actually means. To illustrate, suppose George and Jane decide to get married in anticipation of having a child. Concerned about the wealth he had accumulated over the years (and Jane’s lack thereof), George conditions the marriage

1. A premarital agreement, also referred to as a prenuptial agreement, is “[a]n agreement made before marriage [usually] to resolve issues of support and property division if the marriage ends in divorce or by the death of a spouse.” *Prenuptial Agreement*, BLACK’S LAW DICTIONARY (9th ed. 2009).

2. California law “freely permits contractual variation of the community property regime.” GRACE GANZ BLUMBERG, *COMMUNITY PROPERTY IN CALIFORNIA* 68 (6th ed. 2012); *see also Pre-Marital Agreements: Hearing on SB 78 Before the Assemb. Comm. on the Judiciary*, 2001–02 Reg. Sess. 4–5 (Cal. 2001), [http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb\\_0051-0100/sb\\_78\\_cfa\\_20010625\\_102529\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_0051-0100/sb_78_cfa_20010625_102529_asm_comm.html) [hereinafter *Hearing on SB 78*] (For over 150 years, “California has recognized the right of parties to agree to marriage terms at variance with [community property] law through pre-marital agreements.”).

3. *See* Fahi Takesh Hallin, *Strategies for Successfully Representing California Clients and Overcoming Challenges in Family Law Cases*, in *STRATEGIES FOR FAMILY LAW IN CALIFORNIA: LEADING LAWYERS ON UNDERSTANDING DEVELOPMENTS IN CALIFORNIA FAMILY LAW* 73 (2013 ed.) (“Generally, there is no or very little limitation on parties contracting away their right to community property during the marriage . . .”).

4. Spousal support, often referred to as maintenance or alimony, and can be defined as “[a] court-ordered allowance that one spouse pays to the other spouse for maintenance and support while they are separated, while they are involved in a matrimonial lawsuit, or after they are divorced.” *Alimony*, BLACK’S LAW DICTIONARY (9th ed. 2009). The duty to support one’s spouse is statutory. *See* CAL. FAM. CODE § 4300 (West 2014).

5. *See* Steve Mindel, *Succeeding As a California Family Law Practitioner*, in *STRATEGIES FOR FAMILY LAW IN CALIFORNIA: LEADING LAWYERS ON UNDERSTANDING DEVELOPMENTS IN CALIFORNIA FAMILY LAW* 71 (2014 ed.) (Advising family law practitioners to “warn clients that any modification of spousal support rights remain an unsettled area in family law, and the drafting of premarital agreements should be approached with caution.”); Hallin, *supra* note 3, at 73 (recognizing that “the issue of whether or not a waiver of spousal support in a prenuptial agreement will be valid has been a very hot topic in California for many years.”).

6. Unless otherwise noted, all references to the Family Code in this Article refer to the California Family Code.

7. FAM. § 1612(c).

on her signing a premarital agreement that requires her to waive any right to spousal support if they ever divorced, but also provides for her to receive \$200,000 in lump sum, their Caribbean timeshare, and their million-dollar marital home to which she made no financial contribution. Jane agrees. Shortly after the wedding, she quits her retail job to be a stay-at-home mom, leaving George financially responsible for Jane, their son, and Jane's daughter from a previous marriage. After fifteen years, they separate.

During the divorce proceedings, Jane asks the court for post-dissolution spousal support. She admits that she freely and voluntarily waived her right to spousal support in their premarital agreement, but she claims that enforcing that waiver would be unconscionable under section 1612(c). How should the court rule? Would it be it unconscionable to deny her spousal support, when she would still receive \$200,000, a Caribbean timeshare, and their million-dollar home? Does it matter that Jane has not worked in fifteen years, while George makes over \$1 million per year? What if George makes only \$500,000 per year? What if George lost his job during the marriage? Would it matter if their marriage lasted only fifteen weeks instead of fifteen years?

In *In re Marriage of Facter*,<sup>8</sup> the California Court of Appeal made its first attempt to delineate the circumstances in which enforcement of a premarital waiver of spousal support would be unconscionable. There, Nancy Facter waived her right to spousal support in a premarital agreement.<sup>9</sup> In deciding whether or not to enforce the waiver, the court noted that Nancy was entitled to receive \$200,000, a Jaguar automobile, and a fifty-percent interest in their marital home from her ex-husband.<sup>10</sup> Nevertheless, the court found that “[c]ompared to what she is likely to receive in court-ordered spousal support, these assets [were] manifestly inadequate.”<sup>11</sup> The court had “little difficulty” concluding that the spousal support waiver was unconscionable, given that her ex-husband Jeffrey was

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8. 152 Cal. Rptr. 3d 79 (Ct. App. 2013).

9. *Id.* at 84–85. Paragraph No. 3 of the Property Rights section of the agreement stated that Paragraph No. 2 would “constitute [Nancy’s] sole right to property acquired during marriage and to support . . . .” *Id.* at 83–84. Paragraph No. 6 in the Child Support section of the agreement provided that “nothing in his conditional . . . ‘shall give rise to any other obligations to pay of the housing of [Nancy], spousal support, or additional sums of child support.’” *Id.* at 83.

10. *Id.* at 93.

11. *Id.*

worth over \$10 million with earnings of \$1 million per year, while Nancy had no separate property and no income coming out of the marriage.<sup>12</sup> Said succinctly, the court decided that Nancy deserved more and that Jeffrey could pay more.

To be clear, this Article does not suggest that the Court of Appeals was wrong (or right) in finding that the waiver in *Factor* was unconscionable. Nor does it probe for some mathematical formula to determine unconscionability. Instead, this Article seeks to address several important questions that have remained unanswered since the enactment of Family Code section 1612(c) and continue to remain unanswered even after *Factor*. For instance, what is the standard for determining whether a spousal support waiver is unconscionable at the time of enforcement? Is the waiver unconscionable simply because it later turns out to be unfair? Should spousal support waivers be treated as any other type of contractual waiver with regard to unconscionability? Perhaps the broader inquiry underlying these questions is whether the courts, through this unconscionability approach, should be able to invalidate a premarital contract term when they find it to be more favorable to one party over the other, and if so, why?

Part II of this Article explores the historical development of California law on premarital waivers of spousal support. Part III takes a closer look at *Factor* to illustrate how the current law precluding enforcement of spousal support waivers found to be unconscionable, without a clear standard for determining unconscionability, allows courts to arbitrarily evaluate the substantive fairness of such waivers. Drawing upon contract law principles and policy considerations that arise when prospective spouses attempt to modify their legal obligations under marriage, Part IV argues that a court's unconscionability determination must consider the delicate balance between freedom of contract and public policy embodied in section 1612(c) of the Family Code. Part V explains why the spousal support waiver provision in the recently promulgated Uniform Premarital and Marital Agreements Act of 2012<sup>13</sup> fails to strike such a balance, and proposes a set of policy-based guidelines for judicial or legislative consideration regarding the enforceability of such waivers under the existing law.

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12. *Id.*

13. UNIF. PREMARITAL & MARITAL AGREEMENTS ACT, 9C U.L.A. 12 (Supp. 2014).

## II. THE EVOLUTION OF CALIFORNIA LAW ON SPOUSAL SUPPORT WAIVERS

Premarital agreements have long been used to delineate the property rights between spouses during the marriage<sup>14</sup> and to regulate the disposition of property upon the death of one of the spouses.<sup>15</sup> In the 1970s, as the number of divorces increased in the advent of “no-fault” divorce legislation and changing attitudes towards marriage, California courts began recognizing and enforcing premarital agreements in contemplation of divorce.<sup>16</sup> With regard to property rights, spouses were freely permitted to “agree to marriage terms at variance with [community property] law . . . unless they violated general contractual concepts of fraud, duress, or undue influence, or otherwise were contrary to public policy.”<sup>17</sup> Yet during that time, courts remained hesitant to enforce provisions waiving or limiting spousal support due to public policy concerns against promoting divorce.<sup>18</sup>

### A. Early Case Law on Spousal Support Waivers

The first major decision in California involving spousal support waivers rested heavily on public policy concerns. In *In re Marriage of Higgason*,<sup>19</sup> decided in 1973, a husband and wife entered into a premarital agreement in which each spouse waived “any and all right

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14. See BLUMBERG, *supra* note 2, at 67 (“To insulate daughters from the operation of the [English] common law, wealthy English families created trusts for a wife’s separate benefit and negotiated premarital contracts that gave a wife control of her property during marriage.”).

15. *Id.* (“[P]remarital agreements have served the needs of older persons, often widows and widowers, who wish to remarry but also to safeguard the family patrimony for the children of a prior marriage. Originally, such contracts regulated the disposition of property upon the death of one of the parties.”). Such agreements were once “regarded with distrust and hostility” for being within “the province of the wealthy, the age disparate, the heartless, or the simply greedy.” Allison Marston, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 888 (1998); see also *Hearing on SB 78*, *supra* note 2, at 4–5 (“[Premarital] agreements normally have been considered enforceable unless they violated general contractual concepts of fraud, duress, or undue influence, or otherwise were contrary to public policy.”).

16. CHARLOTTE K. GOLDBERG, *COMMUNITY PROPERTY* 69 (2014); see also BLUMBERG, *supra* note 2, at 68 (“As the frequency of divorces increased, attorneys began to insert divorce provisions in premarital agreements.”); *Hearing on SB 78*, *supra* note 2, at 5 (“As economic conditions, attitudes toward marriage, and views on the status of men and women changed over the latter half of the twentieth century, the use of pre-marital agreements also has increased.”).

17. *Hearing on SB 78*, *supra* note 2, at 5.

18. Michelle Butler, *Part Two: Alimony and the Marriage Contract: California Premarital Agreements Waiving or Specifying Spousal Support Obligations*, 20 J. CONTEMP. LEGAL ISSUES 41, 41 (2009).

19. 516 P.2d 289 (Cal. 1973) disapproved by *In re Marriage of Dawley*, 551 P.2d 323, 327 (Cal. 1976).

for contribution to the support, maintenance and expenses of the other party.”<sup>20</sup> At the time they were married, the wife was a seventy-three-year-old woman with “substantial assets,” whereas the husband, at forty-eight, was “earning \$2 an hour plus tips, and had little or no means.”<sup>21</sup> About halfway through their two-year marriage, the husband began incurring substantial medical and hospitalization costs after being beaten by an unknown assailant, having a lung surgically removed due to lung cancer, and suffering a heart attack that left him disabled.<sup>22</sup> The trial court denied the husband’s request for temporary spousal support of \$2,500 per month and other post-dissolution financial benefits based on its conclusion that the premarital agreement precluded him from receiving such support.<sup>23</sup>

The California Supreme Court remanded, holding that the premarital agreement was void against public policy and, therefore, did not preclude the court from awarding support to the husband.<sup>24</sup> Recognizing a distinction between agreements relating to the disposition of property and those that seek to “vary the personal duties and obligations to each other which result from the marriage contract itself,”<sup>25</sup> the court articulated the bright line rule that “[a]ny attempt by the parties to diminish or waive this obligation in an antenuptial agreement is unenforceable.”<sup>26</sup> The court reasoned that because contracts containing spousal support waivers would “facilitate divorce or separation by providing for a settlement only in the event of such an occurrence,” such contracts would not be “in contemplation that marriage relation will continue until the parties are separated by death” and would, therefore, be void against public policy.<sup>27</sup>

Shortly thereafter, in *In re Marriage of Dawley*,<sup>28</sup> the California Supreme Court revisited its ruling in *Higgason* when it upheld the validity of a premarital agreement in which the parties, both of whom planned the early dissolution of their marriage, agreed to keep their

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20. *Id.* at 290–91.

21. *Id.* at 290.

22. *Id.* at 291.

23. *Id.* at 292–93.

24. *See id.* at 295–98.

25. *Id.* at 296.

26. *Id.* at 295.

27. *Id.*

28. 551 P.2d 323 (Cal. 1976).



earnings and other property acquired during marriage as separate property.<sup>29</sup> In her request for court-ordered support, the wife relied on *Higgason* to argue that the premarital agreement as a whole was invalid as against public policy because it was not “made in contemplation that the marriage relation will continue until the parties are separated by death.”<sup>30</sup> The court disagreed, however, clarifying that a premarital agreement “violates state policy favoring marriage only insofar as its terms encourage or promote dissolution,” and that the parties’ anticipation of an early termination of their marriage was irrelevant to the enforceability of the agreement.<sup>31</sup> Finding that the spousal support provision neither waived nor limited financial support to the wife, but instead guaranteed her a minimum amount of support, the court held that the agreement did not violate public policy and was therefore enforceable.<sup>32</sup>

*B. The Uniform Premarital Agreement Act and Pendleton*

When it first codified statutory law regarding premarital agreements, the California Legislature contemplated the prevailing public policy against contractual limitation of spousal support articulated in *Higgason* and *Dawley*.<sup>33</sup> In 1985, California became the first state to adopt the Uniform Premarital Agreement Act (UPAA),<sup>34</sup> which was promulgated by the National Conference of Commissioners on Uniform State Laws to address the “substantial uncertainty as to the enforceability . . . of [premarital] agreements and [the] significant lack of uniformity of treatment of these agreements among the states.”<sup>35</sup> When bill was first proposed in the California State Senate, it contained all sections of the model code almost word for word.<sup>36</sup> However, after considering testimony in opposition of the UPAA sections regarding spousal support, the bill was enacted without the provisions that allowed for premarital

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29. *Id.* at 325.

30. *Id.* at 325.

31. *Id.* at 329–30.

32. *Id.* at 331.

33. See *Hearing on SB 78*, *supra* note 2, at 2 (at the time of enactment of the Uniform Premarital Agreement Act, “California case law considered the waiver of spousal support to be void as against public policy, because public policy favored the protection of marriage and the waiver of spousal support was believed to encourage dissolution.”).

34. Charlotte K. Goldberg, “*If It Ain’t Broke, Don’t Fix It*”: *Premarital Agreements and Spousal Support Waivers in California*, 33 LOY. L.A. L. REV. 1245, 1245 (2000).

35. UNIF. PREMARITAL AGREEMENT ACT Prefatory Note, 9B U.L.A. 36 (1983).

36. See *Hearing on SB 78*, *supra* note 2, at 5.

modification or elimination of spousal support.<sup>37</sup>

The California Legislature explained that by deleting the two spousal support provisions from its version of the UPAA, “California case law would continue to prevail on the issue of spousal support in premarital agreements.”<sup>38</sup> Some commentators understood that, by omitting those provisions, the Legislature “intended to preclude predetermination of spousal support upon divorce” as against public policy in favor of marriage.<sup>39</sup> Others, however, viewed that the Legislature’s omission of the support provisions left open the question of whether the courts should continue to follow prior case law (*Higgason* and *Dawley*) on the enforceability of spousal support waivers, or whether the Act should be read to allow the courts discretion in allowing or prohibiting such waivers.<sup>40</sup> The Supreme Court took fifteen years to address this issue in its decision in

Fifteen years later, in *In re Marriage of Pendleton*,<sup>41</sup> the California Supreme Court recognized that “changes in the law governing the spousal relation warrant[ed] the reexamination of the assumptions and policy underlying the refusal to enforce waivers of spousal support.”<sup>42</sup> In *Pendleton*, a husband and wife, each of whom had considerable assets to their name and elevated earning capacities at the time of dissolution,<sup>43</sup> entered into a premarital agreement in which they each waived “all rights to any type of spousal support or

37. See UNIF. PREMARITAL AGREEMENT ACT § 3(a)(4), 9C U.L.A. 43 (1983) (“Parties to a premarital agreement may contract with respect to . . . the modification or elimination of spousal support.”). But see *Hearing on SB 78*, *supra* note 2, at 5 (“After hearing testimony opposing the bill’s waiver provisions on several grounds . . . the Legislature deleted the two provisions permitting waiver of spousal support before enacting the rest of the UPAA into law.”); Butler, *supra* note 18, at 42 n.6 (“[O]pposition from the Women Lawyers Association of Los Angeles and others led the Family Law Section [of the California State Bar] to condition its support [of the bill] on the elimination of the provision allowing the waiver of spousal support.”).

38. Butler, *supra* note 18, at 42 (quoting ASSEMBLY SUBCOMMITTEE ON THE ADMINISTRATION OF JUSTICE, REPORT ON SB 1143, S.B. 1143, 1985–86 Reg. Sess., at 3 (1985)).

39. Goldberg, *supra* note 34, at 1253; see also Robert H. Martin, *Waivers of Spousal Support in Premarital Agreements*, 1 SAN DIEGO JUST. J. 475, 487 (1993) (“The legislature has spoken. And the California courts have made clear their intentions. In California, the courts will continue to apply case law and will hold waivers of spousal support void as against public policy.”).

40. Butler, *supra* note 18, at 42–43.

41. 5 P.3d 839 (Cal. 2000).

42. *Id.* at 845.

43. *Id.* at 840. At the time of their divorce, each spouse was worth approximately \$2.5 million. The husband held a doctorate in pharmacology and a law degree, while the wife held a master’s degree and was earning \$5,772 per month in Social Security benefits, investment returns, and rental income. *Id.*

child support from the other” in the event of divorce.<sup>44</sup> Both parties, represented by independent counsel in the negotiation and preparation of the agreement, understood its legal consequences and executed it freely and voluntarily.<sup>45</sup>

Despite having satisfied the statutory procedural requirements, the trial court found the waiver to be void as against public policy, and it ordered the husband to pay temporary spousal support of \$8,500 per month.<sup>46</sup> The Court of Appeal reversed and remanded on the ground that “the current state of family law is one that ‘should not per se prohibit premarital spousal support waivers or limitations.’”<sup>47</sup> The California Supreme Court agreed, concluding that:

[N]o public policy is violated by permitting enforcement of a waiver of spousal support executed by intelligent, well-educated persons, each of whom appears to be self-sufficient in property and earning ability, and both of whom have the advice of counsel regarding their rights and obligations as marital partners at the time they execute the waiver.<sup>48</sup>

Noting that section 1612(a)(7) of the Family Code expressly permits premarital agreements as to “any other matter, including their personal rights and obligations, not in violation of public policy,”<sup>49</sup> the Supreme Court reversed and remanded.<sup>50</sup>

In the majority opinion, Justice Baxter noted that the California version of the UPAA, as it was introduced, contained provisions that would have permitted waivers of spousal support but were subsequently deleted by amendment.<sup>51</sup> In his view, the omission of

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44. The spousal support waiver was worded as follows: “[B]oth 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.” *Id.*

45. *Id.*

46. *Id.* at 840–41 (explaining that in determining the amount of support to be ordered, the court took note of the couple’s “\$20,000 to \$32,000 per month” lifestyle).

47. *Id.* at 841 (quoting *In re Marriage of Pendleton*, 72 Cal. Rptr. 2d 840, 845 (Ct. App. 1998), *aff’d*, 5 P.3d 839 (Cal. 2000)).

48. *Id.* at 848.

49. CAL. FAM. CODE § 1612(a)(7) (stating that in addition to those subject matters expressly enumerated in subsections (a)(1) through (a)(6), “[p]arties to a premarital agreement may contract with respect to . . . [a]ny other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty”).

50. *Pendleton*, 5 P.3d at 849.

51. *Id.* 849–50.

those provisions evinced the Legislature's intention to "leave the law as it was in 1985," but he found it to be "unreasonable to assume that the Legislature intended the common law of the 19th century to govern the marital relationship in the 21st century."<sup>52</sup> Justice Baxter understood the Legislature to have been "satisfied with the evolution of the common law governing premarital waivers of spousal support and intended that evolution to continue."<sup>53</sup> In light of that interpretation, the court found that "the common law policy, based on assumptions that dissolution of marriage is contrary to public policy and that premarital waivers of spousal support may promote dissolution, [was] anachronistic."<sup>54</sup>

The *Pendleton* court took a significant step towards the common-law recognition of spousal support waivers by overruling *Higgason*, but it also called for legislative action on the matter. In its opinion, the majority expressly invited the Legislature to impose limitations on the right to waive spousal support and/or to specify the circumstances in which enforcement of a waiver would be unjust.<sup>55</sup> Less than one year later, the invitation was accepted.<sup>56</sup>

### C. *The Pendulum Swings After Pendleton*

In 2001, Senate Bill 78 amended section 1612 of the Family Code to expressly permit premarital waivers of spousal support. As it was introduced, however, the bill contained language to prohibit such waivers, which the author intended to operate as a direct legislative response to nullify the *Pendleton* holding.<sup>57</sup> According to the author of the bill, the *Pendleton* court "fundamentally

52. *Id.* (explaining that the "common law of the 19th century" imposed a blanket prohibition against premarital waivers of spousal support because such waivers were found to encourage divorce); see *In re Marriage of Higgason*, 516 P.2d 289, 295 (Cal. 1973); *Barham v. Barham*, 202 P.2d 289 (Cal. 1949); *Whiting v. Whiting*, 216 P. 92 (Cal. 1923).

53. *Pendleton*, 5 P.3d at 845.

54. *Id.* at 845.

55. *Id.* at 839 n.12 ("The Legislature may, of course, limit the right to enter into premarital waivers of spousal support and/or specify the circumstances in which enforcement should be denied.").

56. See *Hearing on SB 78*, *supra* note 2, at 5.

57. *Id.* ("[T]he right of a child or a spouse to support may not be adversely affected by a premarital agreement.") (emphasis omitted). The bill was also proposed in response the California Supreme Court's decision in *In re Marriage of Bonds*, which held that the lack of representation by independent counsel at the execution of a premarital agreement was only one factor in determining voluntariness of a premarital agreement. 5 P.3d 815, 828 (Cal. 2000). However, this Article focuses specifically on spousal support waivers and the court's evaluation of substantive fairness thereof at the time of enforcement.

misinterpreted the Legislature's intent" in omitting the spousal support provisions from its version of the UPA. <sup>58</sup> But after the bill met opposition from various organizations and individuals, <sup>59</sup> an amended version was proposed that allowed enforcement of such waivers on a case-by-case basis so long as certain conditions were met; the amended version passed almost unanimously. <sup>60</sup> As it was ultimately enacted, the support provision of Senate Bill 78—now codified in subsection (c) of Family Code section 1612—provides:

Any provision in a premarital agreement regarding spousal support, including, but not limited to, a waiver of it, is not enforceable if the party against whom enforcement of the spousal support provision is sought was not represented by independent counsel at the time the agreement containing the provision was signed, or if the provision regarding spousal support is unconscionable at the time of enforcement. <sup>61</sup>

Although the bill as enacted did not prohibit waivers of spousal support as its author originally intended, it created two obstacles for those seeking to enforce such waivers in court. <sup>62</sup> The first part of the rule, which requires representation by independent counsel at the time of signing, operates as a procedural safeguard to ensure voluntariness at the time of execution of the waiver. The second part, however, is substantive in nature in that it expressly prohibits enforcement of waivers that are shown to be unconscionable at the time of enforcement. <sup>63</sup>

This Article centers on the unconscionability standard set forth

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58. *Hearing on SB 78, supra* note 2, at 5.

59. *Id.* at 6 (explaining that the bill, as introduced, met opposition from the Coalition of Parent Support and other individuals who argued that a statutory prohibition on spousal support waivers is "paternalistic, demeans adult women who should be able to enter a premarital agreement as freely as any other contract, discourages second marriages by men already carrying an unfair spousal support burden, and is contrary to the laws of 40 other states and the District of Columbia").

60. *Complete Bill History*, S.B. 78, 2001–02 Reg. Sess. (Cal. 2002), [http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb\\_0051-0100/sb\\_78\\_bill\\_20010912\\_history.html](http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_0051-0100/sb_78_bill_20010912_history.html) (last visited Mar. 4, 2015) (detailing that the bill was passed with thirty-nine ayes to zero noes in the Senate, and sixty-one ayes to six noes in the assembly).

61. CAL. FAM. CODE § 1612(c) (West 2014).

62. *See also* John G. Gherini, *The California Supreme Court Swings and Misses in Defining the Scope and Enforceability of Premarital Agreements*, 36 U.S.F. L. REV. 151, 171 (2001) (explaining that the amendment "adds significant protections to a party who benefits from spousal support").

63. FAM. § 1612(c).

in the second part of the rule because, as illustrated in *In re Marriage Facter*,<sup>64</sup> this standard gives courts significant discretion in evaluating the substantive fairness of spousal support waivers.<sup>65</sup> Furthermore, it allows courts to determine the enforceability of a waiver by considering the circumstances existing at the time the waiver is to be enforced, as opposed to the time of its execution.<sup>66</sup>

### III. *IN RE MARRIAGE OF FACTER*: PAINTING A PICTURE OF THE UNCONSCIONABLE WAIVER

The enactment of Senate Bill 78 amended California law to provide, among other things, that “[a]ny provision in a premarital agreement regarding spousal support, including, but not limited to, a waiver of it, is not enforceable . . . if the provision regarding spousal support is unconscionable at the time of enforcement.”<sup>67</sup> In *In re Marriage of Facter*, the California Court of Appeal made its first attempt to paint a picture of what an unconscionable waiver of spousal support looks like at the time of enforcement.<sup>68</sup> As one practitioner noted, *In re Marriage of Facter* is “the most remarkable case involving premarital agreements to come along in over a decade, and the family law bench and bar are going to be dealing with the fallout from it for years to come.”<sup>69</sup>

#### A. *The Agreement, the Disagreement, and the Decision*

When Nancy met Jeffrey in 1990, she had a part-time job selling shoes at Nordstrom, and Jeffrey was a partner at a law firm.<sup>70</sup> Jeffrey was a Harvard graduate; Nancy had a high school diploma.<sup>71</sup> Jeffrey

64. 152 Cal. Rptr. 3d 79 (Ct. App. 2013). For a discussion of *Facter*, see *infra*, Part III.

65. See Butler, *supra* note 18, at 46 (“In determining which support arrangements are ‘unconscionable’ at the time of divorce, the legislature seems to have relegated considerable space to common-law development and treatment of these agreements.”).

66. This type of provision has been referred to as a “second-look” provision. DAVID WESTFALL ET AL., *ESTATE PLANNING LAW AND TAXATION* § 11.05(1)(a)(i) (4th ed. 2014).

67. FAM. § 1612(c).

68. *Id.* at 79. Although it is of no significant consequence to this analysis, it is important to note that the *Facter* court did not directly refer to Family Code section 1612(c) when it made its ruling on unconscionability, but instead referred to the language from *Pendleton*. *Id.* This is because the statute does not apply retroactively to premarital agreements executed before the statute was enacted. See *In re Marriage of Rosendale*, 115 P. 3d 417 (Cal. 2005); *In re Marriage of Howell*, 126 Cal. Rptr. 3d 539 (Ct. App. 2011).

69. Brian J. Kramer, *Dealing with the Fallout from In re Marriage of Facter*, BRIAN J. KRAMER P.C. FAMILY LAW (Sept. 23, 2013), <http://bjkpc.com/2/featured-blog/>.

70. *In re Facter*, 152 Cal. Rptr. 3d at 86.

71. *Id.* at 92.

began providing financial support for Nancy as their relationship progressed.<sup>72</sup> He bought her a used car and financed her real estate licensing course.<sup>73</sup> When Nancy stopped working, Jeffrey became solely responsible for the living expenses of Nancy and her two children from a prior marriage.<sup>74</sup> When they purchased their home in Mill Valley, they took title in joint tenancy, even though Nancy did not contribute any money towards the purchase.<sup>75</sup>

The couple decided to get married in contemplation of having their first child together.<sup>76</sup> According to Nancy, “Jeffrey wanted to have a child but Nancy told him she would not do so outside of marriage.”<sup>77</sup> Nancy had already been involved in divorce litigation with her prior husband<sup>78</sup> that included disputes regarding support and attorney fees;<sup>79</sup> she was familiar with “laws on community property, support, and support arrearages.”<sup>80</sup> Jeffrey expressed to Nancy his concern about protecting his earnings and conditioned the marriage on her signing a premarital agreement, which he would prepare himself.<sup>81</sup>

On November 7, 1994, the day before their wedding, Jeffrey and Nancy entered into a premarital agreement (the “Agreement”).<sup>82</sup> The Agreement declared that Jeffrey’s separate property (valued at approximately \$3 million at the time) and his earnings of between \$475,000 and \$700,000 before the marriage, were to be kept out of Nancy’s reach.<sup>83</sup> Also, because the Agreement opted out of community property rights, all property acquired during marriage by each spouse would be his or her own separate property.<sup>84</sup> In the event of divorce or permanent separation, however, Jeffrey promised to give Nancy \$100,000 up front, and an additional \$100,000 if the

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72. *Id.* at 84.

73. *Id.*

74. *Id.*

75. *Id.* at 86.

76. *See id.* at 85.

77. *Id.*

78. *Id.* at 86.

79. *Id.* at 86 n.11.

80. *Id.* at 86.

81. *Id.* at 85 (“[Jeffrey] told [Nancy] he was afraid of marriage because he had worked hard all his life, had earned a lot of money, and wanted all that he had earned prior to marriage to be protected.”).

82. *Id.* at 83 (“The parties married the day after they signed the Agreement.”).

83. *Id.* at 82.

84. *See id.*

marriage lasted at least fifteen years and if he was a partner at his firm for more than seven years during the marriage.<sup>85</sup> Nancy was also to receive at divorce half of the value of the marital estate (after reimbursement of the down payment, costs, fees and taxes to Jeffrey), all of the home's furnishings, and the Jaguar automobile.<sup>86</sup> The Agreement also contained a waiver of spousal support.<sup>87</sup>

The couple separated after sixteen years of marriage.<sup>88</sup> In her motion for temporary support and attorney fees, Nancy argued that the document did not contain a spousal support waiver.<sup>89</sup> Jeffrey opposed, relying on two provisions to argue that a spousal support waiver was contemplated in the agreement: (1) the provision that his promise to continue paying the mortgage, taxes, and insurance on the marital home "shall [not] give rise to any other obligations to pay for the housing of [Nancy], *spousal support*, or additional sums for child support"; (2) the provision stating that the assets enumerated in Paragraph No. 2 "constitute [Nancy's] sole right to property acquired during the marriage *and to support*."<sup>90</sup> The trial court granted Nancy's motion for temporary support and attorney fees and costs, and in response, Jeffrey abandoned his efforts to enforce the spousal support waiver.<sup>91</sup> Jeffrey instead focused his argument on the severability clause in the Agreement, which would require the property-related provisions of the Agreement to be honored despite the invalid waiver.<sup>92</sup> Yet his abandonment of the waiver claim did not prevent the trial court from finding the spousal support waiver to be unconscionable, and using that finding to invalidate the entire agreement as unenforceable.<sup>93</sup>

On appeal, the court agreed that there was an invalid, unconscionable waiver of spousal support in the Agreement,<sup>94</sup> but it

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85. *Id.* at 83.

86. *Id.*

87. *Id.* at 89. Although there was some dispute as to whether the Agreement actually contained a spousal support waiver, the court ultimately found that a spousal support waiver existed in Paragraph No. 3 of the Agreement.

88. *Id.* at 82–83. The parties married in 1994 and separated in 2010.

89. *Id.* at 83.

90. *Id.* at 83–84 (second and third alterations in original).

91. *Id.* at 84.

92. *Id.*

93. *Id.* at 87–88.

94. *Id.* at 93. Although this Article is narrowly concerned with unconscionability *at the time of enforcement*, it is important to note that the appellate court in *Factor* also discussed at length whether the spousal support waiver was unconscionable *at the time of execution* based on the



found that the trial court erred in refusing to sever the invalid provisions.<sup>95</sup> In deciding whether the spousal support waiver was unconscionable at the time of enforcement, the court acknowledged that, under the Agreement, Nancy was already entitled to receive \$200,000, the Jaguar automobile, and a fifty-percent interest in their marital home.<sup>96</sup> Nevertheless, according to Judge Margulies, these assets were “manifestly inadequate” when “[c]ompared to what she [was] likely to receive in court-ordered spousal support.”<sup>97</sup> After all, Jeffrey owned separate property valued at \$10 million and earned an annual income of \$1 million per year, while Nancy had neither income nor separate property to her name.<sup>98</sup> Thus, the court had “little difficulty” concluding that the waiver of spousal support was unconscionable.<sup>99</sup>

### B. *The Facter Aftermath*

Although the *Facter* court identified factual circumstances that would make a spousal support waiver unconscionable, it neglected to articulate a clear standard from which it decided that those circumstances amounted to unconscionability.<sup>100</sup> The court simply decided that \$200,000, a Jaguar automobile, and a fifty-percent ownership interest in a multi-million-dollar home was not enough in light of Jeffrey’s net worth and annual income.<sup>101</sup>

To clarify, this Article does not suggest that *Facter* was incorrectly decided. Nor does it suggest that a monetary imbalance between the parties is irrelevant to the inquiry. However, the court’s mathematical approach in *Facter* provides little guidance as to what constitutes unconscionability, perhaps because it would be difficult,

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circumstances around the time Nancy signed the agreement. *See id.* at 90–92. Finding that “there was a great disparity in the parties’ respective incomes and assets at the time they entered into the Agreement” and that a “significant inequality of bargaining power” was evidenced by the fact that Jeffrey drafted the Agreement and told Nancy that the spousal support waiver was not negotiable, the court concluded that the waiver was unconscionable at the time of execution. *See id.* at 92.

95. *Id.* at 99.

96. *Id.* at 93.

97. *Id.*

98. *Id.*

99. *Id.*

100. *See* Request for Partial Depublication at 2, *In re Marriage of Facter*, 152 Cal. Rptr. 3d 79 (Ct. App. 2013) (No. A134191), <http://www.walzermelcher.com/articles-prenup/Req-for-Partial-Depublish.pdf>.

101. *In re Facter*, 152 Cal. Rptr. 3d at 93–94 & n.26.

if not impossible, to attach a mathematical formula to unconscionability. If Jeffrey had promised \$500,000 to Nancy instead of only \$200,000, would the support waiver still be unconscionable? What about \$700,000? What if he promised her full ownership interest in their home rather than only fifty percent?

The lack of a clear and objective standard for determining unconscionability makes it difficult for prospective spouses to predict the enforceability of such waivers and leads to unnecessary litigation.<sup>102</sup> But in a broader sense, the *Factor* decision illustrates the prevailing issue with California's unconscionability approach on spousal support waivers: a rule that bars enforcement of support waivers found to be unconscionable at the time of enforcement, without proper guidance for determining unconscionability, allows courts to arbitrarily evaluate the substantive fairness of such waivers. This Article seeks to resolve this issue by proposing a clear and objective set of guidelines for determining whether a premarital waiver of spousal support is unconscionable at the time of enforcement.<sup>103</sup> To that end, the following part of this Article discusses the contract law principles and policy considerations that arise when prospective spouses attempt to waive spousal support obligations before marriage.

#### IV. PUBLIC POLICY VS. FREEDOM OF MARITAL CONTRACT

Contractual autonomy often conflicts with public policy considerations when prospective spouses attempt to modify or waive their legal rights and obligations before marriage.<sup>104</sup> Under the bargain principle of contracts, "parties should be bound to honor agreements to which they truly consented at an earlier time."<sup>105</sup> The underlying premise is that "[c]ontracts would not serve their function of allocating the risk of future events if the law were to decline enforcement of an agreement merely because the future turned out

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102. See Request for Partial Depublication, *supra* note 100, at 2; Peter M. Walzer, *The Gender Factor of Marriage of Factor*, L.A. LAW., May 2013, at 44, 44 ("[A] vague standard as to the meaning of the word 'unconscionability' will lead to considerable litigation over the enforceability of prenups.").

103. See *infra* Part V.B.

104. See Request for Partial Depublication, *supra* note 100, at 2 ("There is a natural tension between freedom of contract and the court's role in protecting spouses in need of spousal support.").

105. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 7.05 cmt. a (2002).

less favorably than one of the contracting parties expected.”<sup>106</sup> On the other hand, however, “social policy seeks to assure a fair allocation of the gains and losses when the marriage relationship ends.”<sup>107</sup> As noted by the California Legislature, “agreements between prospective spouses occupy a unique area of law and policy, involve emotional relationships far different than those between most contracting parties, and thereby merit a unique approach.”<sup>108</sup> The following sections explain how this unique approach took form in the careful balancing of freedom of contract and public policy concerns with regard to the ability of prospective spouses to contractually modify or waive their legal rights and obligations before marriage.

#### A. Public Policy in Favor of Marriage

The Uniform Premarital Agreement Act (UPAA)<sup>109</sup> has been adopted by twenty-six states since its promulgation in 1983;<sup>110</sup> roughly half of those states have made significant amendments.<sup>111</sup> Although, California was the first state to adopt the UPAA in 1985, the Legislature omitted the provisions that permitted spousal support waivers in premarital agreements<sup>112</sup> because California case law at that time considered such waivers to be against public policy

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106. *Id.*

107. Joan M. Krauskopf, *Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery*, 23 FAM. L.Q. 253, 256 (1989).

108. CAL. SENATE JUDICIARY COMM., BILL ANALYSIS OF SB 78: PREMARITAL AGREEMENTS, S.B. 78, 2001–02 Reg. Sess., at 7 (Cal. 2001), [http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb\\_0051-0100/sb\\_78\\_cfa\\_20010425\\_100434\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_0051-0100/sb_78_cfa_20010425_100434_sen_comm.html).

109. UNIF. PREMARITAL AGREEMENT ACT § 1, 9C U.L.A. 39 (1983).

110. UNIF. PREMARITAL AGREEMENT ACT, 9C U.L.A. 35 (1983).

111. J. Thomas Oldham, *Would Enactment of the Uniform Premarital and Marital Agreements Act in All Fifty States Change U.S. Law Regarding Premarital Agreements?*, 46 FAM. L.Q. 367, 371 (2012) (“Thirteen states adopted the UPAA without modifications, while twelve states enacted it with modifications that almost always made it easier for a spouse to challenge an agreement.”).

112. *See* UNIF. PREMARITAL AGREEMENT ACT § 3(a)(4), 9C U.L.A. 43 (1983) (providing that “[p]arties to a premarital agreement may contract with respect to . . . the modification or elimination of spousal support.”); UNIF. PREMARITAL AGREEMENT ACT § 6(b), 9C U.L.A. 43 (1983) (providing that “[i]f a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination 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, a court . . . may require the other party to provide support to the extent necessary to avoid that eligibility.”). *But see* CAL. SENATE JUDICIARY COMM., *supra* note 108, at 22 (“After hearing testimony opposing the bill’s waiver provisions on several grounds . . . the Legislature deleted the two provisions permitting waiver of spousal support before enacting the rest of the UPAA into law.”).

favoring the protection of marriage.<sup>113</sup> This common-law doctrine was based on the assumption that “the state had a vital interest in and should act to ensure the permanency of the marriage relation.”<sup>114</sup>

In *Pendleton*, the court recognized that “changes in the relationship between spouses and support obligations in particular . . . clearly warrant[ed] reassessment of what remains of the rule that premarital waivers of spousal support may promote dissolution and, if they do so, are unenforceable.”<sup>115</sup> Under this premise, the court took a significant step toward contractual autonomy between spouses by lifting the blanket prohibition on premarital waivers of spousal support, concluding that “a premarital waiver of spousal support does not offend contemporary public policy” so long as it is “entered into voluntarily by parties who are aware of the effect of the agreement.”<sup>116</sup> Justice Baxter made clear, however, that “[p]ublic policy continues to favor and encourage marriage.”<sup>117</sup>

### *B. Policy of Protecting Spousal Support*

As previously noted, when Senate Bill 78 was first introduced in 2001, it was intended “to legislatively confirm that waivers of spousal support in premarital agreements are void as against public policy.”<sup>118</sup> According to its author, Senator Sheila Kuehl, “[p]reserving spousal support as a protection against the unknown circumstances at the end of a marriage . . . is an important policy goal justifying the continued prohibition of spousal support waivers in premarital agreements.”<sup>119</sup> This policy goal of preserving spousal support remained an important consideration even after the bill was amended in the Assembly to expressly permit premarital waivers of spousal support.

Supporters of the amended version of Senate Bill 78, now

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113. CAL. SENATE JUDICIARY COMM., *supra* note 108, at 2 (“At that time, California case law considered the waiver of spousal support to be void as against public policy, because public policy favored the protection of marriage and the waiver of spousal support was believed to encourage dissolution.”). *See, e.g.*, *Barham v. Barham*, 202 P.2d 289 (Cal. 1949); *Whiting v. Whiting*, 216 P. 92 (Cal. 1923).

114. *In re Marriage of Pendleton*, 5 P.3d 839, 847 (Cal. 2000).

115. *Id.* at 848.

116. *Id.*

117. *Id.* at 847.

118. CAL. SENATE JUDICIARY COMM., *supra* note 108, at 5; *see supra* Part II.C.

119. CAL. SENATE JUDICIARY COMM., *supra* note 108, at 6.

codified as section 1612(c) of the Family Code, recognized that “spousal support, and the role that it can play at the time a marriage is ending, is worthy of some special protection.”<sup>120</sup> That special protection took form as two foundational requirements that must be met for a spousal support waiver to be enforceable: First, the waiving spouse must have been represented by independent counsel at the time of execution.<sup>121</sup> This provision functions as a procedural safeguard to ensure voluntariness at the time of execution of the waiver. Second, the support waiver must not be unconscionable at the time of enforcement.<sup>122</sup> This provision allows courts to evaluate the substantive fairness of the waiver at the time enforcement is sought, not at the time the waiver was executed. Therefore, the statute gives prospective spouses contractual autonomy to modify their rights and obligations to each other, subject to procedural and substantive limitations reflecting the prevailing policy goal of preserving spousal support.

### C. Public Policy Considerations in the *Factor* Decision

As illustrated in the *Factor* decision, the unconscionability approach set forth by Senate Bill 78 allows courts to evaluate the substantive fairness of a premarital waiver of spousal support at the time of enforcement, even when all procedural requirements have been met at the time of execution of that waiver. And as explained in this part, the substantive review of fairness is justified by public policy concerns embodied in existing California law. The prevailing issue with the court’s decision in *Factor*, however, is that it neglected to articulate the policy considerations that justified its substantial review of the spousal support waiver in the premarital agreement. Nor did it require Nancy, the party contesting enforcement of the waiver, to prove that these policy concerns were existent. Instead, the court focused largely on Jeffrey’s net worth and earning capacity (and Nancy’s lack thereof) to rationalize its decision to invalidate Nancy’s waiver of spousal support.<sup>123</sup>

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120. *Hearing on SB 78, supra* note 2, at 10.

121. *See* CAL. FAM. CODE § 1612(c) (West 2014).

122. *See id.*

123. *In re Marriage of Factor*, 152 Cal. Rptr. 3d 79, 93 (Ct. App. 2013).

## V. ALTERNATIVE APPROACHES TO ENFORCEABILITY

Since the promulgation of the Uniform Premarital Agreement Act (UPAA) in 1983,<sup>124</sup> states have taken widely varying approaches to the enforceability of provisions in premarital agreements that limit or waive spousal support.<sup>125</sup> In some states, prospective spouses have significant discretion to waive or limit spousal support before marriage. For instance, the Texas version of the UPAA omits section 6(b),<sup>126</sup> which gives courts discretion to decline enforcement of support waivers that would cause the waiving party to be eligible for public assistance programs.<sup>127</sup> Similarly, non-UPAA states such as South Carolina and Florida have enforced spousal support waivers even where one party would become a public charge, so long as it was foreseeable for it to occur at the time of execution.<sup>128</sup> On the other hand, some states, such as Iowa, South Dakota, and New Mexico, do not permit any modification or limitation on spousal support in premarital agreements.<sup>129</sup>

In the middle of the spectrum are those states that impose specific limitations on enforceability of premarital waivers of spousal support. In Colorado, for instance, a support waiver will not be enforced if the waiving party would be left unable to provide for his or her reasonable post-divorce needs.<sup>130</sup> Indiana considers whether enforcement of the waiver would result in “extreme hardship” to one party, while Illinois probes for any “undue hardship” arising out of any unforeseen change of circumstances during the marriage.<sup>131</sup> Several states have joined California in prohibiting enforcement of waivers found to be unconscionable at the time of divorce, including Connecticut, New Jersey, and North Dakota.<sup>132</sup>

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124. UNIF. PREMARITAL AGREEMENT ACT, 9C U.L.A. 43 (1983).

125. WESTFALL ET AL., *supra* note 66, ¶ 11.05[1][a][i].

126. *Id.* ¶ 11.05[1][b].

127. UNIF. PREMARITAL AGREEMENT ACT § 6(b), 9C U.L.A. 43 (1983).

128. J. Thomas Oldham, *With All My Worldly Goods I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades*, 19 DUKE J. GENDER L. & POL'Y 83, 110 (2011).

129. *Id.* at 87.

130. *Id.* at 123.

131. *Id.* at 124.

132. *Id.* at 87.

A. *The Uniform Premarital and Marital Agreements Act:  
An Incomplete Solution*

Recognizing the “significant divide” among the states as to the ability of courts to modify or set aside premarital agreements for unfairness at the time of enforcement, the Uniform Law Commission began promulgating the Uniform Premarital and Marital Agreement Act (UPMAA) in July of 2012.<sup>133</sup> Its overall goal was to “produce an act that would promote informed decision-making and procedural fairness without undermining interests in contractual autonomy, predictability, and reliance.”<sup>134</sup>

First, section 9(e) of the UPMAA would allow the court to invalidate a spousal support waiver if enforcement “causes a party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution.”<sup>135</sup> Although the drafters assert that section 9(e) attempts to give vulnerable parties “protections far beyond what was given in the original Uniform Premarital Agreement Act” of 1983,<sup>136</sup> its language is derived almost word for word from the spousal support waiver provision in the 1932 act,<sup>137</sup> which the California Legislature already rejected in 1983.<sup>138</sup> More importantly, however, Section 9(e) does not conform to existing public policy, given that “spousal support awards in California are based on the marital standard of living, not on an amount that would keep the supported spouse off public

133. Barbara A. Atwood & Brian H. Bix, *A New Uniform Law for Premarital and Marital Agreements*, 46 FAM. L.Q. 313, 314–15 (2012).

134. *Id.* at 315.

135. UNIF. PREMARITAL & MARITAL AGREEMENTS ACT § 9(e), 9C U.L.A. 12 (Supp. 2014). (“If a premarital agreement or marital agreement modifies or eliminates spousal support and the modification or elimination causes a party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, on request of that party, may require the other party to provide support to the extent necessary to avoid that eligibility.”).

136. UNIF. PREMARITAL & MARITAL AGREEMENTS ACT § 9 cmt., 9C U.L.A. 25 (Supp. 2014).

137. Section 9(e) of the UPMAA is adapted from section 6(b) of the UPAA, which states: If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination 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, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility. UNIF. PREMARITAL AGREEMENT ACT § 6(b), 9C U.L.A. 43 (1983).

138. *See supra* Part II.B; *see also* Goldberg, *supra* note 34, at 1245–46 (“[California] did not adopt wholeheartedly the ‘freedom of contract’ philosophy evinced by [the UPAA].”).

assistance.”<sup>139</sup>

The second UPMAA provision, section 9(f), would allow a court to:

[R]efuse . . . a term of a premarital or marital agreement if, in the context of the agreement as a whole: (1) the term was unconscionable at the time of signing; or (2) enforcement of the term would result in substantial hardship for a party because of a material change in circumstances arising after the agreement was signed.<sup>140</sup>

The first part of this provision has already been incorporated in California law on premarital agreements.<sup>141</sup> The second part resembles the approach adopted by the State of Illinois, where courts are permitted to order spousal support if enforcement of the support waiver would cause “undue hardship” to one party because of “circumstances not reasonably foreseeable at the time of execution” of the agreement.<sup>142</sup> The UPMAA provision, however, does not require that the change in circumstances was unforeseeable, but only that the change was “material” and that it resulted in “substantial” hardship.

Although the second part of section 9(f) seems to provide a clear and balanced standard for determining the enforceability of a spousal support waiver, it neglects to consider some policy considerations discussed earlier. What if, for instance, Jane signed a premarital agreement waiving spousal support while she was unemployed, and she remained unemployed until the divorce twenty years later? Unable to find employment at fifty years old and with no assets to her name, Jane is likely to meet the “substantial hardship” requirement under section 9(f). But has there been a “material change in circumstances” as required by the section? Is Jane’s aging of twenty years a “material change?” As illustrated by this example,

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139. Goldberg, *supra* note 34, at 1249 (citing CAL. FAM. CODE § 4320 (West 2014) (“In ordering spousal support under this part, the court shall consider all of the following circumstances: consider all of the following: (a) The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage . . . ”)). “[T]he 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.” *Id.*

140. UNIF. PREMARITAL & MARITAL AGREEMENTS ACT § 9(f), 9C U.L.A. 23, (Supp. 2014).

141. *See* FAM. § 1615(a) (“A premarital agreement is not enforceable if the party against whom enforcement is sought proves . . . the agreement was unconscionable when it was executed . . . ”).

142. Oldham, *supra* note 128, at 110.



section 9(f) may not protect against a “substantial hardship” that did not arise out of a “material change in circumstances arising after the agreement was signed.”<sup>143</sup>

As applied to *Facter*, this change-in-circumstances approach, by itself, would likely have favored enforcement of the spousal support waiver, contrary to the court’s ruling. There was no material change in circumstances apparent in *Facter*. Nancy quit her job before the marriage, and she was still unemployed at divorce sixteen years later.<sup>144</sup> Even if their having a child (as they planned)<sup>145</sup> can be characterized as a material change in circumstances, it would be difficult to argue that Nancy would experience “substantial hardship” after receiving \$200,000, a Jaguar sedan, and half of the multi-million-dollar home.<sup>146</sup> The set of guidelines proposed in the following section incorporates this change-in-circumstances approach into a larger framework for determining enforceability of spousal support waivers in premarital agreements.

### *B. Proposed Guidelines: A Comprehensive Approach*

Subsection (c) of Family Code section 1612 states that “[a]ny provision in a premarital agreement regarding spousal support, including, but not limited to, a waiver of it, is not enforceable if . . . the provision regarding spousal support is unconscionable at the time of enforcement.”<sup>147</sup> As previously discussed, this rule, without clear guidelines for determining unconscionability, allows courts to arbitrarily evaluate the substantive fairness of spousal support waivers. This author proposes two additional provisions (the “Guidelines”) for legislative or judicial adoption, which are adapted from section 7.05 of the Principles of the Law of Family Dissolution: Analysis and Recommendations drafted by the American Law Institute.<sup>148</sup> The bifurcated approach under the Guidelines first requires the party challenging enforcement to show that public policy concerns exist to justify the court’s substantive review of the waiver,

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143. UNIF. PREMARITAL & MARITAL AGREEMENTS ACT § 9(f), 9C U.L.A. 23, (Supp. 2014).

144. *See In re Marriage of Facter*, 152 Cal. Rptr. 3d 79, 84–87 (Ct. App. 2013).

145. *Id.* at 85.

146. *Id.* at 93.

147. CAL. FAM. CODE § 1612(c) (West 2014).

148. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 7.05 CMT. A (2002). Guidelines 1 and 2 are based on subsections 2 and 3 of section 7.05 of the Principles of the Law of Family Dissolution. “Substantial injustice” is replaced with “unconscionability” and “agreement” is replaced with “waiver” in the Guidelines.

and then requires the court to consider a non-exhaustive set of factors when deciding whether or not a waiver of spousal support is unconscionable at the time of enforcement.

The Guidelines provide as follows:

- (1) A court may consider whether a provision regarding spousal support is unconscionable at the time of enforcement if, and only if, the party resisting its enforcement shows that one or more of the following have occurred since the time of the waiver's execution:
  - (a) more than ten years have passed since the execution of the waiver;
  - (b) a child was born to, or adopted by, the parties;
  - (c) there has been a material change in circumstances that has a substantial impact on one of the parties or their children.
- (2) In deciding whether a provision regarding spousal support is unconscionable at the time of enforcement, a court must consider all of the following:
  - (a) the magnitude of the disparity between the outcome if the waiver is enforced and the outcome under otherwise prevailing law;
  - (b) for those marriages of limited duration in which it is practical to ascertain, the difference between the circumstances of the objecting party if the waiver is enforced, and that party's likely circumstances had the marriage never taken place;
  - (c) whether the purpose of the waiver was to benefit or protect the interests of third parties (such as children from a prior relationship), whether that purpose is still relevant, and whether the waiver's terms were reasonably designed to serve it; and
  - (d) the impact of the agreement's enforcement upon the children of the parties.

The legislative or judicial consideration of these Guidelines would allow California courts to strike an appropriate balance between freedom of contract and policy considerations when evaluating the substantive fairness of a premarital waiver of spousal support. The remainder of this Article identifies the policy goals achieved under each part of the Guidelines and applies them to the

factual circumstances in *Facter* to illustrate that, had the court adopted the Guidelines, it would have arrived at the same conclusion, but with significantly more guidance and justification for its finding of unconscionability.

### 1. A Policy-Based Threshold Requirement

Section (1) of the Guidelines operates as a threshold requirement that must be satisfied *before* the court is permitted to evaluate a spousal support waiver for unconscionability at the time of divorce. Perhaps this section of the Guidelines is the more important of the two, given that it effectively requires the party resisting enforcement to show that public policy concerns exist to warrant the court's review of the substantial fairness of an otherwise valid contractual term.

Only one of the three conditions under Section (1) must be satisfied before the court can evaluate whether a spousal support waiver is unconscionable at the time of enforcement. Each condition reflects certain policy considerations embedded in existing California law. For instance, subsection (a) requires that more than ten years have passed since the execution of the waiver. This condition is adapted from section 4336(b) of the Family Code, which provides that “[f]or the purpose of retaining jurisdiction, there is a presumption affecting the burden of producing evidence that a marriage of 10 years or more, from the date of marriage to the date of separation, is a marriage of long duration.”<sup>149</sup> Subsection (a) of the Guidelines promotes marriages of long duration and, thereby, conforms to the state policy in favor of marriage (and against dissolution).

The condition set forth under subsection (b) is satisfied if the marriage produces a child, including through adoption. Underlying this condition is the state's policy of protecting the interests of children in the marriage reflected in Family Code section 4320(g), which requires courts to consider “[t]he ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.”<sup>150</sup>

Subsection (c) incorporates the “change-of-circumstances” approach under section 9(f) of the UPMAA, which allows courts to

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149. FAM. § 4336(b).

150. *Id.* § 4320(g).

invalidate a spousal support waiver if its enforcement would lead to “substantial hardship for a party because of a material change in circumstances arising after the agreement was signed.”<sup>151</sup> However, because Section (1) of the Guidelines operates as a threshold requirement, subsection (c) sets a lower bar than the UPMAA by requiring only that a “substantial impact,” rather than “substantial hardship,” resulted from a material change in circumstances. By making it easier to meet this condition, subsection (c) adheres to the policy goal of protecting spousal support embodied in the current statute.<sup>152</sup>

## 2. A Clear Set of Factors

Section (2) of the Guidelines identifies four factors for a court to consider only *after* it has satisfied the threshold requirement under the first section. The factors under (2)(a) and (2)(b) attempt to promote the policy goal of equitable distribution by requiring courts to ensure that both parties share equally the benefits, and burdens, of the divorce<sup>153</sup> Subsection (a) considers the magnitude of the disparity between the outcome if the support waiver is enforced and the outcome without such waiver. Under subsection (b), if the marriage is of limited duration (less than ten years under California law<sup>154</sup>), the court must consider the difference between the circumstances of the waiving party if the waiver is enforced, and that party’s likely circumstances had the marriage never taken place.

The factors under (2)(c) and (2)(d) operate as a second layer of safeguards, supplementing section (1)(b) of the Guidelines, to protect children from the effects of a spousal support waiver. Like section (1)(b), these factors conform to the state policy of protecting the interests of children embedded in existing California law, such as section 4320(2)(g) of the Family Code quoted above.

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151. UNIF. PREMARITAL & MARITAL AGREEMENTS ACT § 9(f), 9C U.L.A. 23 (Supp. 2014).

152. See *Hearing on SB 78*, *supra* note 2, at 10 (“[S]pousal support, and the role that it can play at the time a marriage is ending, is worthy of some special protection.”).

153. See Michelle Murray, *Alimony as an Equalizing Force in Divorce*, 11 J. CONTEMP. LEGAL ISSUES 313, 314 (1997) (“[S]ome jurisdictions consider alimony to serve the purpose of supplementing or assisting with the equal or equitable division of intangible marital property.”); Krauskopf, *supra* note 107, at 256 (“[T]he purpose of court-ordered economic settlement at marriage dissolution is to achieve a fair sharing of the benefits and burdens of the marriage measurable in dollars.”).

154. FAM. § 4336(b).

C. *Applying the Guidelines to Factor*

The factual circumstances in *Factor* would have satisfied the threshold requirements under section (1) of the Guidelines, thereby giving the court jurisdiction to consider whether Nancy's waiver of spousal support was unconscionable at the time of enforcement. The Factors had been married for approximately sixteen years when divorce proceedings were initiated,<sup>155</sup> well over the ten-year benchmark in subsection (a). Additionally, their marriage produced a son,<sup>156</sup> which satisfies subsection (b).

Also, had the *Factor* court considered the factors set forth in section (2) of the Guidelines, the court would likely have reached the same decision to refuse to enforce the spousal support waiver. For instance, section (2)(a) incorporates the court's mathematical approach in *Factor*. Judge Marguilles calculated the total amount that Nancy would have received had the waiver been enforced, and then compared it to the amount of Jeffrey's assets and annual income.<sup>157</sup> As required under section (2)(a) of the Guidelines, the court considered the magnitude of disparity between the outcome if the waiver was enforced and the outcome without the waiver, concluding that "[c]ompared to what [Nancy] is likely to receive in court-ordered spousal support, these assets are manifestly inadequate."<sup>158</sup>

As to section (2)(b) of the Guidelines, the court considered the difference between the circumstances if the agreement was enforced and the circumstances if the marriage had never taken place. Instead of "pursu[ing] her education or seek[ing] gainful employment," Nancy "devoted her efforts to child rearing and maintaining the family home, while Jeffrey continued to successfully pursue a financially rewarding career."<sup>159</sup> Thus under the Guidelines, the court would have similarly concluded that if the spousal support waiver was enforced, "Nancy will never come close to replicating the marital standard of living."<sup>160</sup>

Although the court did not consider whether the Factors' agreement was intended or designed to benefit or protect third parties

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155. The parties were married in 1994 and separated in 2010. *In re Marriage of Factor*, 152 Cal. Rptr. 3d 79, 82 (Ct. App. 2013).

156. *Id.* at 83 ("The marriage produced a son, who was born in March 1996.").

157. *See id.* at 93.

158. *Id.*

159. *Id.* at 92.

160. *Id.* at 93.

(section 2(c) of the Guidelines), doing so would only have supported the court's decision to refuse enforcement of the support waiver. Jeffrey was simply "afraid of marriage because he had worked hard all his life and had earned a lot of money, and wanted all that he had earned prior to marriage to be protected" and "did not want to have any continuing financial obligations to [Nancy] if their marriage ended."<sup>161</sup> He did not intend for the agreement to protect any third-parties. Nancy had two children from a prior marriage<sup>162</sup> that ended with disputes regarding support and attorney fees.<sup>163</sup> It would be difficult to argue, however, that Nancy intended to protect or benefit her two children by agreeing to waive her rights to spousal support. Therefore, the court's consideration of this section 2(c) of the Guidelines would have weighed in favor of non-enforcement.

The *Factor* court did not expressly consider the impact of the enforcement on Nancy and Jeffrey's son. However, the court acknowledged the fact that Nancy intended to be a "stay-at-home mom"<sup>164</sup> to "devote her efforts to child rearing and maintaining the family home,"<sup>165</sup> and that she "will never come close to replicating the marital standard of living" if the spousal support waiver were enforced.<sup>166</sup> As such, it can be inferred that Nancy's marital standard of living included adequate and proper care for their son, which, according to the court, would certainly be affected by enforcement of the agreement. Therefore, had the court considered the effect of enforcement on Jeffrey and Nancy's son, as required in Guideline 2(d), it would still have likely concluded that enforcement of waiver would be unconscionable.

Had the Court of Appeals in *Factor* applied the Guidelines proposed by this author, not only would the court have reached the same decision (that Nancy's waiver of spousal support was unconscionable at the time of enforcement), the court would have set forth a clear, policy-based approach to determining unconscionability within the meaning of section 1612(c) of the Family Code.

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161. *Id.* at 85–86.

162. *See id.* at 84.

163. *Id.* at 86 n.11 ("Nancy testified that her previous marriage had lasted for eight years. When she got divorced, she and her former husband went through the court system. During the proceedings, there were disputes regarding support and attorney fees.").

164. *Id.* at 85.

165. *Id.* at 92.

166. *Id.* at 93.

## VI. CONCLUSION

California courts and the Legislature have an opportunity to clarify an ambiguity in its existing family law. Section 1612(c) of the Family Code prohibits enforcement of premarital waivers of spousal support that are “unconscionable at the time of enforcement,”<sup>167</sup> but it remains unclear what this phrase actually means. Without a clear standard for determining what makes a support waiver unconscionable, courts have unrestricted and unguided jurisdiction to evaluate the substantial fairness of a private, contractual term between spouses. The judicial or legislative adoption of the Guidelines proposed by this author would strike an appropriate balance between freedom of contract and the policies embodied in existing family law.

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167. CAL. FAM. CODE § 1612(c) (West 2014).