LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
FRIDAY, OCTOBER 6, 2023

PERSPECTIVE

The spousal support waiver conundrum in the Kevin Costner case

By Christine Byrd

Shutterstock

Kevin Costner and Christine Baumgartner had a prenuptial agreement that included a waiver of spousal support in the event of divorce. So why did she pursue spousal support after she filed for divorce? Like most family law questions, the answer is complicated but fascinating.

First, there are two different types of spousal support under California law. There is temporary spousal support and then there is permanent spousal support. Temporary spousal support is ordered at the beginning of a divorce case and is intended to provide financial assistance pending trial and/or until the parties reach a settlement on spousal support. In re Marriage of Mendoza & Cuellar (2017) 14 Cal.App.5th 939, 942. Permanent spousal support is not ordered until the end of a case and is intended to provide support in the future based on consideration of numerous factors. Cal. Fam. Code section 4320.

Second, even where a prenuptial agreement includes a waiver of spousal support, the court may order temporary spousal support if one party is challenging the enforceability of that waiver. Why? Because the waiver is presumed to be unenforceable until there is a court finding that the agreement satisfies the requirements of Family Code section 1615(c)(1) and (2). *Last v. Superior Court of Orange County* (2023) 94 Cal.App.5th at 30, 39. The court order for temporary spousal support may include a requirement that the support be paid back if, in the end, the waiver of spousal support is found to be enforceable. *Id.*

In the Costner case, Baumgartner had challenged the enforceability of the limitations in her waiver, and the issue was set for a full hearing. Her formal request was for permanent, not temporary, spousal support. The support that was ordered in the meantime was child support, although when considering a request that it be increased, the court described it as "disguised" spousal support.

Why was another hearing needed on the prenuptial agreement when the court had already upheld its validity in the context of the dispute over the house and the move-out provision? The answer is that the provision waiving spousal support is severable from the rest of the agreement. A party may challenge the enforceability of a spousal support waiver alone, separate, and apart from the enforceability of the rest of the prenuptial agreement. Until this issue is decided, the support waiver is not enforceable. Last, supra, 94 Cal.App.5th at 43.

Why would the spousal support waiver be unenforceable when the rest of the prenuptial agreement is enforceable? The answer lies in

the legal history behind California Family Code Section 1612(c), a provision that is either a safety hatch or a loophole in prenuptial agreements, depending on your point of view.

Section 1612(c) was drafted in the wake of a California Supreme Court case, In re Marriage of Pendleton and Fireman (2000) 24 Cal.4th 39, which upheld the use of spousal support waivers. It held that a waiver "does not violate public policy and is not per se unenforceable." *Id.* at 53-54. In dicta, Pendleton suggested that enforcing a waiver might be unjust under some circumstances, but it did not decide what those circumstances were. *IbId.*

The California Legislature then amended the Family Code to comply with the Pendleton decision by adding a provision that a spousal support waiver could be included in a prenuptial agreement as long as certain safeguards were in place at the time the agreement was made by the parties. Fam. Code section 1615. But it also provided that a waiver was not enforceable if it was "unconscionable at the time of enforcement." Fam. Code section 1612(c). This provision took effect on Jan. 1, 2002. It is not retroactive to agreements signed before that date. In re Marriage of Howell (2011) 195 Cal.App.4th 1062.

Simply put, this provision appears to say that a spousal support waiver may be perfectly valid and enforceable at the time that the parties sign it and get married, but if it is unconscionable when they divorce, then it is not enforceable. Despite the fact that Section 1612(c) has been around for over 20 years, what circumstances make a waiver "unconscionable at the time of enforcement" remains a mystery.

The elements for enforceability at the time of the signing of the agreement are well established. In re Marriage of Zucker, 75 Cal. App.5th 1025, 1043, as modified on denial of reh'g (Apr. 1, 2022), review denied (July 13, 2022); In re Marriage of Facter (2013) 212 Cal. App.4th 967. *See* also, Last, supra, 94 Cal.App.5th at 34. In contrast, the elements for finding the waiver "unconscionable at the time of enforcement" under Section 1612(c) are not established at all. There is no published case involving an agreement executed after Jan. 1, 2002; i.e., where Section 1612(c) is applicable. Indeed, in the three published cases on this issue, all the agreements were signed before 2002.

In Facter, the prenuptial agreement was drafted by the husband, who was a lawyer and who said that it could not be changed in any respect. The husband also had significant assets and income, whereas the wife had little education and no material financial assets. The agreement was found unconscionable when executed, and not surprisingly, it was found to still be unconscionable at the time of enforcement.

In the second case, In re Marriage of Miotke (2019) 35 Cal. App.5th 849, the waiver was upheld by a private judge, who found that there was no significant disparity in the income or assets of the parties at the time they executed the agreement and that it was not the result of fraud, menace, duress or undue influence. The trial court accepted the decision and entered judgment. The wife's unconscionability argument was not addressed in the appellate decision because it had not been preserved for appeal.

The third and most recent case is Zucker, supra, 75 Cal.App.5th at 1043. In Zucker, the prenuptial agreement was held enforceable at the time of execution but unconscionable at the time of enforcement based on a very sorry set of facts. When the parties executed the prenuptial agreement, the wife was pregnant and the husband wanted her to have an abortion. She refused and the husband then agreed to marriage only subject to the prenuptial agreement. The wife had the agreement reviewed by independent counsel, who advised her not to sign the agreement. She signed it anyway. Years later, at the time of divorce, she sought to set aside the spousal support waiver. The court found the prenuptial agreement was very unfair, but that the wife had signed it knowingly and voluntarily even after receiving independent legal advice not to sign it. As a result, the court did not find it unconscionable at the time of execution, but it did find the waiver of spousal support unenforceable on the grounds that it was "unconscionable at the time of enforcement." Although the prenuptial agreement was not covered by Section 1612(c), the court found the result was consistent with public policy, in effect giving the wife the benefit of Section 1612(c) as well as the legal advice that she had rejected originally. Also taken into consideration was the wife's history of mental health issues, including a rape at age 14 while hospitalized for anorexia, and the fact that the parties had had six children during the marriage. Given the unusual facts in Zucker, and the fact that Section 1612(c) was not directly applicable in the case, its holding is of limited guidance.

What is common in divorce cases are claims like the one in the Costner case, where the parties' financial circumstances and personal lifestyle have improved dramatically over a long-term marriage and then, when facing divorce, one party challenges the spousal support waiver. The cases do not lead to the conclusion that this kind of "buyer's remorse" or changed circumstances leading to unfairness are sufficient to set aside a waiver. In the published cases, fundamental inequities at the time of the formation of the prenuptial agreement coupled with extreme circumstances at the time of enforcement seem to have been the factors leading the courts to set aside the spousal support waivers. Until a case is decided under Section 1612(c), however, identifying what circumstances would be sufficient to render a spousal support waiver "unconscionable at the time of enforcement" remains elusive.

Disclaimer: The content is intended for general informational purposes only and should not be construed as legal advice. If you require legal or professional advice, please contact an attorney.

Christine Byrd *is a JAMS mediator and arbitrator, and a retired judge of the Los Angeles Superior Court.*