Recent ALIMONY Cases

PRENUPS AND MILITARY ALLOWANCES MATTER, BUT MARRIAGE REGISTRATION AND POTENTIAL RETIREMENT MAY NOT

Audra Ibarra

More people divorce in the United States than in most other countries.[1] Although it is no longer true that half of all marriages in the United States end in divorce, divorce is still common. In a recent year, approximately 40 percent of all marriages ended in divorce.[2] First marriages that ended in divorce lasted an average of eight years. Forty-six percent of all marriages involved a remarriage for one or both spouses. The median time between a divorce and a second marriage was three and a half years. With so many people marrying, divorcing, and remarrying so frequently, it is understandable why divorce, and in particular the issue of alimony, is so contentious. Recently, the California Courts of Appeal decided four cases that concern the impact of prenuptial agreements, military allowances, marriage registration, and potential retirement on alimony.

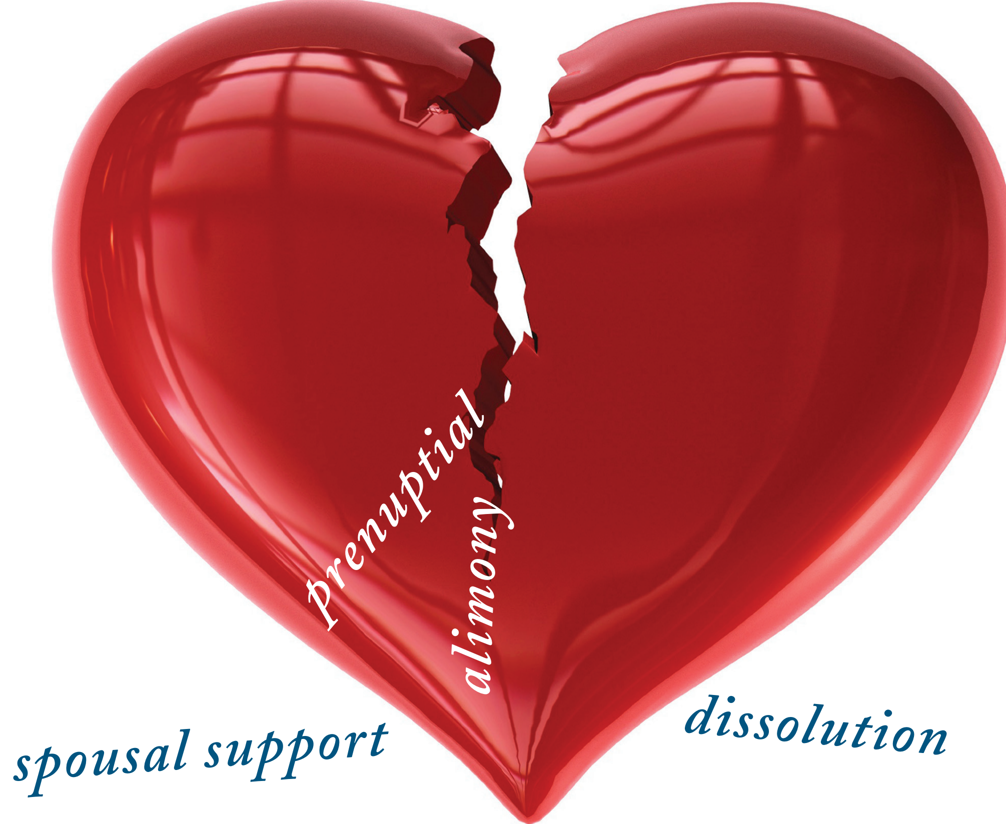
PRENUPS MATTER

In re Marriage of Howell is a case of first impression. 126 Cal.Rptr.3d 539 (4th Dist., Div. 1 May 24, 2011). In that case, the Court of Appeal held that a prenuptial waiver of alimony or spousal support is enforceable, even if it was signed without independent counsel, as long as it was signed before 2002. The court further held that this is true despite the fact that a waiver signed without counsel after 2002 would not be enforceable. In 2002, the California legislature enacted subdivision (c) of section 1612 of the Family Code. That subdivision invalidated waivers made without counsel:

> 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 . . . .
> Cal. Fam. Code § 1612(c) (emphasis added).

In a dissolution of marriage proceeding, Pamela Howell sought spousal support. Prior to marrying Michael Howell in 1999, she had signed a prenuptial agreement without an attorney. In the agreement, they had mutually waived spousal support in the event of a divorce. Michael argued that the waiver was a bar to support after divorce. But after a bifurcated trial, the Superior Court in San Diego County held that the waiver was unenforceable under subdivision (c) of section 1612 of the Family Code and ordered that Michael pay Pamela spousal support.

The Court of Appeal reversed in relevant part. It held that subdivision (c) of section 1612 of the Family Code does not apply retroactively to invalidate a waiver of spousal support signed before 2002. The court explained that a new law is retroactive only if the legislature intended it to be retroactive or if the law clarifies, as opposed to changes, existing law. Based on the face of the statute itself, as well as its legislative history, the court found that the "Legislature did not intend subdivision (c) of section 1612 to apply retroactively." *Howell*,



126 Cal.Rptr.3d at 548. The court also found that the subdivision changed, as opposed to clarified, then existing law. The court concluded that this change was the legislature's response toward a shift in public policy:

> *[B]efore its enactment,* there was *no requirement that a party have independent counsel* at the time of executing the premarital agreement in order for a waiver of spousal support to be enforceable. Instead . . . there was a *shift in public policy* towards enforcement of such provisions. Our *Legislature responded by enacting subdivision (c) of section 1612.*
> *Id.* at 547.

MILITARY ALLOWANCES MATTER

In re Marriage of Stanton is also a case of first impression. 190 Cal.App.4th 547, 551 (4th Dist., Div. 1 Nov. 24, 2010).[3] In that case, the Court of Appeal held that military housing and food allowances count in the calculation of alimony. The court held that this is true even though such allowances are neither taxable nor subject to wage garnishment.

Solomon Stanton sought a reduction of temporary child and spousal support. He had married Carol Stanton and they had a son. When they divorced, the court had ordered that Solomon pay Carol temporary support. Solomon is a member of the United States Navy. The court had calculated the amount of support based in part on Solomon's military allowances for housing and food. In his request for reduction, Solomon argued that because federal law exempts a military allowance from federal tax and wage garnishment, the court had violated the federal preemption doctrine by including his allowances in its calculation. Under the federal preemption doctrine, Congress can preempt state laws:

> The supremacy clause of the United States Constitution establishes a constitutional choice-of-law rule, makes federal law paramount, and *vests Congress with the power to preempt state law.*
> *Id.* at 555 (emphasis added).

Nevertheless, after a hearing, the Superior Court in San Diego County denied Solomon's request for reduction.

The Court of Appeal affirmed. It held that the federal preemption doctrine does not prohibit the inclusion of a military allowance in calculating child or spousal support. The court explained that the doctrine is inapplicable to family law unless Congress's intent is clearly contrary to state law:

> [T]he United States Supreme Court explained: "We have consistently recognized that 'the whole sub-

> ject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.' . . . '[T]his Court has limited review under the Supremacy Clause to a determination [of] whether Congress has *"positively required by direct enactment"* that state law be pre-empted.'"
> *Id.* at 555–556 (emphasis in original).

The Court of Appeal found that Congress had not intended for a military allowance to be excluded from child or spousal support. The court concluded that "[t]he nontaxable status of military allowances does not suggest Congress had any preemptive intent with regard to either child or spousal support." *Id.* at 556. The court found that federal tax law defines taxable income, irrespective of whether nontaxable income is used for support. The court further concluded that "the protection of certain military allowances from wage garnishment for support arrearages does not indicate Congress intended to preempt state family support law." *Id.* at 558. The court found that "[t]he purpose of federal garnishment law is 'to avoid sovereign immunity problems, not to shield income from valid support orders.'" *Id.* at 559. Finally, the court found that courts in other states have held that "federal preemption is inapplicable to military allowances." *Id.* at 560.

FAILURE TO REGISTER A MARRIAGE MAY BE IRRELEVANT

In *In re Marriage of Cantarella*, the Court of Appeal held that a failure to register a marriage does not bar alimony upon divorce if the marriage was entered into before 1994. 191 Cal.App.4th 916, 920 (4th Dist., Div. 3 Jan. 11, 2011). The court further held that this is true even though such a failure after 1994 may bar support under the Family Code. The Family Code only became effective in 1994. Before then, the Family Law Act governed marriage.

In a divorce proceeding, Joseph Cantarella sought a modification of a spousal support order. In 1991, a judge conducted a marriage ceremony for Joseph and Tanya Cantarella. After their marriage certificate was rejected twice due to a technical error, they did not resubmit it for registration. In approximately 2002, they were married in a new ceremony. When they dissolved their marriage, the court ordered that Joseph pay Tanya spousal support for several years. In his request for modification, Joseph argued that the couple had been legally married only since 2002. However, after a hearing, the Superior Court in Orange County found that the couple had been married since 1991. The court denied the request for modification and ordered that Joseph pay Tanya permanent spousal support.

The Court of Appeal affirmed. It held that a failure to register a marriage certificate does not invalidate a marriage entered into before 1994. The court explained that although the Family Law Act required registration, it did not specify whether it was essential to a valid marriage. The court concluded that under the act, a valid marriage was created when a couple exchanged vows in a marriage ceremony:

> [A] *marriage ceremony* culminated in the *parties' declaration that they accepted each other as husband and wife.* Common sense and tradition tells us this is the moment at which the parties' valid consent creates a marriage.
> *Id.* at 924 (emphasis added).

The court found that to hold the act required registration for a valid marriage would violate public policy in support of marriage:

> To hold that a failure by a party to register a certificate voids a marriage would *invalidate "marriages already solemnized* in this state and would, among other results, *affect the marital status of the parties, their property rights and rights of inheritance."*
> *Id.* at 925 (emphasis added).

POTENTIAL RETIREMENT MAY BE IRRELEVANT

In *In re Marriage of Kochan*, the Court of Appeal held that the potential retirement income of a spouse, who has current and long-term employment, is irrelevant in the calculation of alimony. 193 Cal.App.4th 420, 428 (2nd Dist., Div. 8 Mar. 9, 2011). The court further held that this is true even if the potential retirement income would be greater than the current employment income.

In a dissolution proceeding, Janice Kochan sought to increase the spousal support she received from Roman Kochan. Roman had been employed by California State University at Long Beach for forty years. He was eligible for retirement, as well as for postretirement part-time employment at the university. He enjoyed his work and did not want to retire. After a bench trial, the Superior Court in Los Angeles County found that Roman's potential income under the retirement and post-retirement employment scenario would be greater than his current employment income. The court granted Janice's request for an increase in spousal support. The court based its support calculation in part on Roman's earning capacity upon retirement and postretirement employment. Although a court must consider earning capacity under Family Code section 4320, it exercises discretion in deciding whether support should be based on earning capacity or actual earning.

> Family Code section 4320 provides that the family law court "shall consider" the "earning capacity of each party" in ordering spousal support, but the decision *whether to order support based on a party's earning capacity rather than actual earning* is a matter *within the court's discretion.*
> *Id.* at 422 (emphasis added).

The Court of Appeal reversed. It held that potential retirement income of a current and long-term employee is not a proper basis for calculating spousal support. The court explained that just as a court should not enter an order that would compel a spouse to forgo retirement, it also should not enter an order that would compel a spouse to retire. The court further held that a court abuses its discretion "when it bases an order for spousal support on a finding that a spouse's present earning from long-term employment can be increased by taking a retirement, and returning to work in an available, but different, position." *Id.* at 429. The court concluded that "a spouse who continues working in a long-held position should not have his or her support obligation based on his or her earnings capacity measured by some alternative employment scenario." *Id.* at 430. The court found that to conclude otherwise would lead to problems in other situations, including those involving judges:

> For example, in the event a *long-seated judicial officer* were to divorce, may the family law court consider the likelihood that he or she would earn *significantly greater income in private practice or by becoming a private judge?*
> *Id.* (emphasis added).

GUIDANCE BUT NOT FINALITY

For a couple in contentious litigation over alimony, these recent Courts of Appeal cases provide guidance. For a spouse on the winning side of these cases, they even provide legal support. In California, because of vertical *stare decisis*, the decisions in the cases are binding on all state trial courts, irrespective of their county or appellate district. However, for a spouse on the losing side of these cases, there is still a chance of prevailing on appeal. Because there is no horizontal *stare decisis* within the Courts of Appeal, the decisions in the cases are not binding on other appellate districts or even other divisions within the districts in which the cases were decided. In other words, the Courts of Appeal are generally free to decide differently on future cases. Thus, while these cases provide guidance on the impact of prenups, military allowance, marriage registration, and potential retirement on alimony, they do not end litigation over these issues.

Notes

1. See U.S. Census Bureau, www.census.gov/compendia/statab/2011/tables/11s1335.pdf (as of July 22, 2011).

2. See Wikipedia, The Free Encyclopedia, http://en.wikipedia.org/wiki/Divorce#United_States (as of July 22, 2011) (additional citations therein).

3. On March 10, 2011, a petition for a writ of certiorari was filed in the United States Supreme Court. The petition was still pending review as of July 22, 2011, when this article was submitted for publication.

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