CALIFORNIA Family Law Monthly

In re Marriage of Guilardi
200 Cal App.4th 770

Family law practitioners endlessly debate whether or not to include 1542 waivers in Marital Settlement Agreements and Judgments. Also the subject of ongoing discussion is whether to substitute a prevailing party clause re attorneys fees to discourage future litigation and to make clear that the losing party will pay, in place of the statutory need-based standard. What is thought of as customary standardized boilerplate language that the parties intend the agreement to be a final agreement and relinquish any and all other and further claims also has unanticipated
pitfalls. What happens when one party later comes to the belief that the agreement was egregiously unfair, that the other party committed fraud, lack of disclosure, etc., and tries to set aside the MSA and the Judgment. A not unfamiliar scenario. This is *Guilardi,* and a renewed lesson for all of us as drafters of these agreements. How many cases will it take to teach us that standardized language should be viewed as a potential danger, not as a time saving easy way out.

The wife in *Marriage of Guilardi* attempted, unsuccessfully, to set aside a Marital Settlement Agreement ("MSA") and Judgment, alleging fraud, mistake, duress, perjury, and noncompliance with *Family Code* Section 2100 *et seq.* The result, according to Wife, was that she received inequitable spousal support and the division of community property, to which she knowingly agreed, was unfair. The trial court denied her motion, finding that even though the MSA was inequitable on its face, Wife had knowingly and willingly entered into it.

After the trial court denied Wife's motion to set aside the MSA, she sought attorney's fees of $867,638 incurred in bringing her motion. Husband moved to dismiss based on a prevailing party provision in the MSA. The trial court granted Husband's motion. Wife appealed. Court of Appeal affirmed. Wife lost. The Court of Appeal agreed with the trial court's finding that, while the MSA did not contain an express waiver of fees, its broad language conveyed an implicit waiver of any claims arising out of the agreement, other than those available to the prevailing party in the proceeding. The Court of Appeal emphasized that Wife had acknowledged that she had the opportunity to obtain counsel, and that she signed the MSA while further acknowledging that she understood its provisions and waived the provisions of *Civil Code* Section 1542. The Court did not decide whether the trial court failed to exercise its discretion while rejecting Wife's claims under the need-based fee statutes.

We had better take another and closer look at prevailing party clauses. In *In re Marriage* of *Cryer* [2011 Cal. Fam. Law Monthly 369-378 (November 2011)], the court awarded fees to the losing wife even though husband was the prevailing party. Citing In re Marriage of *Hublou* (1991) 231 Cal. App.3d 956, the *Cryer* court emphasized that attorneys fees may be awarded against a prevailing party to enable parties to have the ability to present their case.

The lesson that *Marriage of Guilardi* teaches is that parties – whether represented or not – should carefully consider provisions regarding waivers of attorney's fees or shifting a need-based standard to a prevailing party standard. The case indicates that, regardless of the party's need for fees or the inequitable economic position of the parties, a party who knowingly bargains and signs away attorney's fees protection will be bound by such provisions. Be careful!

MARSHALL S. ZOLLA