Divorce and Separation Agreements

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2008 NC State Bar LAMP Conference

"Marriage is an adventure, like going to war"

- G.K. Chesterton

"I was married by a judge. I should have asked for a jury"

- Groucho Marx

"I don't think I'll get married again. I'll just find someone I don't like and give them a house."

- Lewis Grizzard

"Nothing says lovin' like marrying your cousin!"

- Al Bundy

STUDENTS AS TRAINERS

BRING BACK YOUR COURSE MATERIALS!

Divorce Basics

Overview of Process

- NY, Wisconsin -- "package deal"
- NC, Delaware -- "one claim at a time"

Divorce Basics

- Marriage
- Domicile
- Grounds

Marriage

- Valid marriage = undo with a divorce
- Purported marriage, invalid mg contract = annulment
  - declaration that no marriage exists
  - common grounds: prior subsisting mg, nonage

Domicile

Williams v. NC, US Sup Ct, 1945

- One of the parties must be domiciled in state which grants divorce
  - domicile = where one lives
  - Intent + presence
  - Return if temporary absence
  - SCRA and domicile
- *State 2* is not bound by *State 1's* def'n of domicile

Domicile: An Example

Mayer v. Mayer: 311 SE2d 659 (NC App '84)

- Mrs. Mayer and Guyfriend fly to Dom. Republic to get her a divorce.
- Then they marry.
- Later they separate; Mrs. Mayer sues Guy for alimony.
- Guy defends: "We're not married!"

Holding in Mayer

- Dom. Rep. divorce not valid, neither party domiciled there;
- But, by his own conduct, Guy is estopped to challenge validity of divorce.

Impact on LAA today …

NCGS 50-18

- Statute appears to say that SM stationed here for 6 months can file for divorce in NC.
- *But see* Martin, 118 SE2d 29 (NC '61)
  - Mere presence not enough
  - Domicile required
  - Statute really means that living on base is OK for domicile [if other aspects are also there]

Impact on LAA today…

- Don't advise divorce in NC if neither party domiciled here!
- Examine the J/D basis for divorce if client brings you a div. decree.

Grounds for Divorce

NCGS 50-6

- Parties have lived apart
- For more than a year
- With intention that it be permanent

Common Questions:

- "Living apart in same house?"
- "Isolated acts of sexual relations during 1 year?"
- "File on 1-year anniversary?"

Effects of Divorce

- Single again
- Maiden name
- Bar to alimony, E/D if not claimed before divorce granted

Snapshot of divorce hearing

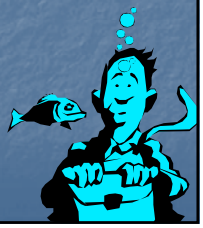
- Done by summary judgment usually, no testimony
- If testimony…
- Judgment effective immediately, no "waiting period"
- No separation agreement required
- Possible incorporation of sep. agr. if requested

Change of Name

- To maiden name during divorce
- [same] after divorce
- Any other name change: before the Clerk
  - 10 days' notice
  - 2 affidavits of good character

OVERVIEW OF DIVORCE

- ***JURISDICTION***
- ***2 TYPES OF DIVORCE PROCEDURES***
  - → "One claim at a time"
  - → The "package deal"



OVERVIEW OF S/A CLAUSES

- Gen'l [kids' names, intent to live apart]
- Specific: administrative [entire agreement, incorporation, atty fees]... and
  - **The big one: GEN. RELEASE**
- Specific: substantive
  - **Child-related**: custody, visitation, support
  - **Adult**: alimony, property division, taxes

COMMON QUESTIONS: Incorporate S/A?

The S/A after signing...

- IF BREACH--
  - Suit for damages
  - Specific performance?
- TO MODIFY--
  - Consent of both parties
  - If child-related: court may always "modify"

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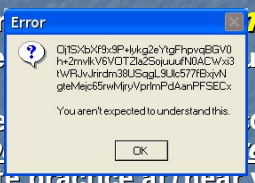
The S/A at divorce hearing...

- **NOTE: DIVORCE HEARING...**
  - ***ONLY MAKES YOU "SINGLE AGAIN? or...***
  - ***RESOLVES ALL YOUR DIFFERENCES?***
- **S/A is recognized?**
- **Is examined, approved?**
- **Becomes part of the decree?**
- **Loses its character as a contract?**
- **NOTE: S/A trying to double duty = the problem**

COMMON QUESTIONS: Incorporate S/A?

- Incorporation, merger, approval are "words of art" in different states
- "Incorpor… *…nbiguous*
- No single … …ules (or more)
- Don't spe… …ORPORATION" *unless yo… …e doing!* [i.e., local/state practice at/near yr base, or after contact with local counsel where divorce will occur]



COMMON QUESTIONS: Incorporate S/A?

☑ SOME GENERAL RULES:

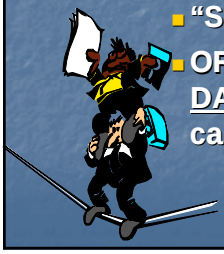
- If S/A becomes an order of court, then it can be enforced in usual ways: contempt, garnishment, etc.
- Future modifiability:
  - IF SO-- INCORPORATION, MERGER
  - IF NOT-- "NO MODIFICATION" AND INTEGRATED CLAUSES FOR PROPERTY DIVISION AND ALIMONY
  - CAN'T MAKE CHILD SUPT, CUSTODY UNMODIFIABLE

Incorporation of sep. agr. – NORTH CAROLINA rules

- Case: Walters, NC 1983
- Without incorporation – just a contract
  - No modification without joint consent
  - Enforcement mechanisms
- With incorporation – becomes ct order
  - Violation is contempt of court
  - Court can modify
    - Executory promises
    - If change of circumstances

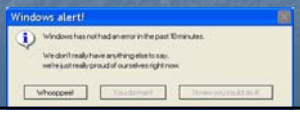
COMMON QUESTIONS

- WHAT TO DO [IN S/A] re DISPUTED ITEMS?
  - "SILENCE IS GOLDEN" -- ?
  - OR… "SILENCE IS DANGEROUS!" [Knisley case]



SUMMARY

- What have we learned?
- How can we use it?
- Feedback, evaluation



Separation Agreements and Divorce

LEGAL ASSISTANCE
DIVORCE AND SEPARATION AGREEMENTS

I. OVERVIEW OF DIVORCE

A. Jurisdictional basis – one of the parties must be a domiciliary of the state or country granting the divorce

B. Advising your clients--

1. Don't file for divorce where your client just happens to be stationed; make sure it's filed in the domicile of husband or of wife

2. If the other side does this (and there's no jurisdictional basis for divorce), advise the client about contesting the divorce – cost/benefit analysis, "pro's" and "con's"

3. Advising against "foreign divorces" – Nevada, Dominican Republic, Mexico, etc. (see Silent Partners at www.abanet.org/family/military on overseas, foreign divorce)

C. Advising your clients about the two types of divorce procedures in the US –

1. "One Claim at a Time" One type of jurisdiction, represented by states such as Delaware and North Carolina, allows the granting of a divorce without reference to any other claims for relief. Once the no-fault grounds exist, the plaintiff can file for divorce and, within proper time, have a divorce granted to him or her.

2. "The Package Approach" The other type of jurisdiction, represented by New York and Wisconsin, only allows a divorce after all marital claims have been settled or tried. The resolution of these marital issues -- property division, alimony, custody and child support -- must have been accomplished by agreement or litigation before the court will grant a divorce to the parties. It is in these cases where we hear the client say, "she won't give me a divorce." This means that the other party will not settle the case, thus allowing a divorce to be granted. In reality, however, it is always the judge who grants the divorce, not the other party. If the other side will not settle, then the only alternative for the one who wants the divorce is to press his case and ask for a trial.

II. OVERVIEW OF SEPARATION AGREEMENTS

A. Gathering facts (ATCH 1, Separation Agreement Checklist, at end of SILENT PARTNER)

B. General clauses (names & ages of children, right to live separate and apart)

C. Specific administrative clauses

1. Examples: interpretation rules, incorporation or not, attorney's fees if breach

2. The BIG ONE: *general release clause*

D. Specific substantive clauses (child support, custody & visitation, alimony, property division, taxes)

III. CONSTRUCTION OF SEPARATION AGREEMENTS

A. See--

1. ATCH 2, "Recent Case Law on Construction of Separation Agreements

2. ATCH 3, "A Mini-Encyclopedia of Ambiguous Separation Agreement Provisions"

3. ATCH 4, "Avoiding Attorney Malpractice in Drafting Separation Agreements"

B. Basic principles

1. Be specific -- say what you mean

2. If you draft it and it's ambiguous, it's construed against you and your client

C. What to do about issue which is in dispute and can't be resolved?

1. Leave it open, unsigned, do nothing -- parties may cool off and later be able to reach agreement

2. Sign a partial settlement, "excepting out" the disputed term -- one of the parties usually loses negotiating leverage if the other party really needs a signed agreement and only a partial settlement is signed

3. Leave it out of the agreement and say nothing about it? Problems--

a. "**SILENCE IS GOLDEN**"? Omitting an issue may sound like the easy way out when you can't agree on it...

b. OR... **"SILENCE IS DANGEROUS**"? Consider the need for *explicit reservation* of the issue; don't just remain silent on it.

(a) *U.S. v. Knisley*, 817 F.Supp. 680 (1993) [malpractice claim against Army for failure to include military pension in separation agreement negotiated between two Army legal assistance attorneys; the parties couldn't agree on the pension, so the separation agreement didn't mention it!];

(b) *Hagler v. Hagler*, 345 S.E.2d 228 (N.C. 1988) [failure to hold open or reserve any issues of property division means they are waived under the "general release" clause in a separation agreement; here the wife lost her claim to equitable distribution because there was no reservation of it in the agreement]

4. Be careful of your phrasing when you ***reserve*** the pension. What does Mrs. Smith think this means?

a. Most likely, that her rights have been protected and that she has had her share "reserved" by the separation agreement, so she doesn't have to worry about this issue again... not that it's been "held open" but that she must demand her share of the pension when she's served with divorce papers!

b. Velma Brown v. United States (E.D.N.C.) -- malpractice claim settled in 1997 for $70,000; one of the issues was whether LAA had properly counseled plaintiff about need to demand her share of pension by filing counterclaim for equitable distribution when served with divorce papers. Since she did nothing, pension rights were lost.

D. The difference between executed and executory terms

1. Some promises are permanent, final or completed

2. Some are modifiable, incomplete

3. Lesson: Don't trade permanent for modifiable (unless you know what you're doing!)

4. Examples--

a. MAJ John Smith agrees to give his wife the house, and she agrees to accept a low amount of child support; once the agreement is signed and the house deeded to her, she petitions in court for higher child support

b. CPT Jane Brown negotiates for zero visitation by her husband in exchange for his keeping his civilian retirement benefits; two years after the settlement is signed, he files for visitation with the children

IV. THE SEPARATION AGREEMENT AFTER IT'S SIGNED:

a. It's a contract!

b. Enforcement: [See ATCH 5, "Enforcement of No-Molestation Clauses in Separation Agreements" and ATCH 6, "Recent Case Law on Modification and Enforcement of Separation Agreements"]

i. If breached -- suit for damages

ii. If remedy at law is expensive, time-consuming and inadequate, request for specific performance (i.e., an order requiring the breaching party to perform his promise)

c. To modify

i. Must get the other side's consent

ii. But court can always independently set child-related terms (custody, visitation, support

V. APPROVAL, INCORPORATION AND MERGER CLAUSES

1. See--

a. ATCH 2, "Recent Case Law on Construction of Separation Agreements"

b. ATCH 7, "What Happens to a Separation Agreement in a Divorce?"

2. A shorter, but better, answer -- "God only knows... and even He's not sure sometimes!"

3. Legal effects vary from state to state --

a. Some state require the agreement to be incorporated into the divorce decree, some don't

b. Some judges inquire closely into the promises and provisions of the agreement, some don't even look at it

B. Levels of court "approval"

1. Acknowledgement, ratification, or approval

a. Acknowledge existence of agreement

b. Determine that it is valid, insulating it to some extent from future attack

2. Incorporation

1. Determine that agreement is valid and include its terms as part of the decree

2. This usually insulates agreement from collateral attack, at least to some extent.

3. Merger

a. Agreement is determined to be valid

b. It becomes the order of the court

4. Caution! These are terms of art in some jurisdictions, and the agreement should clearly state their intent; the word "incorporation" is especially ambiguous and may have several different meanings.

d. Consequences

i. Degree of protection from attack after the divorce is granted.

1. Incorporation and merger provide the greatest level of protection from challenges based on alleged unconscionability and improper execution.

2. Acknowledgement may or may not provide such protection.

ii. Satisfies a prerequisite to request direct payments of military retired pay [**if drafted correctly**] -- the decree or a "court ordered, ratified, or approved property settlement" that must provide for division. 10 U.S.C. § 1408(a)(2).

iii. Satisfies a prerequisite to request involuntary allotment [**if drafted correctly**]

iv. Enforcement mechanisms.

1. Acknowledged (and usually incorporated) agreement can only be enforced as a contract, with no basis for contempt actions. Specific performance may be available for breach of periodic payment provisions where remedy at law is inadequate, costly and time-consuming.

2. Merged agreement for payment of money -- judgment, contempt, involuntary allotment, garnishment, seizure of property

v. Modification of provisions

1. Terms for child support, custody, and visitation may always be independently determined by a court

2. Is this modification of the contract?

3. Or is it just a separate and independent determination?

4. The same rule holds true in some jurisdictions for alimony.

5. Any provision that is merged ceases to exist as a contractual obligation and instead becomes a part of the decree, and may only be modified as such. Typically, this means that executory terms may be modified if there has been a change in circumstances.

6. What have the parties bargained for? Should easier enforcement be traded against modifiability? What if the terms are reciprocal consideration for each other? Mutual and interdependent promises?

vi. Further caution!! Incorporation and merger are not solutions for hastily and poorly drawn separation agreements. They are not "re-work shops" for settlements. They are not the means of getting a bad agreement in front of a sympathetic judge. And even if the judge can modify an incorporated/merged agreement, that can be GOOD or BAD for the client, depending on who cut the better deal when the agreement was signed.

* * *

ATCH 1, S*ilent Partner* on separation agreements

SILENT PARTNER

SEPARATION AGREEMENTS

INTRODUCTION: ***SILENT PARTNER*** *is a lawyer-to-lawyer resource for military legal assistance attorneys. It is an attempt to explain broad generalities about the law of domestic relations. It is, of course, very general in nature since no handout can answer every specific question. Comments should be sent to the address at the end of the last page.*

*** * ***

STANDARD AND ADMINISTRATIVE PROVISIONS

INTRODUCTION. First of all, remember the basics:

- A separation agreement is a contract between a husband and wife when they separate from each other. In this document they resolve such matters as property division, debts, custody and support. It is not a "temporary paper" drafted just to get someone off post, back to the states, etc. It contains binding and – in most cases – final promises. It may be the most important contract that the parties sign.

- No law requires a separating couple to execute a separation agreement; however it is a wise idea if there are debts, children, support claims or property involved and the parties want to settle these matters in writing.

- In most places, a separation agreement requires the notarized signatures of both parties at or after the parties' separation.

- No one can compel a spouse to sign a separation agreement. An "agreement" means that both parties sign voluntarily. Coercion, fraud, undue influence or lack of knowledge will void the terms of a separation agreement.

- A separation agreement is not proof of the parties' separation. It is a document reciting their promises and agreements. Whether it makes a divorce easier or faster is a matter of state law.

STANDARD CLAUSES

A good separation agreement starts by listing the parties' full names, their states of residence, the dates of marriage and separation, and the names and birthdates of any children of the marriage. These facts give helpful background information, and the recitation of children's names provides a useful reference when the children's names are stated later in the text of the agreement in defining terms for visitation, custody, child support, college expenses or allocation of the dependency exemption.

The standard or “boilerplate” clauses usually found in such an agreement state that:

1) The parties are separating (or have separated) and have the right to live separate and apart from each other as if single and unmarried.
2) Neither party shall harass, molest or interfere with the other.
3) Neither party shall incur debts in the other's name.
4) Each party waives all marital, estate and inheritance rights.
5) Each party waives all claims against the other, except a claim for marital dissolution or absolute divorce (this important term is called the “General Release” clause; more on it is found below).
6) Breach of the agreement will allow recovery of attorney's fees, damages and, if applicable, enforcement by specific performance.

PREPARATION OF THE AGREEMENT. No single attorney can represent both husband and wife in a separation agreement. It is best to have two attorneys involved, one to advise each partner. In this way, the husband and the wife both know that they have received independent legal advice for their individual situation from a lawyer who does not have a conflict of interest in trying to represent two clients with different goals and needs.

Leave out options that encourage extreme, unrealistic or illegal choices. A provision for no visitation rights, for example, is probably unenforceable--so don't leave room for it in the agreement. The same goes for a clause permanently waiving child support. Encourage the parties to be realistic in their promises.

Use basic English, not arcane legal-ese. When a difficult word must be employed, use synonyms along with it (or a definition in parentheses) to ensure that it is understood. While lawyers might think in terms of "equitable distribution," the clients will better understand (and the agreement should speak of) "property division." When discussing "maintenance" or "alimony," be sure to define it as "support payments for a husband or wife."

Using a separation agreement questionnaire makes clients think seriously about areas and issues that will need agreement if the time and expenses of litigation are to be avoided, such as property/pension division or alimony. And it requires clients to confer with their partners on arrangements that will require agreement to be workable in the first place, such as custody and visitation, payment of debts, and the structure of support.

WHAT A SEPARATION AGREEMENT CANNOT DO. There are several limitations on what a separation agreement can do:

1. Since it is a contract between spouses, it cannot bind third parties (such as banks or finance companies) that have not signed it. If, however, one party promises to pay a bill and then breaks that promise, then the innocent party may sue the other for breach of contract for the amount of money paid. It's a good idea to use an indemnification clause to ensure this. The clause should state that the breaching party will defend, indemnify and hold harmless the other party from any costs, expenses or damages incurred because of the breach.

2. A separation agreement cannot stop one spouse from harassing the other. While separation agreements usually have a nonharassment clause in them, please advise your clients that no piece of paper -- be it agreement or court order -- is going to stop a person from doing something he or she wants to do. If the problem is one of physical violence, a court order would be better than a separation agreement and could be used to punish the wrongdoer if he or she then violated the order. If it is some other form of harassment, it may be possible to go to court for an injunction or to sue the spouse for money damages, but these may not be very effective remedies in most cases, and they certainly will not be cost-effective.

3. The terms for child custody, visitation and support are not binding on the court; they can always be modified by the court, if in the best interest of the children. In the absence of proof to the contrary, however, there is a presumption in many states that the terms concerning the children in the agreement are fair, reasonable and necessary for the best interest and welfare of the children. If you really want binding and enforceable terms for custody, visitation or support, get a court order.

"DATING CLAUSES." There is no such thing as a "dating clause" that legitimizes adultery. Sexual relations with a person who is not one's spouse is adultery, and no "dating clause" will serve to make legal something that is illegal. Most separation agreements do, however, contain a clause that allows each spouse to be left alone as if single and unmarried and that forbids each spouse from harassing, molesting or interfering with the other. Again, please advise that this is not a license for adultery.

SECURING PROMISES. If you represent the intended recipient of monthly payments (child support, alimony, pension payments or property division installments), be sure to secure those promises! While it's hard to secure them against nonpayment (short of getting a court order for wage assignment), getting life insurance to secure a promise will help the recipient if the payor dies while he's still making the payments. Be sure to use private insurance, however, not SGLI. That's because of a Supreme Court case, Ridgway v. Ridgway, 454 U.S. 46 (1981). In that decision, the Court stated that a member's beneficiary for SGLI is whomever he has selected at his death, regardless of agreements or court orders to the contrary. No private contract or state court order can supersede the federal statutes concerning SGLI. Thus no agreement you prepare can bind the servicemember to keep the recipient as beneficiary for life insurance if you use SGLI – you'll need to look to a private policy of life insurance for this.

When you use a private policy, make sure you include a clause that transfers ownership of the insurance policy to the non-insured party for the term of the obligation. If you do this, the

beneficiary cannot be changed by the insured party, and the new owner will always be notified of pending cancellation due to a lapse in premium payment. The clause should also require prompt execution of the company form to transfer ownership (such as within thirty days of signing the separation agreement).

MAKING PROMISES NON-MODIFIABLE. Child-related promises, such as visitation, support and custody, cannot be removed from the court's overview; a judge can always change the terms for these when it's in the child's best interest. But what about alimony payments? Or property division promises? Can those be made unchangeable so that the recipient doesn't lose the benefit of her negotiated bargain? The answer is YES – if you do your homework (i.e., research). You'll have to contact an attorney in the state where the agreement might be enforced, but you'll usually discover that there are several ways to make these binding and enforceable:

1. You can, in some states, simply insert a provision that the terms are non-modifiable without the consent of the parties.

2. In other states, you can accomplish this by making the promises part of an unincorporated separation agreement. All you need to do is state that the agreement (or, if you wish, the specific clauses involved) may not be incorporated into a divorce decree or other court order. This would make the promises unmodifiable without the parties' consent, as in a future amendment to the agreement. You'll need a clause that says: *This separation agreement [***or** *Paragraph X of this separation agreement] may not be incorporated into a divorce decree or other court order; it shall remain non-modifiable without the express written consent of the parties.*

    - The disadvantage of this approach is that you usually cannot monitor whether the agreement is offered for incorporation by the other side once a divorce lawsuit is filed.

    - In addition, it's usually impossible to predict where the divorce case will be filed. What if it is filed in a state that requires incorporation?

3. Alternatively, you can make the promises interdependent, as part of an integrated property settlement. If you do this, then even if the agreement is later incorporated, it will not be modifiable (at least under North Carolina law). You'll need a clause that says: *The terms herein for property division [and alimony* if that's included*] are an integrated property settlement. They are interdependent and reciprocal, given in exchange for each other. They shall remain non-modifiable without the express written consent of the parties.*

ENFORCEMENT. The violation of a separation agreement, when it's not incorporated into a divorce decree, is by lawsuit for breach of contract. The remedies available include money damages, injunction and specific performance (that is, an order from the court directing a party to perform the promises he made in the agreement). Contempt of court is not available for breach of an unincorporated agreement, since contempt is the wrongful refusal to obey a court

order. Contempt is available, however, when a party breaches an agreement that has been incorporated into a court order or decree. When drafting a separation agreement, be sure to include a clause allowing the court to award expenses and attorney's fees to the party who has to bring the enforcement action.

INCORPORATION. What can you do about incorporation of the agreement into a divorce decree? There are several options for the drafter:

- You may include in your separation agreement a clause that requires its incorporation into a decree of divorce.

- Or your clause can bar the incorporation, or only bar it unless the parties later agree to this in writing.

- You may also leave out any reference to incorporation, so that it will have to be decided at the time of divorce.

So what's the low-down on incorporation? The answer is not very good – because there's simply no way of reproducing here all the state-by-state information you'll need to decide what to do about incorporation in Utah or Florida or Alaska. There are at least 51 different rules… more if you count the local variations from county to county. For example, separation agreements are routinely incorporated in divorce decrees in Fayetteville, NC (near Ft. Bragg). But this seldom occurs in Raleigh, NC, just 60 miles away!

In some states, incorporation is mandatory and there's no way of doing a separation agreement without incorporating it into the final decree of divorce or dissolution. In some it's optional – the attorney may or may not choose to include a clause about incorporation. In some states, incorporation means mere approval of the agreement by the judge; sometimes this provides a measure of insulation against later attack.

In some states, incorporation means that the promises become part of the court's order but that the contract still remains intact and enforceable as a contract between the parties. And in some states incorporation means merger – the contract becomes the court's order, and all provisions are enforceable (by contempt, garnishment, etc.) and also modifiable (if there's a change of circumstances regarding an "executory" promise, one not yet completed). The best answer is to contact an attorney in the state where you expect the divorce will be filed and ask him or her what to do about incorporation, as well as what effects incorporation will have.

SUBSTANTIVE PROVISIONS

PROPERTY DIVISION. The parties usually agree on a division of property in their separation agreement, and that agreement will be binding on them. The property to be divided consists of real property (land and the buildings on it), tangible personal property (cars, jewelry and furniture, for example) and intangible personal property (such as bank accounts, stocks and bonds, and life insurance). Pensions and retirement rights can also be considered marital

property. This type of property is often very valuable, and it is an important aspect of equitable distribution.

In many states there is a presumption that all property acquired during the marriage is equally divisible. This is presumed to be fair. Other divisions, such as 60-40 or 75-25 are certainly legal if the parties agree that the division is fair and equitable, or if the judge makes findings in the property division order that justify an unequal division. The property acquired during the marriage is called marital property in most states, and community property in those states with community property laws.

A good questionnaire will divide personal property into four categories: household furnishings and personal effects; motor vehicles; stocks, bonds, bank accounts and certificates of deposit; and other intangible personal property (cash value of life insurance, retirement benefits, etc.). The parties fill in each section with the correct information, also indicating which one will be entitled to which assets.

Real estate is divided in many separation agreements. This section would list the property address and deed description (it is advisable to use both) and would state which party gets what parcel of real property. If jointly-held land is to be divided, a deed is usually prepared in tandem with the agreement, since the separation agreement clause, standing alone, may not be effective to transfer title. When the land is mortgaged, an "assumption clause" would be used, making the title-holding party responsible for the mortgage and binding him/her to hold harmless and indemnify the other in regard to the mortgage debt. Such transfers generally do not trigger the "due on sale" clause contained in most institutional mortgages.[1]

Next comes division of retirement benefits. If there is to be no division, the agreement should say so. If the decision on pension division is to be put off or deferred until the divorce because there is no present agreement, that also should be stated clearly. Make sure the agreement is very specific and plain in this area. The parties' intent as to dividing a pension or waiving this should be explicitly stated. A poorly worded agreement may be challenged in court as vague and unenforceable, or it may result in a loss of any rights to pension division because they weren't preserved properly in the agreement. If you leave out pension division because there's no agreement, be sure that it's not unintentionally waived by virtue of the "general release clause" in the agreement. Better to say, *"The issue of pension division has not been decided by the parties and it is left open,"* or words to that effect. There is more about this topic below.

The division of pension rights in a separation agreement can be done in two ways, a present-value offset or a future percentage of payments. The former of these involves calculating (or estimating) the present value of the pension right now and setting it off (trading it) against the value of another asset, such as the other spouse's pension or the marital residence. The second approach puts off the division until whenever the employed spouse starts receiving

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1 Under the Garn – St. Germain Depository Institutions Act of 1982, 12 U.S.C. 1701j-3, such transfers are exempt from a "due on sale" requirement if the real property contains fewer than five dwelling units and a spouse of the borrower becomes an owner of the property.

pension payments. At that time the nonpensioned spouse would receive a share of each check equal to one-half (or some other percentage) of the marital share. The marital share is that which accrued during the marriage. The marital share can be calculated by dividing the years of marital pension service by the entire number of years of pension service. If the latter is unknown, the marital share is expressed as a formula, such as: "19/x, where 19 represents the years of military service for Husband during his marriage to Wife, and x represents his total years of military service." This fraction is then multiplied by the amount to be divided, which is sometimes the member's pay at separation or divorce (at that rank and years of service) and sometimes at retirement. Again, this depends on state law.

In military pension division cases, be sure to review the SILENT PARTNER on "Getting Military Pension division Orders Honored by DFAS" to be sure your wording is correct. Also remember that any order or decree (including one incorporating a separation agreement) that provides for SBP coverage must be submitted to DFAS within one year of the divorce for it to be honored; ignoring this time limitation can be a costly mistake.

HOW TO RESERVE PENSION DIVISION (OR ALIMONY). When the parties cannot agree on pension division, alimony or some other item, don't just leave it out! In this area, it's not "Silence is golden" -- it's "Silence is dangerous!" Omitting an item for which there is no agreement means that it's waived. The reason? Every good separation agreement contains a general release clause. This states that any rights or claims not set out in the agreement are waived. And that kills pension division (or alimony or whatever item is still in dispute). A good legal assistance attorney will always include a reservation clause such as: *"The parties cannot agree on military pension division. This issue is reserved for later agreement between them or for court decision."*

However, that may not solve the problem. What if Mrs. Jones doesn't know what "reservation" means? What if she thinks it means that "she's got it" and she needs to do nothing more? Such a view, for a non-lawyer, isn't too unrealistic. If this is her interpretation, then you can just bet that, when the divorce complaint and summons arrive several weeks or months from now, she'll just ignore them instead of getting an attorney to draft a counterclaim for pension division and alimony (which is what she should do to keep these alive after the divorce). If there's no claim pending for alimony or equitable distribution (including pension division) at the time of divorce, then these may be lost under state law. And that's an expensive mistake for Mrs. Jones to make-- and one that can be prevented.

When faced with this situation, you should do two things for your client, Mrs. Jones:

- First, include a statement in the separation agreement that informs her of what she needs to do, such as, *"The reservation of [alimony/pension division] in this agreement does not mean that it has been decided. Wife must file a claim for this with the court when a divorce is requested by either party. If Husband serves her with divorce papers, she must file this at court in a timely response to the divorce papers for [alimony, pension division]. If she files for divorce herself, she must request this in her complaint filed with the court. If she does not do this, then she may lose these rights."*

- Secondly, put it in a follow-up letter to her. Make it as plain and forceful as you can. Be sure she knows that her rights could be lost if she doesn't ask for them at the time that the divorce petition or complaint is filed. You should send it certified mail to be sure she gets it, and keep a copy of your letter and the receipt!

DEBT DIVISION. A good separation agreement also contains terms for allocation of marital debts. You should set out a schedule for who pays what debt in the agreement, including the creditor's name, account number, purpose of the debt, approximate balance and monthly payment amount. This will not stop the creditor from suing both parties if payments are not made by one spouse and both names are on the obligation, but it allows the innocent party to ask the court to hold the wrongdoer accountable for the debt as set out in the agreement.

As to who should get what debts, there is no "right" answer to this question. In one case, the husband may take on payment for all the debts because he is the sole source of income in the family or because he created the debts in the first place. In another case, the wife may take over certain debt payments for things she charged or purchased or for things that she is being given in the property division. For example, if the husband is getting the station wagon and the wife is getting the washer and clothes dryer, it might seem fair that each should assume the debt payment for the items he or she is receiving.

CUSTODY AND VISITATION. The parties should detail their plans for custody and visitation. The rise of joint custody statutes and cooperative parenting arrangements[2] in the last fifteen years has caused some lawyers to replace the prior separation agreement entry, which indicated the parent who would have custody of the children, with several alternatives regarding sole or joint custody, joint custody being further subdivided into joint legal custody (or "shared decision-making") and joint physical custody (or shared time with the children). Other attorneys prefer to keep the choices simple for separating spouses, leaving the only custody question on the separation agreement questionnaire as, "Who will have custody of the child/children?"

The section dealing with visitation rights should allow two alternatives--reasonable, flexible visitation rights (unspecified and by agreement of the parties), and specific, structured visitation rights. The latter might include, for example, visitation privileges every other weekend, during four weeks each summer, and for every other Christmas and spring vacation. Leave plenty of space for the parties to detail long-distance visitation arrangements if or when one of the parties moves pursuant to military orders. Further information on visitation (as well as custody) options can be found in the SILENT PARTNER on "Counseling on Custody and Visitation."

ALIMONY. The next section might deal with spousal support, also known as alimony or maintenance. Alimony is money paid by one spouse to the other to help with food, shelter, transportation, clothing and other living expenses. When the parties have agreed on some measure of temporary or permanent support, you should definitely put that in the separation agreement. Such a provision might state, for example, that the husband shall pay the wife

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2 *See* Schwartz, "Toward a Presumption of Joint Custody," 18 Fam. L. Q. 225 (1984).

alimony of $500 per month until he or she dies or until she remarries. Or it could state that the wife shall pay the husband alimony of $100 per month for a total of four years, at which time it will terminate forever. Here are some other alimony tips:

1. For alimony to be deductible for the payor, it must be taxable to the recipient.[3] For this tax treatment, however, the alimony payments must end no later than the recipient's death.[4] It is also acceptable to make the alimony nontaxable to the recipient if it is nondeductible for the payor. This is a particularly important term, and the agreement should clearly indicate how alimony payments shall be treated for tax purposes.

2. Alimony usually ends at the death of either party or the remarriage of the recipient (usually the wife). Sometimes a separation agreement states that alimony will also end at such time as the recipient starts living with an unrelated person of the opposite sex on a regular basis as if they were husband and wife. With today's societal changes, it would not be a bad idea to say that payments stop upon the recipient's romantic cohabitation with <u>any</u> <u>person</u>, whether of the opposite sex or not.

3. Alimony can be waived. It is always best to set out such a term clearly in the agreement. Don't just leave it out or let the agreement be silent on this issue. A waiver of alimony is such an important term that it should be clearly spelled out in the agreement so that there is no misunderstanding. If the agreement is <u>silent</u> on this issue, the <u>general</u> <u>release</u> clause will operate to waive alimony.

4. What if Mrs. Jones asks, "Am I entitled to alimony?" Be careful – you can't answer that question. How can you say what she's entitled to? Non-consensual alimony is only granted by the court. While you can't predict what the court will do, you can tell Mrs. Jones that the court would probably grant her alimony if you do your homework. Some research will tell you whether, for example, fault is necessary for alimony, alimony is only granted for rehabilitative purposes, alimony depends solely on her need for support, and other issues. If she is returning to Ohio, for example, you'll need to research the law of that state, which is where she may be able to bring her claim in court. Some states even have guidelines for alimony, maintenance or spousal support. Such research in North Carolina law, for example, would show you that she'll likely receive spousal support if:

    a. She files a lawsuit requesting alimony;

    b. She is the <u>dependent spouse</u> – she is financially dependent on her husband or in need of support from him or her;

    c. Her husband is the <u>supporting spouse</u>; and

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3 I.R.S. Code §§ 71 and 215.

4 Temporary Reg. §1.71-1T, Q-10.

d. An award of alimony is equitable under the circumstances after considering numerous factors set out in the statute.

In the absence of alimony guidelines, the best way to figure how much alimony a client needs is to calculate the difference between her reasonable monthly needs and her current net income. To do this, follow these steps:

- First of all, figure out the total monthly needs of Mrs. Jones. Make sure you have deducted any monthly expenses that are attributable to Major Jones or that he'll be paying.
- Next, figure out which ones are "reasonable" and discard the rest. This is difficult but necessary. A monthly budget that includes huge car payments or expensive weekly trips to the beauty salon and clothing stores may be frowned upon by the judge.
- Then subtract the net income of Mrs. Jones – the result is "her gap" between reasonable monthly expenses and net income. This is her unmet needs, the net amount she needs each month.
- Next compare this figure to the difference between the supporting spouse's income and his reasonable monthly expenses.

Her gap should be equivalent (under ideal circumstances) of the "extra" money he has left over from his paycheck after he pays for his own reasonable monthly expenses. Since these "gaps" seldom exist in reality and everyone is usually spending a lot more than he or she is making, it is often a question of haggling, discussion, bargaining and horse-trading as to how much alimony should be paid in any individual case.

The next step is to take the "gap amount" for Mrs. Jones and "gross it up" to the pre-tax equivalent. This means imputing the amount that, after taxes are taken out, will yield the "gap amount" for her. The way to do this is as follows:

1. Find out Mrs. Jones' federal tax bracket (look at the IRS tax tables). [For illustration purposes, let's assume this is 25%.]
2. Add in the percentage of her state tax bracket (if any). [Let's assume this is 7%.]
3. Add the two together. [25% + 7% = 32%]
4. Subtract the sum from 100%. [100% - 32% = 68%]
5. Divide this into the "gap amount" to get the pre-tax amount that will be needed. [If the gap amount is $1000 a month, then the taxable alimony needed is $1000/.68, or about $1470.]
6. You can double-check this calculation by multiplying the federal and state tax bracket percentages by the taxable alimony to get the taxes to be paid. Then subtract the taxes from the alimony and you should arrive back at the "gap amount." [Let's check: $1470 x 32% in taxes = $470. And $1470 - $470 = $1000 as the gap amount. Voila!]

CHILD SUPPORT, COLLEGE AND CHILD TAX ISSUES. Child support should also be settled in a separation agreement in those cases in which there are minor children. When there is more than one child, the support should ordinarily be allocated between the children, and

a specific ending date should be stated.[5] Assuming that military medical care or CHAMPUS will take care of most medical expenses, space should be left for division of any uncovered health care expenses between the parties. There should also be room left for college education provisions (should the parties desire to continue support through college) and terms for life insurance (to secure child support should one of the parents die). As a final aspect of child support, the parties should indicate in the separation agreement who will claim the dependency exemption for each child (which will determine who gets the child tax credit, currently $500 per child). In the absence of an agreement, the parent who has physical custody for more than half of the year is entitled to claim the exemption.[6] See the SILENT PARTNER on "Child Support Options" for more information on how to deal with support amounts, medical expenses, college clauses and allocation of the dependency exemption and child tax credit.

TAX CLAUSES. You should include a clause about tax filing. This provision can save the parties a lot of money in taxes if prepared properly. A good example would be a clause that required the parties to file jointly so long as they are eligible to do so (usually until the year they are divorced) and to divide the refund or liability for taxes in a specified way, such as 50-50, or 75-25, depending on the incomes of the parties. It would also require them to cooperate and exchange documents in the event of an audit, and to be individually responsible for any taxes, interest or penalty due to a party's misstatement of income, adjustments, credits or deductions.

SEPARATION AGREEMENT CHECKLIST. Finally, here's a comprehensive checklist that covers every aspect of separation agreements, from basic information needed to substantive clauses.

I. DATA ACCUMULATION.

A. Personal.

1. Names (including maiden name), Social Security numbers (SSN's).

2. Dates of birth (DOB).

3. Residence and domicile.

4. Children: names, dates of birth, SSN's

   a. Of this marriage.

   b. Prior marriages.

5. Date and place of marriage

6. Date of separation

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5 In the absence of an allocation of child support between children, a parent is not entitled to reduce or modify unilaterally the amount of support when a child turns 18 or is otherwise not entitled to support. Craig v. Craig, 103 N.C.App. 615, 406 S.E.2d 656 (1991); Brower v. Brower, 75 N.C.App. 425, 331 S.E.2d 170 (1985); Gates v. Gates, 69 N.C.App. 421, 317 S.E.2d 402 (1984).

6 I.R.S. Code § 152 (e).

7. [Optional: prior divorces, immigration status, citizenship, prior support orders, antenuptial agreement, work and education histories, special needs/handicaps.]

B. Income.

1. Current gross pay.

2. Mandatory withholdings by employer.

3. Tax withholdings (W-4 form).

   a. Marital status.

   b. Number of withholding allowances claimed.

4. Other income or cash receipts.

   a. Interest/dividends.

   b. Rent.

   c. Pensions.

   d. Child support.

   e. Spousal support.

   f. Anything else?

5. Deferred compensation plan contributions? § 401K Plan?

C. Medical Insurance Available.

1. Cost? Waiting period?

2. Coverage available after divorce? Convertible to individual policy?

3. If so, at what cost?

4. Dental plan available? Cost? Waiting period? Orthodontia covered?

5. Mental health coverage?

D. Assets.

1. Insurance policies.

   a. Name of insurer.

   b. Policy number.

   c. Policy owner.

   d. Type (term, whole life, etc.).

   e. Cash surrender value.

f. Death benefit.

g. Loans outstanding?

2. Stocks, bonds, notes.

a. Name of certificate/instrument.

b. Name of location of certificate/instrument.

c. Valuation; date and method used.

d. Income tax basis.

e. Form of title.

3. Tangible Personalty.

a. Automobile(s).

(1) Make, model, and year.

(2) Fair market value and method of valuation.

(3) Outstanding loan balance and monthly payment.

b. Furnishings and appliances of significant value.

(1) Describe.

(2) Value and method of valuation.

(3) Outstanding loan balances and monthly payments.

c. Miscellaneous items (lawn mower, trailer, canoe, etc.).

(1) Describe.

(2) Value and method of valuation.

(3) Outstanding loan balances and monthly payments.

4. Financial accounts.

a. Type.

b. Account number.

c. Owner.

d. Institution (name, address).

e. Value.

5. Other financial assets.

6. Real estate.

   a. Present occupant.

   b. Popular description.

   c. Legal description.

   d. Type of asset.

   e. Title in whose name? Form?

   f. Encumbrances?

      (1) Who is creditor?

      (2) Type of security.

      (3) Who is debtor?

         (4) Amount due? Payment rate?

         (5) Any balloon payment required?

         (6) Interest rate? Flexible or fixed?

         (7) Any unrecorded claims (i.e., amount owed to family)?

   g. If leased, length of lease - rental received/obligations of owner.

7. Pensions.

   a. Military – pension, Thrift Savings Plan.

   b. Civil service.

   c. Other.

      (1) Vested?

      (2) Contributions by employee?

      (3) Defined benefit or defined contribution?

E. Debts.

1. Who is the creditor?

2. Type of debt (unsecured loan, revolving charge account, mortgage, etc.).

3. Reason for incurring the debt.

4. Encumbered property (if any).

5. Account number.

6. Account balance.

7. Monthly payment.

8. Interest rate.

9. Status of account (current or in arrears).

10. Who is obligated to pay?

11. Have joint credit accounts been converted to only one spouse?

12. Have military check-cashing privileges for the spouse been cancelled in the local command, the commissary, and the exchange system?

II. DRAFTING THE AGREEMENT.

A. Recitals/Boilerplate.

1. Identity of parties and vital statistics.

2. Marital status; is the marriage valid?

3. Fact basis of agreement (i.e., the parties are separated).

4. Intent as to "jointly held" property.

5. Unique factors that have been considered (e.g., re: allocation of debt responsibility, spousal support, child support, etc.).

6. Dissolution proceeding contemplated or filed; court and case number if filed.

7. Intent as to incorporation.

8. Parties' intent re employment.

9. Health of parties.

10. Completeness of agreement; any issues left remaining?

11. Pendente lite orders and prior support agreements or obligations.

    a. Being superseded?

    b. All payments current?

    c. Amount of arrears?

12. Dispute resolution provisions?

13. Statement of consideration.

14. Waiver of estate, role as executor/trix, etc.

15. Non-harassment provision.

16. Method of modification.

17. Effect of reconciliation.

18. Opportunity to consult an attorney; each understands the agreement.

19. Payment of attorney's fees and costs for agreement; for divorce; and if breach?

B. Child Custody and Visitation.

1. Type of custody.

   a. Joint legal.

   b. Joint physical.

   c. Sole custody to one parent.

   d. Split custody.

2. Sole legal custody.

   a. Can custodial parent move from the jurisdiction? The country?

   b. Visitation terms--

      (1) With visitation specified.

      (2) With no visitation specified.

3. Extent of visitation.

   a. "Reasonable."

   b. Specified times.

   c. Notice to custodial parent.

   d. Mutual agreement?

   e. Location; overseas?

   f. Non-use of visitation does not constitute a waiver of future visitation.

   g. Transportation costs.

      (1) Fly unaccompanied?

      (2) Transportation to/from airport.

      (3) Additional transportation costs custodial parent moves.

h. Consequences of denial of visitation.

i. Grandparent visitation if non-custodial parent cannot exercise right.

4. Miscellaneous matters.

a. Right to telephonic communication.

b. Copies of report cards.

c. No other surname to be used.

d. No remarks disparaging the other parent.

C. Child Support.

1. Amount to be paid.

a. Flat sum, or per child basis.

b. Periodic adjustments? How often? What basis for a new amount?

c. Adjustment for extended periods of visitation?

2. Medical, hospital, dental, orthodontic, and surgical.

3. Who pays any costs not reimbursed by insurance?

4. Obligation to keep child as designated beneficiary on life insurance policy?

5. Duration of payment:

a. Define emancipation?

b. 23 if in college?

6. Who claims child as dependent for income tax? Promise to cooperate and execute necessary IRS forms; remedy for failure to do so. Conditioned on current support payments? Hold harmless from increased taxes due to loss of dependency exemption and tax credit?

D. Spousal Support.

1. Waiver?

2. Purpose of support.

3. Periodic or lump sum.

4. Duration.

5. Taxable to recipient?

E. Asset Division.

1. Preliminary.

a. Identify; describe the assets.

b. Classify: marital/community, or separate?

c. Evaluate.

d. Allocate between the parties.

2. Confirmation of separate property or transfer from one to the other.

3. Continued co-ownership as true "joint tenancy with right of survivorship?" Tenants-in-common?

5. Disposition of personal effects.

6. Specific clauses for military pension division, SBP coverage (if applicable), other pension division (or waiver, or reservation by court over pension division)

7. Sale of real property

8. Possession pending sale

7. Delayed sale.

a. Responsibility for mortgage.

b. Payment of rental value?

c. Responsibility for maintenance, upkeep, and income in interim.

d. Division of proceeds upon sale?

e. Reservation of jurisdiction by court over the asset and division thereof if delayed disposition.

F. Debts.

1. Identity of separate debts.

2. Identity of marital debts.

3. Disposition of debts. (Note: This is not binding on creditor).

4. Defend, indemnify and hold harmless.

5. Credits for payments after separation.

6. Warranty re future debts for which other may be responsible.

G. Taxes.

1. Consider state as well as federal.

2. Filing status for current year.

3. Filing status for future years (up to date of divorce).

4. Division of refund for current (and future?) years.

5. Allocation of additional taxes, penalties, and interest for:

   a. prior years.

   b. current year.

H. Warranties.

1. Full property and debt disclosure.

2. No known factors affecting value.

3. After-discovered marital property.

4. Effect of invalidity of any one clause.

I. Judicial Action and Miscellaneous.

1. Applicable law.

2. Covenant to carry contract through to execution: sign documents, deeds, assignments.

3. Failure to sign or deliver document required by contract (or judgment); application to court.

4. Provision for the return of dependent ID cards.

5. Effective date of agreement.

6. Signature of parties and notarization.

7. Names of attorneys.

8. Exhibits attached?

9. Has client been advised to:

   a. Modify his/her will to exclude the spouse as a beneficiary?

   b. Revoke powers of attorney -- with spouse as agent?

   c. Designate new beneficiaries for insurance policies?

   d. Designate new beneficiaries for military benefits?

   e. Designate new beneficiaries for retirement benefits [401(k) plan, IRA, etc.]?

[rev. 2-17-03]

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ATCH 2, "Recent Case Law on Construction of Separation Agreements"

by Brett R. Turner

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In September and October of 1991, we published a two part article on the validity of separation agreements. Such agreements are the heart of modern family law practice, and there are numerous treatises available on negotiating and drafting them. Few of these treatises, however, provide guidance to the attorney who must attack, defend or interpret the agreement after it has been signed. Our previous two articles tried to meet this need with a comprehensive discussion of the available means for rescinding or upholding an existing separation agreement.

In our next two issues, we turn to the final leg of the triad: interpretation of unclear agreements. The topic is inherently nebulous, for even the brightest legal scholars could never anticipate in advance every unclear clause which finds its way into a divorce settlement. We can, however, identify various rules of construction, and there are certain recurring types of ambiguous clauses which have been construed in a consistent manner. A proper understanding of the law on interpreting separation agreements can therefore shed light upon a wide variety of unclear provisions.

Our main article this month will discuss the rules of law which govern construction questions. Frequently, however, construction issues turn upon questions of fact rather than questions of law. In next month's issue, therefore, we will publish a listing of specific ambiguous phrases and how they have been construed by the courts. We will also discuss the law on modification by the parties themselves and the principles governing enforcement by the courts.

This article, like the previous two, will not draw confusing distinctions among separation agreements, property settlements, stipulations, consent judgments and the like. Instead, we will use the terms "separation agreement" and "divorce settlement" interchangeably to refer to all private contracts which settle a divorce action. See generally 2 H. Clark, The Law of Domestic Relations 409 (2d ed. 1987).

I. AGREEMENTS AND DIVORCE DECREES

The first step in construing any separation agreement is to determine the relationship between the agreement and the divorce decree. If the parties have been divorced and the agreement was merged into the divorce decree, the separation agreement no longer exists as an independent document. Instead, the parties' rights are governed solely by the divorce decree.

Divorce Decree Existing: General Principles

To determine the relationship between the agreement and the divorce decree, we must consider the meaning of three familiar terms: approval, merger, and incorporation. These terms have been as much discussed and as little understood as any three words in the history of law. Nevertheless, the concepts behind the terms are remarkably simple in operation. The confusion displayed by many of the decisions is almost purely a matter of conflicting terminology.

Thus, the first step toward clarifying the law on this subject is to define all three terms clearly. Traditionally, there have been two ways in which a divorce decree can treat a valid separation agreement. First, the decree can simply note the existence of the agreement and hold that it is valid. For purposes of this article, we will call this option approval. Second, the court can adopt the terms of the agreement as terms of the decree, and order that the agreement itself have no continuing independent validity. Because the terms of the agreement are said to merge into the divorce decree, we will call this option merger. It can be seen from these definitions that approval and merger are exact opposite of each other: approved agreements are contracts but not decrees, while merged agreements are decrees but not contracts.

In addition, a number of states are beginning to recognize a third alternative. Divorce litigants have traditionally been frustrated by the need to elect between treating their agreement as a contract and treating it as a decree, and they have often wished for a combination of the best elements of both choices. States responding to this desire have created a third alternative which we will call incorporation. Incorporated agreements are treated as part of the decree, but they also retain independent validity as a contract. There are therefore two co-existing documents, a decree and a contract, both of which must be considered when the agreement is construed.

It is essential to realize that the above definitions are not the definitions used by all of the

reported cases. In particular, states which have not recognized the third alternative frequently use "incorporation" as a synonym for merger. Nevertheless, once we control for differences in terminology, every states recognizes the same set of possible relationships between a decree and a valid agreement. To emphasize that all three options are terms of art which should be given a clear and uniform meaning, we will place them in italics whenever they appear in this article.

To determine which of the three options applies in a particular case, we begin with the simplest alternative. When the court divorces parties who have signed a separation agreement, the decree at the very least contains an express or implied finding that the agreement is valid. The general rule, therefore, is that the relationship between the decree and the agreement is that of approval.

After noting the general rule, we must then ask if there is sufficient evidence to justify departing from that rule. This process requires that we consider the other two alternatives: merger and incorporation.

Merger

The distinction between merger and approval is a simple one: does the contract continue to exist as an independent document? If the answer is yes, then merger has not occurred, and we must proceed to the next alternative. If the answer is that the contract lacks independent validity, however, then merger is clearly present. See generally Johnston v. Johnston, 297 Md. 48, 465 A.2d 436 (1983); Parrish v. Parrish, 30 Mass. App. Ct. 78, 566 N.E.2d 103 (1991); Riffenburg v. Riffenburg, 585 A.2d 627 (R.I. 1991); but see Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983) (maverick decision holding that any agreement approved by the court merges into the final judgment).

The simplest evidence of merger is an express statement in the divorce decree. Where the decree directly states that the contract shall have no independent validity, merger has clearly occurred. Conversely, if the decree directly states that the contract shall still be valid, merger has not occurred. See, e.g., Flynn v. Flynn, 42 Cal. 2d 55, 265 P.2d 865 (1954).

In most cases, however, the divorce decree contains no express statement on the continuing validity of the contract. In this event, the next source to examine is the contract itself. If the contract answers the question and the decree is silent, it is logical to assume that the court intended to follow the option chosen by the parties. For decisions relying on a direct statement that the agreement would survive the decree, see Marshick v. Marshick, 24 Ariz. App. 588, 545 P.2d 436 (1976); Moore v. Moore, 389 Mass. 21, 448 N.E.2d 1255 (1983); Johnston v. Johnston, 297 Md. 48, 465 A.2d 436 (1983).

In construing the language of the decree and the agreement, the agreement does not necessarily lose validity merely because that language uses the term "merger." Courts have recognized that due to the confusing use of terminology by courts and parties in this area of the law, the term "merger" is not sufficiently clear to require a finding that the contract does not survive. See Parrish v. Parrish, 30 Mass. App. Ct. 78, 566 N.E.2d 103 (1991) (error to find that contract did not survive, based solely upon agreement's use of the term "merger"; remanded for a fuller review of the evidence).

If neither the agreement nor the decree states that the contract will lose independent validity after the signing of the decree, merger does not occur. As an exception to the general rule, merger exists only where there is some supporting evidence in the decree or the agreement. Parrish v. Parrish, 30 Mass. App. Ct. 78, 566 N.E.2d 103 (1991); Lipschutz v. Lipschutz, 391 Pa. Super. 537, 571 A.2d 1046, alloc. denied, 589 A.2d 692 (Pa. 1990); but see Appels-Meehan v. Appels, 167 Ariz. 182, 805 P.2d 415 (Ct. App. 1991) (merger occurs unless contract provides otherwise).

The normal principles of issue preclusion apply to the question of merger. Thus, where the court held in a previous action that the agreement was or was not merged into the decree, that holding is binding in all future actions in which merger is at issue. See Ballestrino v. Ballestrino, 400 Pa. Super. 237, 583 A.2d 474 (1990).

Incorporation

If the court finds that the contract was not merged into the decree, it may or may not have to consider the concept of incorporation. As noted above, many states have not yet recognized incorporation as defined in this article. Parties in these states must therefore choose between merger (decree but no agreement) and approval (agreement but no decree). See, e.g., Bennett v. Bennett, 250 N.W.2d 47 (Iowa 1977); Greiner v. Greiner, 61 Ohio

App. 2d 88, 399 N.E.2d 571 (1979); Sonder v. Sonder, 378 Pa. Super. 474, 549 A.2d 155 (1988); Taylor v. Taylor, 10 Va. App. 681, 394 S.E.2d 864 (1990). Where incorporation is not recognized, a decree or agreement using the word "incorporation" can mean either approval or merger, depending on the totality of the circumstances. See Bennett v. Bennett, supra; Sonder v. Sonder, supra.

Other jurisdictions permit the court to adopt the terms of the contract as terms of the decree without necessarily destroying the contract as an independent document. For instance, in Johnston v. Johnston, 297 Md. 48, 465 A.2d 436 (1983), the court noted that "once incorporated, the contractual provisions becomes part of the decree, modifiable by the court where appropriate and enforceable through contempt proceedings." 465 A.2d at 440. Nevertheless, "where the parties intend a separation agreement to be incorporated but not merged in the divorce decree, the agreement remains a separate, enforceable contract and is not superseded by the decree." Id. at 441. Thus, the question of whether the language of the agreement is included in the decree is an entirely separate question from whether the agreement survives as an independent document. If the answers to these questions are that the language of the agreement was included but that the agreement did survive, then the relationship between the agreement and the decree is one of incorporation.

Incorporation is also recognized by the Uniform Marriage and Divorce Act (UMDA). The Act originally agreed with the traditional rule that the parties must choose between approval and merger, but a subsequent amendment to the Act changed its position. The Act now provides:

> Terms of agreements set forth in the decree are enforceable by all remedies available for enforcement of a judgment, including contempt, and are enforceable as contract terms.

UMDA § 306, 9A Unif. L. Ann. 147, 217 (1987) (emphasis added). The drafters explained the change:

> [T]he original 1970 Act . . . required a choice between "merging" the agreement in the judgment and retaining its character as a contract. Strong representations as to the undesirability of such a choice, in the light of foreign doctrines as to the enforceability of judgments, as compared with contract terms, in this area of the law, made by persons and groups whose expertise entitled them to respect, led the Conference, in 1971, to change its former decision.

UMDA § 306 comment, 9A U.L.A. at 218.

For other cases recognizing incorporation as a distinct alternative to merger and approval, see Flynn v. Flynn, 42 Cal. 2d 55, 265 P.2d 865, 866 (1954) ("[w]hether or not a merger is intended, the agreement may be incorporated into the decree"); Armstrong v. Armstrong, 248 Ark. 835, 454 S.W.2d 660 (1970) (court can incorporate agreement, thus making it enforceable by contempt, without merging in into decree); DePaolo v. DePaolo, 104 A.D.2d 631, 480 N.Y.S.2d 10 (1984) (agreement and contract can co-exist as valid documents); cf. Riffenburg v. Riffenburg, ___ R.I. ___, 585 A.2d 627, 631 (1991) ("if the judgment explicitly states that the judgment's treatment of the matter shall have independent validity from the separation agreement, then the judgement shall have such validity").

In states where incorporation is recognized, it can be either express or by reference. Express incorporation is easily determined: to the extent the provisions are the decree are the same as the provisions of the agreement, incorporation has occurred. See Wierwille v. Wierwille, 34 Ohio St. 2d 17, 295 N.E.2d 200 (1971); 24 Am. Jur. 2d "Divorce & Separation" § 841 (1983).

Incorporation by reference is a harder question. The best evidence is obviously an express statement that the terms of the agreement are included in the decree just as if they had been copied word-for-word. See, e.g., Johnston v. Johnston, 297 Md. 48, 465 A.2d 436, 437 (1983) ("made a part hereof as if fully set forth"). Incorporation can also exist if the court "otherwise makes clear that [the agreement's] provisions are to be regarded not merely as covenants of the parties but also as court directives." Ruppert v. Fish, 84 Md. App. 665, 581 A.2d 828, 832 (1990).

Where the decree does not contain dispositive language, the court can again look to the agreement. Absent contrary language in the decree, it is again logical to assume that the court intended to

adopt the parties' preference. See Johnston v. Johnston, 297 Md. 48, 465 A.2d 436 (1983).

As a special exception to the general rule of approval, incorporation occurs only if there is some supporting evidence in the decree or the agreement. Thus, where both documents are silent, the agreement is only approved. See Ruppert v. Fish, 84 Md. App. 665, 581 A.2d 828 (1990).

The court may expressly incorporate part and not all of the parties' agreement. Ruppert v. Fish, 84 Md. App. 665, 581 A.2d 828 (1990); Owney v. Owney, 8 Va. App. 255, 379 S.E.2d 745 (1989). Likewise, the court may incorporate provision of an agreement even if the court could not include those provisions in an independent order. See, e.g., Albrecht v. Albrecht, 19 Conn. App. 146, 562 A.2d 528 (post-majority child support), cert. denied, ___ Conn. ___, 565 A.2d 534 (1989); Jackson v. Jackson, 102 N.C. App. 574, 402 S.E.2d 869 (1991) (post-majority child support); In re Porter, 100 Or. App. 401, 786 P.2d 740 (alimony in a nominal amount), cert. denied, 796 P.2d 1206 (1990); see generally S. Green & J. Long, Marriage and Family Law Agreements § 4.03 (1984 & Supp. 1991).

As noted above, if the court finds that the contract was not incorporated, it has decided only that the language of the agreement was not repeated in the decree. An unincorporated agreement still falls under the general rule of approval, and it is therefore still valid as a contract. Owney v. Owney, 8 Va. App. 255, 379 S.E.2d 745 (1989).

If the original decree did not incorporate the agreement, the agreement cannot be retroactively incorporated at a later time. E.g., Unger v. Unger, 145 Misc. 2d 633, 547 N.Y.S.2d 529 (Sup. Ct. 1989); but see Crain v. Crain, 109 A.D.2d 1094, 487 N.Y.S.2d 221 (1985) (where incorporation clause was omitted from divorce decree by oversight, mistake could be corrected retroactively).

II. CONSTRUCTION: GENERAL PRINCIPLES

Separation agreements are normally interpreted by the same principles of law which govern the construction of contracts generally. See Clark v. Clark, 535 A.2d 872 (D.C. 1987); Rimkus v. Rimkus, 199 Ill. App. 3d 903, 557 N.E.2d 638 (1990); Feick v. Thrutchley, 322 Md. 111, 586 A.2d 3 (1991); Boyett v. Boyett, 799 S.W.2d 360 (Tex. Ct. App. 1990). Incorporated agreements are usually construed as contracts rather than judgments. See Albrecht v. Albrecht, 19 Conn. App. 146, 562 A.2d 528, cert. denied, ___ Conn. ___, 565 A.2d 534 (1989); Spradley v. Hutchinson, 787 S.W.2d 214 (Tex. Ct. App. 1990).

Thus, where the contract is clear and unambiguous, the court must give its terms their normal meaning. Goldberg v. Goldberg, 290 Md. 204, 428 A.2d 469 (1981). "[W]e accord the words used by the parties their usual, ordinary and accepted meaning unless there is evidence that they intended to employ the language is a special or technical sense." Feick v. Thrutchley, 322 Md. 111, 586 A.2d 3, 4 (1991). Thus, the court should interpret each party's promises "by the objective test of what [the] promise would be understood to mean by a reasonable person." Id. at 5.

In determining the plain meaning of the words used in the contract, courts frequently refer to dictionaries and other common sources which define usage. See, e.g., In re Holderrieth, 181 Ill. App. 3d 199, 536 N.E.2d 946 (1989); Glassberg v. Obando, 791 S.W.2d 486 (Mo. Ct. App. 1990). The parties' own prior actions are also some evidence of how they themselves interpreted the agreement. Id. "No part [of the agreement] should be rejected as surplusage unless absolutely necessary, since it is presumed that the parties inserted each provision deliberately and for a purpose." In re Holderrieth, 181 Ill. App. 3d 199, 536 N.E.2d 946, 949 (1989). Even if the contract is not ambiguous, the court may still construe the language to include implied as well as express promises. Marcolongo v. Nicolai, 392 Pa. Super. 208, 572 A.2d 765 (1990).

Where the terms of the contract are ambiguous, the court can look to extrinsic evidence of the parties' intent in signing it. Feick v. Thrutchley, 322 Md. 111, 586 A.2d 3 (1991). "An instrument is ambiguous when the language is reasonably susceptible to more than one meaning. However, language is not rendered ambiguous merely because the parties do not agree on its meaning." In re Holderrieth, 181 Ill. App. 3d 199, 536 N.E.2d 946, 949 (1989); Baldwin v. Baldwin, 19 Conn. App. 420, 562 A.2d 581 (1989) ("[a] word is ambiguous when it is capable of being interpreted by reasonably well informed persons in either of two or more senses"). In construing ambiguous contracts, courts tend to interpret them against the drafter. See, e.g., In re Winningstad, 99 Or. App. 682, 784 P.2d 101 (1989).

One particularly useful form of extrinsic evidence is the positions taken in negotiating the

original agreement. For instance, in Ochs v. Ochs, 540 So. 2d 190 (Fla. Dist. Ct. App. 1989), the question was whether agreement-based spousal support terminated when the wife started cohabiting with another man. The contract was silent on the question, but the husband had suggested during the original negotiations that support cease upon cohabitation, and the wife had rejected the idea. The court held that the support did not terminate. See also Martens v. Dunham, 571 So. 2d 1190 (Ala. Ct. App. 1990) (attaching substantial weight to post-agreement letter which stated one party's interpretation of the contract).

In looking at extrinsic evidence, the court may find additional contractual obligations which were part of the parties' bargain but not included in the written contract. E.g., In re Steffen, 467 N.W.2d 490 (S.D. 1991) (contract not inconsistent with wife's claim of an oral agreement that husband would hold certain assets in trust for her benefit). Such obligations are unlikely, however, when the contract contains a clause stating that it integrates the parties' entire bargain. See Sadur v. Ellison, 553 A.2d 651 (D.C. 1989).

Standard of Review

The proper construction of a contract is ordinarily an issue of law. Appellate review is therefore de novo, and the trial court's decision should receive no particular discretion. See, e.g., Webster v. Webster, 566 So. 2d 214 (Miss. 1990); Glassberg v. Obando, 791 S.W.2d 486 (Mo. Ct. App. 1990).

If the contract is ambiguous and the extrinsic evidence is conflicting, the proper balancing of that evidence is a question of fact. The trial court's decision will therefore be affirmed as long as it is supported by at least some evidence. See, e.g., Miller v. Miller, 133 N.H. 587, 578 A.2d 872 (1990); Emery v. Emery, 166 A.D.2d 787, 563 N.Y.S.2d 526 (1990).

Blanket Releases

Many separation agreements contain a broad general release clause which purports to waive all other causes of action between the parties. These releases are generally interpreted broadly by the courts. For instance, a general release prevents division of any asset not specifically mentioned in the agreement. See, e.g., Pacheco v. Quintana, 105 N.M. 139, 730 P.2d 1 (Ct. App. 1986); Ramsperger v. Ramsperger, 120 A.D.2d 940, 502 N.Y.S.2d 858 (1986); In re Wise, 46 Ohio App. 3d 82, 545 N.E.2d 1314 (1988). The release likewise bars a claim for future alimony. See, e.g., Swift v. Swift, 566 A.2d 1045 (D.C. 1989) (release waives alimony). For additional cases construing general releases, see Overburg v. Lusby, 921 F.2d 90 (6th Cir. 1990); Coleman v. Coleman, 566 So. 2d 482 (Ala. 1990) (both holding that release waives cause of action for marital tort); Skinner v. Skinner, 579 So. 2d 358 (Fla. Dist. Ct. App. 1991) (release bars wife's action to be reimbursed for paying prior medical bill, even though court had issued interlocutory order requiring husband to pay it; order had merged into final decree, which was silent on the subject).

General releases do not, however, waive the right to collect life insurance as beneficiary of a policy owned by the other spouse. That right is a free gift from the other spouse rather than a legally enforceable claim. Moreover, even if a claim did exist, it would be a claim against the insurer and not against the other spouse. Kruse v. Todd, 260 Ga. 63, 389 S.E.2d 488 (1990). For similar reasons, a blanket release does not prevent the releasing party from inheriting under the other party's will. Blunt v. Lentz, 241 Va. 547, 404 S.E.2d 62 (1991).

In addition, the parties may limit a general release with specific exceptions. See, e.g., Parshall v. Parshall, 385 Pa. Super. 142, 560 A.2d 207 (1989) (parties added to typewritten general release a handwritten provision reserving the wife's rights in the husband's pension; release does not prevent wife from later obtaining part of husband's retirement pay).

III. PROPERTY DIVISION PROVISIONS

The property division provisions in most separation agreements are simple and straightforward. Each of the parties' assets is normally assigned to one party or the other, and that party is entitled to immediate possession of the asset in question. All assets are subject to division, including assets the court could not divide without an agreement. Boyett v. Boyett, 799 S.W.2d 360 (Tex. Ct. App. 1990) (separate property under community property statute); see generally L. Golden, Equitable Distribution of Property § 3.41 (1983 & Supp. 1991). If the contract awards a specific part of an asset to one spouse, there is an implied promise that the rest of the asset goes to the other spouse. Doyle v. Sullivan, 149 Misc. 2d 910, 566 N.Y.S.2d 997 (1991) (stipulation that wife would receive 50% of

husband's pension was implied waiver of her right to receive more than 50%).

Where a property division provision contains specific requirements, those requirements are usually strictly construed. See, e.g., Lang v. Lang, 551 So. 2d 547 (Fla. Dist. Ct. App. 1987) (enforcing plain language of contract which stated that husband "shall" buy or build wife a new home); Bresnan v. Bresnan, 156 A.D.2d 532, 548 N.Y.S.2d 803, 804 (1989) (where husband was "a few days" late in exercising option to purchase marital home, option had expired and wife could not be forced to convey her interest).

No particular words of art are required to divide property, however, and the courts will are willing to add terms which are reasonably implied from the language used. See, e.g., Marcolongo v. Nicolai, 392 Pa. Super. 208, 572 A.2d 765, 766 (1990) (statement that each party "shall be entitled to full and individual ownership" of certain assets constituted an implied promise by the other party to convey those assets), alloc. denied, 593 A.2d 420 (1990); In re Steffen, 467 N.W.2d 490 (S.D. 1991) (contract recited that the parties were satisfied with the existing division of their personal property; clause did not prevent wife from claiming an oral agreement to hold certain assets in trust for her benefit). Where the parties used words of art without understanding their limited meaning, the words will be construed more broadly. See Feick v. Thrutchley, 322 Md. 111, 586 A.2d 3 (1991); In re Lawson, 409 N.W.2d 181 (Iowa 1987) (both holding that clause dividing military "retirement pay" applies to all military retirement benefits, even if those benefits are strictly defined as "retainer pay" rather than "retired pay"). The agreement may give one spouse a monetary award, which may be payable in installments and need not be definite in amount. See Sutton v. Sutton, 28 Ark. App. 165, 771 S.W.2d 791 (1989) (contract could properly award wife property division payments of $500 per month until death or remarriage).

Likewise, the court is free to correct any clerical or typographical errors in the agreement. See Newell v. Hinton, 556 So. 2d 1037 (Miss. 1990) (parties agreed that wife would receive "1984" Mustang, but that car had been traded in for 1985 Mustang shortly before the agreement was signed; parties had obviously intended to award wife the new car); Emery v. Emery, 166 A.D.2d 787, 563 N.Y.S.2d 526 (1990) (husband's promise to pay wife the difference between their retirement incomes would be construed to mean half the difference; literal interpretation would lead to absurd result); Johnson v. Johnson, 379 N.W.2d 215 (Minn. Ct. App. 1985) (due to typographical error, support ceased on death or remarriage of "respondent" payor; reforming agreement so that support terminated on death of payee).

Still, the court cannot add entirely new terms not present in the original agreement. See In re Thomason, 802 P.2d 1189 (Colo. Ct. App. 1990) (husband agreed to pay wife $87,500 from his retirement fund, but contract was silent on tax consequences; trial court erred by requiring husband to hold wife harmless from any taxes incurred on the transfer). In particular, the court cannot divide assets which were omitted from a comprehensive property settlement agreement. See Parr v. Parr, 773 S.W.2d 135 (Mo. Ct. App. 1989) (contract awarded to husband all assets not expressly awarded to wife; provision barred wife from later obtaining part of husband's retirement pay); Patzer v. Patzer, 792 P.2d 1101 (Mont. 1990) (contract which was "full and final settlement" prevented wife from thereafter obtaining part of husband's retirement benefits, even those benefits were not expressly mentioned in the agreement); In re Wise, 46 Ohio App. 3d 82, 545 N.E.2d 1314, 1317 (1988) (where agreement was intended to divide all property, but husband's pension was omitted through wife's own "inexcusable neglect and carelessness," wife was not entitled to any part of pension); Tharp v. Tharp, 772 S.W.2d 467, 468 (Tex. Ct. App. 1989) (agreement awarded "remainder of the marital estate" to husband; wife could not thereafter partition husband's community property pension, which was not mentioned in agreement).

Property division can become complicated when the parties agree to postpone division of certain assets until some point in the future. If one spouse has exclusive use of the asset during the period before sale, that spouse may have a fiduciary duty to manage the property with the other spouse's interest in mind. For instance, in Marshall v. Grauberger, 796 P.2d 34 (Colo. Ct. App. 1991), the husband agreed to hold certain stock for five years and then give it to the wife. If he sold the stock before the five years ended, he was to give the wife the proceeds. During the five year period, the husband sold his own stock in the same corporation at a substantial profit, but he declined to sell the wife's stock, which then declined substantially in value. The court found that he had breached his fiduciary duty to protect the wife's interest. See also Cravero v. Holleger, 566 A.2d 8 (Del. Ch. 1989) (agreement gave husband

exclusive use of trailer park, and required him to pay wife her interest if he sold it or died owning it; while agreement did not create a trust, husband did have implied duty of good faith in executing contract).

The termination of exclusive use is often a subject for dispute between the parties. Unlimited exclusive use is an invalid restriction on alienation of land, and where the contract states no limit, one court implied that the use lasted only for a reasonable duration. Sherman v. Sherman, 168 A.D.2d 550, 563 N.Y.S.2d 424 (1990); but see Miller v. Miller, 133 N.H. 587, 578 A.2d 872 (1990) (enforcing contract which gave wife exclusive use of the marital home until she decided to sell it). Where the wife had had exclusive use of the marital home for eleven years, four of which were after the emancipation of the youngest child, the Sherman court found that a reasonable period had expired.

Modification

As a general rule, of course, property division orders cannot be modified after they have become final. See generally L. Golden, Equitable Distribution of Property § 8.03A (1983 & Supp. 1991). This rule applies with equal force to separation agreements. See In re Thomason, 802 P.2d 1189 (Colo. Ct. App. 1990) (error to add entirely new provision not present in original agreement); Kuhnke v. Kuhnke, 556 So. 2d 1121 (Fla. Dist. Ct. App. 1991) (court had no power to modify contractual provisions for sale of marital home).

Nevertheless, if the contract itself anticipates modification, the court will follow its terms. A good example is Greer v. Greer, 807 P.2d 791 (Okla. 1991), in which the parties were divorced while federal law prohibited state courts from dividing military retirement pay. See generally L. Golden, Equitable Distribution of Property § 6.06 (1983 & Supp. 1991). The wife received no part of that pay, but the parties expressly agreed that the wife could get a share of it in the future if Congress changed the law. Congress did so in 1983, see id., and the wife sued to enforce the contract. The court distinguished the general rule and enforced the modification provision.

Some states also allow the parties to modify their property division by subsequent agreement. Modification may be permitted even where the contract has been approved or incorporated into the decree. See Brown v. Brown, 796 S.W.2d 5 (Ky. 1990).

Clarification. In all states, of course, the court is permitted to clarify an ambiguous property settlement without violating the rule against modification. See, e.g., Ex Parte Bonds, 581 So. 2d 484 (Ala. 1991); Aarvig v. Aarvig, 248 N.J. Super. 181, 590 A.2d 704 (Ch. Div. 1991).

Disguised Support. Modification is also permitted if the payments are disguised spousal or child support. The law on distinguishing between property division and spousal support awards is discussed in part VI below.

Property division and child support awards are unlikely to be confused in most cases. One exception is provisions for exclusive use of the marital home, which are usually an incident of child support where minor children are involved. See, e.g., Kuscik v. Kuscik, 154 A.D.2d 655, 546 N.Y.S.2d 659 (1989) (provision requiring husband to pay certain expenses on wife's home was child support; obligation therefore stopped upon emancipation, even though agreement stated no termination condition); see generally 24 Am. Jur. 2d "Divorce & Separation" § 1025 (1983). As such, exclusive use order may be subject to the court's continuing power to modify child support. This power is discussed further in section VII below.

Provisions regarding the income tax exemption for dependent child are also usually child support rather than property division. See, e.g., Freeman v. Freeman, 29 Ark. App. 137, 778 S.W.2d 222 (1989).

IV. SPOUSAL SUPPORT PROVISIONS

Spousal support provision present some of the most intricate issues of separation agreement construction. The first of these issues is the very nature of the provision itself. Clauses which seem to require spousal support payments may actually require payments for a completely different purpose.

Spousal Support vs. Property Division

The distinction between spousal support and property division can sometimes is clear in theory, but frequently unclear in practice. The conceptual difference is easily stated: spousal support is intended to provide continuing financial assistance to maintain a certain standard of living, while property division is

intended to award the receiving spouse a certain specific share of the parties' marital estate.

The major practical problem in distinguishing spousal support from property division is federal and state income tax law, which provides different tax consequences for the two types of payments. See generally 34 Am. Jur. 2d "Federal Taxation" ¶ 7410 (1992). For this reason, parties frequently mislabel payments in order to obtain more favorable tax treatment. The parties' labels for this payments are not controlling as a matter of law, the court must look beneath the surface of the agreement to determine the true purpose of the payments. In making this determination, the court is free to use parol evidence. "[T]he term 'alimony,' especially when used in separation agreements, may be described as latently ambiguous." D'Huy v. D'Huy, 390 Pa. Super. 509, 568 A.2d 1289, 1294, alloc. denied, 581 A.2d 572 (Pa. 1990), quoting Kohn v. Kohn, 242 Pa. Super. 435, 364 A.2d 350 (1976); Puckett ex rel. Puckett v. Puckett, 41 Wash. App. 78, 702 P.2d 477, 480 (1985) ("there is no magic in the use of terms such as alimony, maintenance or property award"), overruled in part on other grounds, Porter v. Porter, 107 Wash. 2d 43, 726 P.2d 459 (1986); see also Hayes v. Hayes, 100 N.C. App. 138, 394 S.E.2d 675 (1990) (where contract ambiguous, error to decide the question without holding a hearing and considering extrinsic evidence); but see Harris v. Harris, 553 So. 2d 129 (Ala. Ct. Civ. App. 1989) (parole evidence rules requires that "alimony" payments be spousal and not child support).

In determining the true nature of periodic payments, courts look at a wide variety of factors. For instance, in D'Huy v. D'Huy, 390 Pa. Super. 509, 568 A.2d 1289 (1990), the parties had three major marital assets. The agreement gave one of the assets to the children, and the husband received the other two in exchange for a lump sum payment. The payment was only a small portion of the worth of the assets. In addition, the husband agreed to make regular monthly payments to the wife for a period of 10 years. Because the payments were in a specific determinable amount and the lump sum payment was so small, the court held that the periodic payments were actually part of the property division.

Likewise, in Myers v. Myers, 560 N.E.2d 39, 40 (Ind. 1990), the husband agreed to pay "maintenance", but the provision was located in the property division paragraph and could at the husband's option be paid directly out of his military retirement pay. A separate paragraph established another obligation which was labeled as alimony. The court had little trouble finding that the payments were property division.

One particularly important factor is the relative amount of marital property awarded to each party under the express property division provisions. If the spouse receiving periodic payments received a substantially smaller part of the marital estate, the payments may well be part of the property division. On the other hand, if the express property division is roughly equal or favors the spouse receiving alimony, the payments are more likely alimony. See Berry v. Berry, 550 So. 2d 1125, 1126 (Fla. Dist. Ct. App. 1989) (where wife received almost all of the marital estate plus periodic payments "for her support and maintenance" equal to half of husband's retirement pay, periodic payments were not consideration for property settlement), cert. den., 563 So.2d 631 (1990).

For additional cases classifying periodic payments, see Joyce v. Joyce, 563 So. 2d 1126 (Fla. Dist. Ct. App. 1990) (payments were alimony, where property division provisions were in separate provision of agreement, there was no evidence that the payments were additional consideration for the property, and the payments were expressly modifiable under certain circumstances); Petty v. Petty, 548 So. 2d 793 (Fla. Dist. Ct. App. 1989) (payments were alimony, where they ceased upon remarriage and were in separate section from property division provisions).

Integrated Bargain Agreements. Some courts analyze the property division vs. spousal support issue by asking whether the parties signed an integrated bargain agreement. An integrated bargain agreement is a contract where one spouse agreed to pay spousal support in exchange for a disproportionate share of the marital estate. As explained below, payments in integrated bargain agreements are treated like property division payments: they are not modifiable, and they do not terminate on remarriage. See generally DuValle v. DuValle, 348 So. 2d 1067 (Ala. Civ. App. 1977); O'Hara v. O'Hara, 564 So. 2d 1230 (Fla. Dist. Ct. App. 1990); Hayes v. Hayes, 100 N.C. App. 138, 394 S.E.2d 675 (1990); see generally Annotation, "Modification of Agreement-Based Divorce Decree--Alimony," 61 A.L.R.3d 520 §§ 19-23 (1975 & Supp. 1991).

There is obviously a considerable overlap between integrated bargains and disguised property

settlements. When periodic payments are given as consideration for property division, they is strictly speaking not spousal support at all, since their purpose was to divide the property and not to provide periodic support. In a limited sense, therefore, there is no real distinction between an integrated bargain and a disguised property settlement.

There may be cases, however, in which the amount of periodic support payments is increased as compensation for property division. In these cases, the disguised property settlement approach might require separating the payments into support and property division portions, while the integrated bargain approach might essentially treat the entire amount as property division. It is therefore conceivable that the two approaches might yield different results in some fact situations. Within the period covered by this article, however, no actual reported case was found in which an integrated bargain agreement could not equally well be described as a disguised property settlement.

Lump Sum Alimony. The distinction between spousal support and property division also substantially overlaps the distinction between lump sum and periodic alimony. Where the court analyzes the issue as a choice between periodic alimony for support or lump sum alimony for the purpose of dividing property, it is essentially deciding the same alimony vs. property division issue addressed above.

There may be cases, however, in which the parties agree to lump sum payments for purposes of support. Such payments are usually treated similarly to property division, in that they are not modifiable and do not terminate on remarriage. E.g., Mallery-Sayre v. Mallery, 6 Va. App. 471, 370 S.E.2d 113 (1988).

Lump sum and periodic alimony can be especially hard to distinguish when the lump sum is payable in installments. One recent decision rejected a proposed rule that all contingent or conditional obligations are periodic alimony, and instead held that the proper characterization depends on the intent of the parties. Where the contract labeled the payments "alimony in gross" and stated the amount as a total sum payable in a specific number of installments, the payments were held to be lump sum alimony. Turner v. Turner, 180 Mich. App. 170, 446 N.W.2d 608 (1989), cert. denied, 435 Mich. 860, 458 N.W.2d 877 (1990).

Spousal Support vs. Child Support

The distinction between child support and spousal support can also be difficult to draw. The fundamental difference between the two payments can be simply stated: spousal support is for the benefit of the receiving spouse, while child support is for the benefit of the children. The issue becomes complex, however, when payments which are labeled in one way are subject to contingencies associated with the other.

For instance, in Terry v. Terry, 28 Ark. App. 169, 771 S.W.2d 321, 321 (1989), the contract required certain payments "for support of minor children." The payments continued until a specific date, however, and ended before that time only if the wife remarried, the children were emancipated and they completed their "formal education." Because of the specific termination date and the express mention of remarriage, the court held that the payments were spousal support.

Similarly, in Petty v. Petty, 548 So. 2d 793 (Fla. Dist. Ct. App. 1989), the agreement provided that the wife would receive periodic payments. The payments were denominated as "permanent alimony," but the contract expressly stated that the wife would use the payments to support children as well as herself. On the other hands, the payments ceased upon remarriage, and were in separate section from provisions dealing with children. The payments were again held to be spousal support. See also Harris v. Harris, 553 So. 2d 129 (Ala. Ct. Civ. App. 1989) (parol evidence rule required that "alimony" payments be characterized as true spousal support and not as child support).

Unified Support. Distinguishing spousal support from child support is most difficult when the contract calls for unified support: a single lump sum periodic payment to support both spouse and children. In this instance, the court must first look to any evidence that the parties intended a specific part of the lump sum to for a particular purpose. For instance, in Lieberman v. Lieberman, 81 Md. App. 575, 568 A.2d 1157 (1990), the husband agreed to pay the wife $2600 per month for three years; $2400 per month for the next three years; and $1800 per month thereafter. The payments were reduced by $900 per month upon the death, custody change, emancipation, or remarriage of each of the parties' two children. In light of the overall schedule, the court had little difficulty concluding that the first $1800 per month was child support, and that all additional payments were spousal support. See also Beard v. Beard, 12

Kan. App. 2d 540, 750 P.2d 1059 (1988) (contract reduced unified support by 25% upon emancipation of each of two children, and by 50% upon wife's remarriage; dicta that unified sum was half alimony and half child support); O'Hara v. O'Hara, 564 So. 2d 1230 (Fla. Dist. Ct. App. 1990) (payments were spousal support, where they were classified as alimony for tax purposes, and neither party had introduced much evidence on the children's needs when seeking to modification); Carter v. Carter, 215 Va. 475, 211 S.E.2d 253 (1975) (trial court properly allocated unified sum evenly among wife and two children).

Where there is no indication that the parties intended any specific allocation of the payments, the court may or may not be able to allocate the payments itself. In Carey v. Carey, 9 Kan. App. 2d 779, 689 P.2d 917 (1984), where no allocation was evident from the face of the contract, the court held that no allocation could be made and treated the entire amount as nonmodifiable spousal support. Conversely, in Nooner v. Nooner, 278 Ark. 360, 645 S.W.2d 671 (1983), the court held without discussion that unified support could always be allocated.

Modification

The modifiability of spousal support is probably the most complex of all separation agreement construction issues. Instead of applying a simple legal test, the court must ask a series of difficult subsidiary questions. The ultimate answer is frequently unclear until several of these questions have been fully considered.

To begin with, the court must use the rules discussed above to determine whether the contract requires true periodic spousal support payments. If the provision is a disguised division of property, it is clearly not modifiable. See Myers v. Myers, 560 N.E.2d 39 (Ind. 1990); cf. Rodgers v. Rodgers, 561 So. 2d 1357, 1357 (Fla. Dist. Ct. App. 1990) ("[i]f a party to a dissolution agreement wishes monthly support payments to be construed as alimony, and therefore modifiable in the future, it is prudent that such intent be expressed in the agreement"). Likewise, lump sum spousal support is ordinarily not subject to modification. See, e.g., Mallery-Sayre v. Mallery, 6 Va. App. 471, 370 S.E.2d 113 (1988). Conversely, if the provision is disguised child support, it probably is modifiable. See part VII below.

If true spousal support payments are involved, the court must next consider whether the payments are part of an integrated bargain agreement. This issue is also discussed in more detail above. If an integrated bargain has been made, the payments are not modifiable. O'Hara v. O'Hara, 564 So. 2d 1230 (Fla. Dist. Ct. App. 1990); Hughes v. Hughes, 553 So. 2d 197 (Fla. Dist. Ct. App. 1989); but cf. In re Jones, 222 Cal. App. 3d 505, 271 Cal. Rptr. 761 (1990) (noting that modification statute was passed for the express purpose of avoiding difficult question of whether spousal supported provisions were part of an integrated agreement).

Assuming that the payments involve true spousal support which are not part of an integrated bargain, the court must next determine the relationship between the agreement and the decree. The law on this subject is discussed further in section I above. In many states, the court can always modify an agreement which has been merged into the divorce decree. This is true even where the agreement itself specifically prevents modification, since a merged agreement is invalid as a contract, and the court cannot disclaim its own power to modify spousal support. See, e.g., Appels-Meehan v. Appels, 167 Ariz. 182, 805 P.2d 415 (Ct. App. 1991); Hamel v. Hamel, 539 A.2d 195 (D.C. 1988); McFadden v. McFadden, 386 Pa. Super. 506, 563 A.2d 180 (1989); but see Bowman v. Bowman, 567 N.E.2d 828 (Ind. Ct. App. 1991) (enforcing no modification clause, even though contract merged into decree).

If the agreement was approved or incorporated, the court finally reaches the core issue: whether the power to modify spousal support for changed circumstances extends the support provisions of a separation agreement. The test for answering this question is often specified by statute. Many of the statutes provide that the modification power does extend to separation agreement, unless the agreement itself provides otherwise. See, e.g., Ky. Rev. Stat. § 403.180(6) (1984).

Whether the agreement provides otherwise is a question of construction. The courts will usually enforce an express clause stating that the support shall not be modifiable. See Sadur v. Ellison, 553 A.2d 651 (D.C. 1989); O'Hara v. O'Hara, 564 So. 2d 1230 (Fla. Dist. Ct. App. 1990); Geraghty v. Geraghty, 259 Ga. 525, 385 S.E.2d 85 (1989); Bowman v. Bowman, 567 N.E.2d 828 (Ind. Ct. App. 1991); Fincklin v. Fincklin, 240 N.J. Super. 204, 572 A.2d 1199 (Ch. Div. 1990); Nichols v. Nichols, 162 Wis. 2d 96, 469 N.W.2d 619 (1991); contra Hayes v. Hayes, 100 N.C. App. 138, 394 S.E.2d 675 (1990)

(agreement cannot prevent court from modifying true spousal support). If the clause prevents only modification by the parties, however, it may not prevent modification by the court. See Parker v. Parker, 543 So. 2d 1298 (Fla. Dist. Ct. App. 1989) (contract prevented modification except if written and signed by parties; clause did not apply to court); Brenizer v. Brenizer, 257 Ga. 427, 360 S.E.2d 250 (1987). The clause might not be enforceable if it would make one spouse a public charge. Pinsley v. Pinsley, 168 A.D.2d 863, 564 N.Y.S.2d 528 (1990); but see Nichols v. Nichols, 162 Wis. 2d 96, 469 N.W.2d 619 (1991) (contrary dicta). A clause which sets forth a specific schedule of amounts or which requires payments of a specific duration does not generally imply non-modifiability. See In re Jones, 222 Cal. App. 3d 505, 271 Cal. Rptr. 761 (1990); see also Aldinger v. Aldinger, 813 P.2d 836, 838 (Colo. Ct. App. 1991) (court could modify agreement-based alimony awarded for 24 months "or until further order of this court"). A general blanket release of all claims against the other spouse also does not prevent modification. Fukuzaki v. Superior Court, 120 Cal. App. 3d 454, 174 Cal. Rptr. 536 (1981).

Some states allow unlimited modification of agreement-based spousal support, but apply a higher standard than the normal changed circumstances test. New York, for example, allows modification only in cases where "extreme hardship" is present. Harkavy v. Harkavy, 167 A.D.2d 510, 562 N.Y.S.2d 182, 183 (1990). A mere change in child custody is not "extreme hardship." Id.; see also Fetherston v. Fetherston, ___ A.D.2d ___, 569 N.Y.S.2d 752, 754 (1991) (standard requires "proof that [the party seeking modification] is actually unable to support herself and is in actual danger of becoming a public charge"); Dworetsky v. Dworetsky, 152 A.D.2d 895, 544 N.Y.S.2d 242 (1989) (remarriage of husband and increase in wife's earnings not sufficient to constitute "extreme hardship"). In Florida, a spouse seeking modification of agreement-based support bears "an exceptionally heavy burden." Andrews v. Andrews, 409 So. 2d 1135 (Fla. Dist. Ct. App. 1982). This test was not met where the wife claimed she did not realize the size of her expenses until after the divorce, id., but it was met where the wife failed in a good-faith attempt to start a horse-breeding business. Gardner v. Edelstein, 561 So. 2d 327 (Fla. Dist. Ct. App. 1990). See also Swift v. Swift, 566 A.2d 1045 (D.C. 1989) (unmerged support provision can be modified only for unforeseen changed circumstances).

Finally, a third group of states flatly holds that the court has no power to modify the support provisions of an unmerged separation agreement. See Nooner v. Nooner, 278 Ark. 360, 645 S.W.2d 671 (1983); Harry M.P. v. Nina M.P., 437 A.2d 158 (Del. 1981); Carey v. Carey, 9 Kan. App. 2d 779, 689 P.2d 917 (1984); Wagner v. Wagner, 535 So. 2d 1269 (La. Ct. App.), cert. denied, 538 So. 2d 592 (La. 1988); Nassa v. Nassa, 399 Pa. Super. 58, 581 A.2d 674 (1990); Riffenburg v. Riffenburg, ___ R.I. ___, 585 A.2d 627 (1991); see generally Annotation, "Modification of Agreement-Based Divorce Decree--Alimony," 61 A.L.R.3d 520 § 8 (1975 & Supp. 1991).

It is worth stressing again that the statutes dealing with modification apply only to a limited class of cases: those involving true spousal support which is not part of an integrated bargain agreement and which was not merged into the divorce decree. As discussed above, where any of these conditions are not met, the modifiability of the provision depends upon principles of law other than the modification statute.

Contracts Limiting Modification. The contract may limit modification without preventing it altogether. For instance, in Aronson v. Aronson, 245 N.J. Super. 354, 585 A.2d 956 (A.D. 1991), the contract provided that the wife's earnings would not be a changed circumstance for purposes of modification. The court indicated that the clause was enforceable, but that it did not prevent the trial court from holding that the wife's inheritance was a sufficient changed circumstance to permit modification. See also In re Mateja, 183 Ill. App. 3d 759, 540 N.E.2d 406 (1989) (enforcing clause preventing any modification unless the wife's earnings were above $13,000).

Contracts Encouraging Modification. Most modification cases involve contracts which attempt to limit the court's power to modify support. Some contracts, however, attempt to encourage modification by providing for review at certain specific times even if the normal changed circumstances test is not met. Courts have generally been willing to enforce these agreements. See, e.g., McDonnal v. McDonnal, 293 Or. 772, 652 P.2d 1247 (1982).

Remarriage

The process for determining whether agreement-based spousal support terminates on remarriage is similar to the test for determining modifiability in general. Initially, the court must

verify that the payments are true spousal support. Disguised property division payments are not subject to modification and do not terminate upon remarriage. See Gieseler v. Gieseler, 787 S.W.2d 810 (Mo. Ct. App. 1990) (even though payments were labeled as "maintenance"); D'Huy v. D'Huy, 390 Pa. Super. 509, 568 A.2d 1289, 1294 (1990); Bittorf v. Bittorf, 390 S.E.2d 793 (W. Va. 1989). Next, the court must determine whether the payments are part of an integrated bargain. Hayes v. Hayes, 100 N.C. App. 138, 394 S.E.2d 675 (1990) (integrated bargain payments do not terminate on remarriage). Then, the court must check to see whether the agreement was merged into the decree. See Shipley v. Shipley, 305 Ark. 257, 807 S.W.2d 915 (1991) (where agreement merged into decree, payments terminated upon remarriage).

If the payments are true spousal support which were not part of an integrated bargain and which did not merge into the divorce decree, the court then looks to the substantive law. As with modifiability, in most states a statute establishes the effect of remarriage on agreement-based spousal support. The most common rule is that remarriage does terminate support unless the agreement provides otherwise. See, e.g., Daopoulos v. Daopoulos, 257 Ga. 71, 354 S.E.2d 828 (1987); see generally Annotation, "Modification of Agreement-Based Divorce Decree--Alimony," 61 A.L.R.3d 520 § 11 (1975 & Supp. 1991).

In applying this test, the courts are usually reluctant to extent support past remarriage unless the agreement is clear and explicit. A specific provision mentioning remarriage will of course prevent termination. See Daopoulos v. Daopoulos, 257 Ga. 71, 354 S.E.2d 828 (1987) (express mention of remarriage is necessary if support is to continue); Fredeen v. Fredeen, 154 A.D.2d 908, 546 N.Y.S.2d 60 (1989) (alimony lasted until a specific date, and would continue after that date if wife was still unmarried; before the specific date, alimony survived remarriage). An express no-modification clause may also be sufficient. See In re Sherman, 162 Cal. App. 3d 1132, 208 Cal. Rptr. 832 (1984); Jung v. Jung, ___ A.D.2d ___, 567 N.Y.S.2d 934, 935 (1991) ("unconditional" payments). Conversely, a provision requiring support for a certain specific duration will usually not be read to contain an implied term continuing support past remarriage. See Gunderson v. Gunderson, 408 N.W.2d 852 (Minn. 1987); Miller v. Miller, 784 S.W.2d 891 (Mo. Ct. App. 1990) (although noting that extrinsic evidence is admissible on the question); Kingery v. Kingery, 211 Neb. 795, 320 N.W.2d 441 (1982); In re Williams, 115 Wash. 2d 202, 796 P.2d 421 (1990); but see Sacks v. Sacks, 168 A.D.2d 733, 563 N.Y.S.2d 884 (1990) (alimony for specific duration does not cease on remarriage). A clause listing one or more express termination conditions other than remarriage will not generally be read to exclude remarriage as an additional grounds for termination. See, e.g., In re Rufener, 52 Wash. App. 788, 764 P.2d 655 (1986); but see Chiles v. Chiles, 778 P.2d 938, 939 (Okla. Ct. App. 1989) (support terminated "only upon [the wife's] death"; obligation survived wife's remarriage). A mere reference to "permanent" support also does not prevent termination. Edwards v. Benefield, 260 Ga. 238, 392 S.E.2d 1 (1990); In re Jensen, 212 Ill. App. 3d 60, 570 N.E.2d 881 (1991).

Cohabitation

Whether agreement-based support ceases on cohabitation depends upon the language of the agreement. The court must initially make the same inquiries it makes in modification and remarriage cases. Thus, if the payments are property division or child support or if they are part of an integrated bargain agreement, they do not terminate. Conversely, if the agreement merged into the decree, the court must look to the law on cohabitation and decree-based spousal support.

If none of the above conditions are met, the court looks to the substantive law. Some states have enacted specific statutes provided that support ceases upon cohabitation unless the agreement provides otherwise. E.g., Ill. Rev. Stat. Ann. ch. 40, ¶ 510(b) (Supp. 1991). Other states treat the question as a matter of common law.

In either case, however, the courts are reluctant to terminate support without a clear basis. For instance, in In re Giles, 197 Ill. App. 3d 421, 554 N.E.2d 714 (1990), the husband agreed to pay alimony until the wife's death or remarriage. The relevant statute provided that cohabitation terminated support unless the parties agreed otherwise in writing. Nevertheless, the court found that by stating only two specific termination conditions, the parties implicitly agreed to exclude any additional conditions. Thus, the payments did not terminate upon cohabitation. See also In re Tucker, 148 Ill. App. 3d 1097, 500 N.E.2d 578 (1986) (alimony stopped upon death, remarriage, or the completion of 121 payments; support did not cease upon cohabitation), cert. denied, 505 N.E.2d 363 (Ill. 1987); Ochs v. Ochs, 540 So. 2d 190 (Fla. Dist. Ct. App. 1989)

(where contract was silent and wife had previously rejected a proposed support clause listing cohabitation as a termination condition, support did not cease upon cohabitation); Croom v. Croom, ___ S.C. ___, 406 S.E.2d 381 (1991) (where agreement did not list cohabitation as grounds for termination, support continued even if wife cohabited solely in order to avoid termination upon remarriage).

Whether alimony automatically ceases upon cohabitation is a separate issue from whether the court can modify the agreement for changed circumstances. In In re Alvin, 184 Ill. App. 3d 644, 540 N.E.2d 919 (1989), the contract expressly provided that alimony would stop upon death or remarriage. Because there was an implied intent to exclude cohabitation from this list of conditions, the trial court erred by treating cohabitation as automatic grounds for termination. The provision was not sufficiently specific, however, to prevent the court from exercising its normal power to modify support for changed circumstances. The court therefore made a separate determination of whether there existed sufficient changed circumstances to modify the award. Since changed circumstances did not exist, the court ultimately held that the support did not terminate.

In construing contractual terms dealing with termination upon cohabitation, the court tend to construe the terms strictly. The cases will be reviewed in more detail in next month's article on specific construction issues, but terms such as "cohabitation" generally require a permanent physical and emotional relationship with a common residence and some degree of financial interdependency. See generally Cook v. Cook, 798 S.W.2d 955 (Ky. 1990); In re Winningstad, 99 Or. App. 682, 784 P.2d 101 (1989); see also Buchan v. Buchan, 550 So. 2d 556 (Fla. Dist. Ct. App. 1989) (cohabitation was not "remarriage" for purposes of agreement, even though wife refused to marry only for religious reasons and had had a priest bless her new relationship; contract requires a legal and not religious or social remarriage).

For a general discussion of the effect of cohabitation on agreement-based support, see Annotation, "Agreement-Based Alimony--Effect of Cohabitation," 47 A.L.R.4th 38 (1986 & Supp. 1991).

Death

The test for termination of alimony upon the death of the payor is similar to the tests for modification because of changed circumstances or remarriage. The first step is to classify the payments. If the payments are not true spousal support or are part of an integrated bargain, they do not cease upon death. See, e.g., In re Estate of Weller, 374 S.E.2d 712 (W. Va. 1988) (obligation survived the payor's death, because payments were part of the property division).

True spousal support payments ordinarily cease upon the death of the payor. If the parties agree to the contrary, however, their agreement will be enforced. See Britton v. Britton, 400 Pa. Super. 43, 582 A.2d 1335 (1990); see generally Annotation, "Alimony--Death of Obligor," 79 A.L.R.4th 10 (1990 & Supp. 1991).

Other Grounds for Termination

In addition to the traditional grounds of remarriage, cohabitation and death, separation agreements may state additional bases for termination of spousal support. These termination conditions are generally construed in light of the parties' overall intent. For instance, in Somogye v. Somogye, 167 A.D.2d 873, 562 N.Y.S.2d 989 (1990), the husband agreed to pay support until the wife completed a course in learning how to be a court stenographer. The wife then dropped out of the course before completing it. Because the wife herself made completion of the condition impossible, the court held that she had no right to complain it was not met. Accordingly, the husband's support obligation terminated.

Amount of Support

Most support clauses require set support at a specific amount. The parties are free, however, to establish a formula or schedule of differing amounts to be paid at different times. Such a schedule is enforceable even if the court itself lacks the power to award variable support where no agreement exists. See Curtis v. Curtis, 151 A.D.2d 945, 543 N.Y.S.2d 220, cert. denied, 74 N.Y.2d 616, 550 N.Y.S.2d 276 (1989); In re Perez, 60 Wash. App. 319, 803 P.2d 825 (enforcing agreement which required support in amount computed by applying present financial facts to prior child support guidelines), cert. denied, 813 P.2d 582 (1991); see generally Annotation, "Escalation Clause in Divorce Decree," 19 A.L.R.4th 830 (1983).

Some court have approved the use of language which is even less specific than a formula

or schedule. See In re Meisner, 807 P.2d 1205, 1208 (Colo. Ct. App. 1990) (contract to provide "whatever may be necessary" for support of children was not too vague to be enforced).

Insurance

Separation agreements sometimes requires one spouse to maintain the other spouse as beneficiary of life or health insurance for a period of time after the divorce. These provisions generally apply not only to specific policies, but also to any replacement policies acquired in exchange for the listed policy. Kruse v. Todd, 260 Ga. 63, 389 S.E.2d 488 (1990); In re Goodfriend, 151 A.D.2d 669, 542 N.Y.S.2d 379 (1989).

V. CHILD SUPPORT PROVISIONS

The law on separation agreements and child support is materially different from the law of separation agreements and spousal support. With respect to spousal support, the only persons affected by the agreement are the parties themselves, and they are free to reach whatever arrangements they desire. With respect to child support, however, the court has a duty to uphold the rights of the children, whose rights cannot be prejudiced by an agreement between the parties.

Standard for Modification

Because of the strong public policy favoring adequate support for children, the authority of the parties to contract on child support issues is limited. Indeed, some states hold that private agreements have no effect on child support, and that the court should determine child support independently from the agreement. See, e.g., Solis v. Tea, 468 A.2d 1276 (Del. 1983); McManus v. Howard, 569 So. 2d 1213 (Miss. 1990); see generally Turner, "Attacking and Defending Separation Agreements: Recent Case Law," 3 Divorce Litigation 73, 79-80 (1991); but cf. Bucholt v. Bucholt, 152 Vt. 238, 566 A.2d 409 (1991) (enforcing stipulation that either party's entry into graduate school would be a sufficient changed circumstance to allow modification of child support; stressing that agreement only triggered court's power to set an appropriate amount of support).

Other states, however, give a greater role to child support agreements. Divorce settlements generally result in better settlements at a smaller cost to the parties and the courts, and these advantages do not disappear merely because child support is involved. For this reason, some courts apply a higher standard when one party seeks to modify an agreement-based child support obligation. A District of Columbia court explained:

> The [higher] standard affords little freedom to the court to change support provisions because it assumes that the parties voluntarily agreed to abide by the specific terms of a separation agreement. It is also based on the premise that at the time of the separation agreement the best interests of the child were a "paramount consideration." . . . Accordingly, the [higher] standard does not diminish the court's responsibility . . . to assure that adequate child support is provided.

Albus v. Albus, 503 A.2d 1229, 1231 (D.C. 1986). A Maryland court stated the same point more simply:

> [The higher standard] simply gives credence to what we think is the soundly based proposition that, while parents, like all humans, often make mistakes, they will not act in a manner detrimental to their children.

Ruppert v. Fish, 84 Md. App. 665, 581 A.2d 828, 833 (1990)

The precise language of the higher standard varies from state to state. In the District of Columbia, the parent seeking modification must show "(1) a change in circumstances which was unforeseen at the time the agreement was entered and (2) that the change is both substantial and material to the welfare and best interests of the children." Cooper v. Cooper, 472 A.2d 878, 880 (D.C. 1984). In Massachusetts, the standard is "something more than a material change in circumstances, namely the existence of special equitable considerations which make relief appropriate." Ames v. Perry, 406 Mass. 236, 547 N.E.2d 309, 312 (1989). In Maryland, the agreement "ordinarily should be given effect; the court should presume, in other words, at least in the absence of compelling evidence to the contrary, that the decision or resolution reached agreeably by the parents is in the best interest of their child." See also In re Falat, 201 Ill. App. 3d 320, 559 N.E.2d 33, 37 (1990) (noting that "[s]ettlement agreements as they

relate to child support are looked upon favorably by Illinois courts," but setting no specific higher standard); see generally Annotation, "Modification of Agreement-Based Child Support," 61 A.L.R.3d 657 (1975).

In New York, when the purpose of modification is to further the rights of the parents, there must be "a showing that the agreement was not fair and equitable when entered into, or that an unanticipated and unreasonable change is circumstances has occurred resulting in a concomitant need." Merl v. Merl, 67 N.Y.2d 359, 493 N.E.2d 936, 502 N.Y.S.2d 713 (1986). The Merl court held that this standard was not met by the wife's decision to change the children's surname to that of her second husband. Cf. Schelter v. Schelter, 159 A.D.2d 995, 552 N.Y.S.2d 477 (1990) (under higher standard, where husband alleged total disability resulting from a work-related injury, error to deny modification without holding a hearing). Conversely, when the purpose of the modification is to uphold the child's right to adequate support, the court can act as if the agreement did not exist. See Montagnino v. Montagnino, 163 A.D.2d 598, 559 N.Y.S.2d 37 (1990) (where agreement was silent on college expenses, court could exercise its normal authority to order sharing of such expenses); Sujko v. Sujko, 160 A.D.2d 1184, 555 N.Y.S.2d 195 (1990) (where support did not commence under agreement until 1991, proper to award temporary support until that time).

The higher standard applies only where the separation agreement was approved or incorporated into the decree. Where the agreement was merged, it no longer exists as a contract and the normal changed circumstances test applies. Hamel v. Hamel, 539 A.2d 195 (D.C. 1988).

Regardless of which standard applies, if the court properly elects to award more support than required by the agreement, the court must determine whether the rest of the agreement severable from the child support provisions. Any provisions which are not severable share the fate of the child support provisions. See White v. Bowers, 101 N.C. App. 646, 400 S.E.2d 760 (1991). Severability is a question of fact, and it is error to grant summary judgment where the contract is ambiguous. Id.

Of course, if the court awards more support than required by a separation agreement, the disadvantaged spouse cannot recover the difference in a breach of contract action. Maki v. Straub, 167 A.D.2d 589, 563 N.Y.S.2d 218 (1990), cert. denied, 78 N.Y.2d 854, 573 N.Y.S.2d 644 (1991).

Post-Majority Child Support

In drafting the child support provisions of a separation agreement, the parties are not bound by the same limitations which apply to court-ordered support. In particular, the parties are free to extend child support past emancipation and past the death of the payor. Contracts exercising this freedom are quite common, and there is a substantial body of case law on both post-majority and post-death support.

Post-majority child support provisions are one of the most common types of child support clauses found in separation agreements. While a growing number of states allow the court to award at least college expenses without an agreement, many states still hold that the court's power to award support on its own initiative terminates at the age of majority. See generally Cutshaw v. Cutshaw, 220 Va. 638, 261 S.E.2d 52 (1979). In all states, however, the courts will enforce agreements to pay support for older children. See, e.g., Winset v. Fine, 565 So. 2d 794 (Fla. Dist. Ct. App. 1990); Cutshaw v. Cutshaw, 220 Va. 638, 261 S.E.2d 52 (1979).

Where the court has no common-law authority to award post-majority support, the court may lack power to modify the post-majority support provision of an agreement. See Albrecht v. Albrecht, 19 Conn. App. 146, 562 A.2d 528, cert. denied, ___ Conn. ___, 565 A.2d 534 (1989); Norris v. Norris, 473 A.2d 380 (D.C. 1984); Jones v. Jones, 244 Ga. 32, 257 S.E.2d 537 (1979); Morrison v. Morrison, 14 Kan. App. 2d 56, 781 P.2d 745 (1989); Hogan v. Hogan, 534 So. 2d 478 (La. Ct. App. 1988), modified on other grounds, 549 So. 2d 267 (La. 1989); In re White, 299 S.C. 406, 385 S.E.2d 211 (Ct. App. 1989); Cutshaw v. Cutshaw, 220 Va. 638, 261 S.E.2d 52 (1979); but see Bingemann v. Bingemann, 551 So. 2d 1228 (Fla. Dist. Ct. App. 1988) (modifying post-majority support without expressly discussing whether the court had power to do so), review denied, 560 So. 2d 232 (Fla. 1990). Where the court does have common-law authority to award post-majority support, modification is of course permitted. See In re Falat, 201 Ill. App. 3d 320, 559 N.E.2d 33 (1990).

College Expenses. The most common type of post-majority support clause is an agreement to pay college expenses. Since the costs of college are difficult to anticipate in advance, these agreements

could rarely be enforced if the courts insisted upon a specific listing of the costs and amounts covered. In recognition of this fact, the courts have enforced these agreements even where their language was very broad. See, e.g., In re Pierce, 95 B.R. 154 (N.D. Cal. 1988) ("educational expenses"); Yarbrough v. Motley, 579 So. 2d 684 (Ala. Civ. App. 1991) ("reasonable" expenses); Stevens v. Stevens, 798 S.W.2d 136, 137 (Ky. 1990) (contract declared father's "intention" to pay college expenses in an amount to be agreed upon by father and child); Smith v. Smith, 159 A.D.2d 929, 553 N.Y.S.2d 243, 244 (1990) ("all sums necessary or desirable" for support of child included college expenses); Stefani v. Stefani, 166 A.D.2d 577, 560 N.Y.S.2d 862 (1990) (father require to pay expenses only if "financially able"). But see Glassberg v. Obando, 791 S.W.2d 486 (Mo. Ct. App. 1990) (contract requiring payment of unspecified expenses was too broad, but remedy was a court order specifying the expenses; contract was not unenforceable).

Where the agreement refers only to reasonable college expenses, it cover both tuition payments and other educational costs such as textbooks. Kiev v. Kiev, 454 N.W.2d 544 (S.D. 1990). In addition, the agreement includes the room and board costs if the child resides away from home. Allyn v. Allyn, 163 A.D.2d 665, 558 N.Y.S.2d 983 (1990), cert. denied, 77 N.Y.2d 806, 569 N.Y.S.2d 610 (1991); Kiev v. Kiev, 454 N.W.2d 544 (S.D. 1990).

Some agreements give the payor a role in choosing the child's school. See Cooper v. Farrell, ___ A.D.2d ___, 566 N.Y.S.2d 347 (1991) (where father had right to make final selection of school, father could not be forced to contribute toward private school he had not chosen). Where the contract is silent on choice of school, a promise to pay college expenses does not give the payor a unilateral right to select the child's college. Mack v. Mack, 148 A.D.2d 984, 539 N.Y.S.2d 219 (1989). The choice of college, however, may be a factor in determining the amount of reasonable college expenses. Id.; cf. Pharoah v. Lapes, 391 Pa. Super. 585, 571 A.2d 1070 (1990) (brilliant child declined full scholarship at Georgia Tech to attend Massachusetts Institute of Technology (M.I.T.); holding over a dissent that reasonable support included part of the tuition at M.I.T.).

College expense clauses frequently require the payor to contribute toward the expenses only if his financial condition so permits at the time when the child actually attends college. Where the agreement does not include a specific test, the court will make its own determination of ability to pay. See, e.g., Stefani v. Stefani, 166 A.D.2d 577, 560 N.Y.S.2d 862, 863 (1990) (father required to pay if "financially able"; father had net annual income of $23,500; father had ability to pay total of $21,500 in expenses spread over six years, but payment of interest on this amount would be unduly burdensome); Whelan v. Frisbee, 29 Mass. App. Ct. 76, 557 N.E.2d 55, 57 (1990) (mother promised to contribute "in good faith" toward her children's college expenses; where mother had borrowed $100,000 to invest in questionable business, mother should have made a contribution under the agreement).

Where the agreement requires payment of expenses without mentioning need, lack of need is not a defense to the obligation. Frank v. Frank, 402 Pa. Super. 458, 587 A.2d 340 (1991). Likewise, unless the contract provides otherwise, the payor's obligation is not reduced merely because the child received financial assistance from another source. Frank v. Frank, 402 Pa. Super. 458, 587 A.2d 340 (1991). Finally, where the contract is silent on the child's course load or academic performance, it is error to imply a condition that the child must take 15 credit hours per semester and maintain a 2.0 grade point average. Bingemann v. Bingemann, 551 SO. 2d 1228 (Fla. Dist. Ct. App. 1988), review denied, 560 So. 2d 232 (Fla. 1990).

Post-Death Child Support

The parties may also agree to extend child support past the death of the payor. Since this is an exception to the general rule that the payor's death terminates child support, post-death support is available only where the agreement clearly provides for it. E.g., Wendell v. Sovran Bank, 780 S.W.2d 372 (Tenn. Ct. App. 1989).

Obviously, the standard for post-death support is met where the contract expressly states that death shall not terminate child support. Less specific language may also suffice. For instance, where the contract stated that support would continue until the child graduated from college or reached age 23, one court found that it did not terminate upon death. Wendell v. Sovran Bank, 780 S.W.2d 372 (Tenn. Ct. App. 1989). In addition to relying on language of the agreement, the court also stressed the fact that the contract required the husband to maintain insurance on his own life. The presence of such insurance, the court said, was a factor in favor of post-death

support. But see Hornsby v. Anderson, 567 So. 2d 1047 (Fla. Dist. Ct. App. 1990) (similar life insurance is evidence against post-death support).

ATCH 3: A MINI-ENCYCLOPEDIA OF AMBIGUOUS SEPARATION AGREEMENT PROVISIONS

Brett R. Turner

In the last two issues, we have discussed in depth the recent case law on construing separation agreements. Often, however, construction questions are issues of fact rather than issues of law. When faced with issues of fact, the attorney has no option other than to search the reported case law and hope that the particular provision at issue has been construed before. Since no commonly available source lists ambiguous provisions in any organized manner, such a search can be difficult to conduct.

To take at least one step toward solving this problem, we have compiled a list of specific clauses interpreted in recent construction cases. The list is arranged alphabetically, and we have systematically tried to include reported cases going back as far as mid-1989. Selected earlier cases have been included as well. If the readership shows sufficient interest in this listing, we might extend the period of coverage forward and/or backward in a subsequent issue.

Abandons: A separation agreement provided that the wife would lose certain benefits if she "abandons" or "deserts" the marital home. The wife did not lose her benefits when the court gave the husband exclusive use of home, because leaving under court order was neither abandonment nor desertion. Lang v. Lang, 551 So. 2d 547 (Fla. Dist. Ct. App. 1989).

Adjusted Gross Income: Where an agreement allocated college expenses in proportion to "adjusted gross income" as listed on each spouse's federal income tax return, the trial court properly used actual income rather than earning capacity. Albrecht v. Albrecht, 19 Conn. App. 146, 562 A.2d 528, cert. denied, 212 Conn. 813, 565 A.2d 534 (1989).

Age of Majority: A separation agreement provided that support would continue until the "age of majority." This clause meant that support would stop at the statutory age of majority, which was 18. The result was not changed by another statute providing that the duty of support at law extends until the child graduates from high school. If post-majority support was payable under this statute, the proper plaintiff was the child and not the mother. There was a strong dissenting opinion. In re Lazar, 59 Ohio St. 3d 201, 572 N.E.2d 66 (1991).

All sums necessary or desirable: "All sums necessary or desirable" for support of child included college expenses. Smith v. Smith, 159 A.D.2d 929, 553 N.Y.S.2d 243, 244 (1990).

Annual Net Income: The husband agreed to pay the wife one-third of his "annual net income" over $20,000. The phrase included contributions made by the husband's employer to the husband's pension and profit-sharing plans. Rosenthal v. Rosenthal, ___ A.D.2d ___, 568 N.Y.S.2d 603 (1991).

Any State University: The parties agreed that the husband would pay the child's college tuition at "any state university in South Carolina." The parties were South Carolina residents at the time the agreement was signed, but the wife and children subsequently moved to North Carolina. Thus, when the child chose to attend a South Carolina university, she was charged the out-of-state tuition. The court held that under the plain language of the agreement, the husband was required to pay the entire tuition, regardless of whether it was the in-state or out-of-state amount. In re White, 299 S.C. 406, 385 S.E.2d 211 (Ct. App. 1989).

Cohabitation: An agreement provided that the wife's support would cease upon "cohabitation." The term clearly required not only a sexual relationship, but also a common residence. Where the wife's paramour had his own separate residence, the support did not terminate. Cook v. Cook, 798 S.W.2d 955 (Ky. 1990).

College and Professional Education: A contract to pay the expenses of "college and professional education" applied only to normal colleges. It did not cover the expenses of a trade school at which the child was studying automobile mechanics. In re Holderrieth, 181 Ill. App. 3d 199, 536 N.E.2d 946 (1989).

Consumer Price Index: A surprising number of agreements call for support to increase proportionally with the "consumer price index." The agreements are problematic, for the federal government publishes a number of different consumer price indexes. Where

the agreement does not specify which one is intended, the contract is ambiguous and the court must look to extrinsic evidence. See Nisbet v. Nisbet, 102 N.C. App. 232, 402 S.E.2d 151 (1991) (remanding the issue for a full hearing).

Costs incurred for education: "Costs and expenses incurred for and in connection with such education" includes child's college room and board expenses, but not the expense of special foods required because of medical problems. Allyn v. Allyn, 163 A.D.2d 665, 558 N.Y.S.2d 983, 984 (1990).

Departure With Intent to Establish a Separate Residence: A separation agreement provided that the husband's duty to provide post-majority support ended with the child's "departure [from the wife's home] with intent to establish a separate residence." This standard was not met when the child left home to attend college. Fetherston v. Fetherston, ___ A.D.2d ___, 569 N.Y.S.2d 752 (1991).

Dependent: A separation agreement provided that the husband's support obligation stopped when the child was emancipated and no longer "dependent." A "dependent" is any person who looks to another for support. Where the child's physical disabilities had limited his earning capacity and forced him to postpone plans for future education, the child was still dependent, even though he was past the age of majority. The husband's support obligation therefore continued. Oblizalo v. Oblizalo, 54 Wash. App. 800, 776 P.2d 166 (1989).

Deserts: See Lang v. Lang, 551 So. 2d 547 (Fla. Dist. Ct. App. 1989) (summarized in this article under "abandons").

Education beyond the high school level: The phrase "education beyond the high school level" includes both college and medical school. Allyn v. Allyn, 163 A.D.2d 665, 558 N.Y.S.2d 983, 984 (1990).

Educational Expenses: A contract to pay half of a child's "educational expenses" for college is not too vague to be enforced. In re Pierce, 95 B.R. 154 (N.D. Cal. 1988).

Exceeds: A separation agreement required that the husband pay 25% of the difference by which $1,400 "exceeds [the wife's] actual psychiatry bills." The wife incurred no such bills, but argued that she should received 25% of the difference between $1,400 and zero. The court disagreed. The agreement clearly required the husband to make payments only if the wife's actual psychiatry bills were greater than $1,400. Scott v. Mohr, 191 Ga. App. 825, 383 S.E.2d 190, 191 (1989).

Financially able: A father with net annual income of $23,500 was "financially able" to pay $21,500 in college expenses spread out over six years; but payment of interest on this amount would be unduly burdensome. Stefani v. Stefani, 166 A.D.2d 577, 560 N.Y.S.2d 862, 863 (1990).

Good faith: A child's mother agreed to contribute toward the child's college expenses "whatever contribution she determines in good faith she is able to provide." She then borrowed $100,000 to invest in a questionable business. The court found that the mother was obligated to contribute to the child's college expenses. Whelan v. Frisbee, 29 Mass. App. Ct. 76, 557 N.E.2d 55, 57 (1990).

Gross Earnings: The husband promised to pay alimony equal to 15% of his "gross earnings." The provision applied to the husband's total real estate commissions. It did not apply to either the husband total taxable income or his total commissions less business expenses.

Gross Income: A separation agreement awarded the wife alimony equal to 15% of the husband's "gross income" over $95,000. The husband acquired stock options as consideration for employment and used them to purchase stock at less than fair market value. The difference between the value and the purchase price was not "income" under the agreement. The court relied significantly on the fact that in the original divorce action, earlier options had been listed on both parties' financial statements as "assets" rather than "income." Baldwin v. Baldwin, 19 Conn. App. 420, 562 A.2d 581 (1989).

Gross Income: A separation agreement awarded the wife part of the husband's "current gross income." This provision entitled the wife to part of the husband $117,000 retirement incentive. Keene v. Keene, ___ A.D.2d ___, 572 N.Y.S.2d 592, 593 (1991).

Insurance program: An "insurance program" includes not only a policy purchased from a private insurer, but also insurance provided as a fringe benefit of employment. The term also includes any policy purchased as a replacement for the exact policy owned when the agreement was signed. Kruse v. Todd, 260 Ga. 63, 389 S.E.2d 488 (1990).

Income: See generally Annotation, "Separation Agreement--Alimony--'Income,'" 79 A.L.R.2d 609 (1961).

Intention: A child's father stated in a separation agreement his "intention" to pay college expenses in an amount to be agreed upon by father and child. This language was sufficient to create an enforceable obligation, and it was not an unenforceable agreement to agree. Stevens v. Stevens, 798 S.W.2d 136, 137 (Ky. 1990).

Matrimonial Action: The parties agreed to waive all rights to recover attorney's fees in any future "matrimonial action." Two years later, the husband moved to reopen the judgment and set aside the agreement on grounds of duress, fraud and unconscionability. The motion was a "matrimonial action," and neither party could recover attorney's fees. Healy v. Healy, 167 A.D.2d 687, 562 N.Y.S.2d 880 (1990).

Net Income After Taxes: The phrase "net income after taxes" refers to the federal tax definition of adjusted gross income, minus the amount of taxes paid. It does not refer to the federal tax definition of taxable income, which includes a number of artificial deductions. Paul v. Paul, 235 Ga. 382, 219 S.E.2d 736 (1975).

Net of Tax: A promise to pay a certain amount of alimony "net of tax" means that the amount of alimony minus the taxes incurred on that alimony should equal the stated amount. In computing the best way to achieve this goal, the trial court has discretion to accept any reasonable tax expert's opinion. Sadur v. Ellison, 553 A.2d 651 (D.C. 1989).

Net Pay: The father agreed to pay 12 1/2% of his "net pay" per child in child support. "Net pay" includes not only the face amount of the husband's paycheck, but also the amount of any income tax refund he receives for the year in question. Donato v. Lucarelli, 109 A.D.2d 741, 486 N.Y.S.2d 58 (1985).

Net Recovery After Attorney's Fees: The husband was injured by medical malpractice during the marriage, and the separation agreement awarded the wife one-fourth of the "net recovery to him after attorney's fees." The husband settled the claim for $50,000 and paid $20,000 to his attorney, but he claimed the right to subtract additional expenses as well. The court held that by specifically mentioning attorney's fees, the parties had intended to exclude all other expenses from the definition of "net recovery." The wife's share was therefore one-fourth of $30,000, or $7,500. Harrington v. Perry, 103 N.C. App. 376, 406 S.E.2d 1 (1991).

Permanent Resident: Under the parties' agreement, the wife's support ceased if an unrelated male became a "permanent resident" of her household. Where her paramour visited her frequently but had his own residence and kept no clothes at the wife's home, the support did not terminate. Phillips v. Phillips, 555 So. 2d 698 (Miss. 1989).

Private and/or Parochial School: A promise to pay the expenses of "private and/or parochial school" includes the expenses of college. The failure to specify which expenses would be paid made the agreement too broad. The proper remedy was a court order specifying the expenses, however, and the contract was not unenforceable. Glassberg v. Obando, 791 S.W.2d 486 (Mo. Ct. App. 1990).

Proceeds: The husband agreed to give the wife part of the "proceeds" of any "sale" of certain corporate stock. The corporation then sold its assets, and the husband exchanged his stock in the seller corporation for stock in the buyer corporation. This transaction constituted a "sale." Because the wife's interest in the "proceeds" attached to whatever the husband received in exchange for the old stock, the wife should receive stock in the new corporation and not a monetary award. Braswell v. Braswell, 574 So. 2d 790 (Ala. 1991).

Regular costs: "Regular costs" of college included tuition, room and board, and textbooks. It did not include clothing or job-hunting costs. Kiev v. Kiev, 454 N.W.2d 544 (1990).

Remarriage: Under the parties' agreement, the wife's support terminated on death or "remarriage." After the divorce, the wife started a new relationship, and sought a religious annulment of her first marriage. She was unable to obtain such an annulment, and her religious convictions thus prevented her from marrying again. She nevertheless began cohabiting with her new partner, and even had a priest bless the new relationship. Despite these indicia of marriage, the wife's support did not terminate. "Remarriage" as used in the contract requires a legal remarriage, the court held, and not merely religious or social remarriage. Buchan v. Buchan, 550 So. 2d 556 (Fla. Dist. Ct. App. 1989).

Resided on a Substantially Continuous Basis: A separation agreement provided that the wife's support would terminate if she "resided on a substantially continuous basis" with another man. The wife's paramour spent 3-4 nights per week at the wife's home, but kept his belongings at a separate residence. In addition, there was no financial interdependency between the couple. The contractual standard was not met, and the wife's support therefore continued. Emrich v. Emrich, ___ A.D.2d ___, 571 N.Y.S.2d 49 (1991).

Retirement Pay: A separation agreement awarded the wife part of the husband's military "retirement pay." The clause applies to all military retirement benefits, even if those benefits technically constitute "retainer pay" rather than "retired pay." Feick v. Thrutchley, 322 Md. 111, 586 A.2d 3 (1991); In re Lawson, 409 N.W.2d 181 (Iowa 1987).

Sale: The husband agreed to make monthly housing payments if the wife "sold" the marital home. This provision did not require sale to a third party, and it was triggered when the parties agreed that the husband would buy out the wife's interest. Webster v. Webster, 566 So. 2d 214 (Miss. 1990).

Sale: The husband agreed to give the wife part of the proceeds of any "sale" of certain corporate stock. The corporation then sold its assets, and the husband exchanged his stock in the seller corporation for stock in the buyer corporation. This transaction constituted a "sale," and the husband was obligated to give part of his new stock to the wife. Braswell v. Braswell, 574 So. 2d 790 (Ala. 1991).

Sale: The parties owned a trailer park. Their separation agreement provided that the husband would retain the park, but that he could sell it for a price not less than $180,000. If he did so, the wife received part of the proceeds; and if he died owning the trailer part, the husband was required to devise part of it to the wife. Shortly before his death, the husband sold the trailer park to his second wife for exactly 180,000, even though its fair market value was $970,000. The court held that the transaction was not a "sale," because the term "sale" implies a price determined by arms-length negotiation. The husband therefore did not comply with the agreement merely by giving the wife her share of the $180,000 stated sale price. Cravero v. Holleger, 566 A.2d 8 (Del. Ch. 1989).

So Long As: A separation agreement required the husband to pay child support "so long as" the children were dependent or unemancipated. When a promise applies "so long as" certain conditions are met, the promise becomes unenforceable only when none of the listed conditions is met. By contrast, if the contract had used "until," the promise would have become unenforceable when any one of the listed conditions was met. Where one of the children was emancipated but still dependent, the husband's support obligation continued. Oblizalo v. Oblizalo, 54 Wash. App. 800, 776 P.2d 166 (1989).

Substantially Similar to a Marriage Relationship: An agreement between the parties provided that alimony would cease if the payee wife entered into a relationship which was "substantially similar to a marriage relationship." This provision was triggered only where the wife entered into an emotional and physical relationship with some degree of financial interdependency. Where the relationship was emotional and physical but the wife was entirely financially independent, the support did not terminate. In re Winningstad, 99 Or. App. 682, 784 P.2d 101 (1989).

Taxes deriving from permanent alimony: The husband promised to pay permanent alimony, plus all "taxes . . . deriving from . . . permanent alimony." The taxes should be computed as if the wife had no income other than the alimony. Taxes paid because the wife's other income put her in a higher tax bracket were not within the scope of the provision. O'Hara v. O'Hara, 564 So. 2d 1230 (Fla. Dist. Ct. App. 1990).

Taxes: "Net income after taxes" means net income minus the actual taxes paid by the husband in the year in question. It does not mean the amount of taxes the husband would have paid if he had remained single instead of remarrying. Paul v. Paul, 235 Ga. 382, 219 S.E.2d 736, 739 (1975).

Until: See Oblizalo v. Oblizalo, 54 Wash. App. 800, 776 P.2d 166 (1989) (summarized in this article under "so long as").

ATCH 4: AVOIDING ATTORNEY MALPRACTICE IN DRAFTING SEPARATION AGREEMENTS

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In late 1991 and early 1992, **Divorce Litigation** has published a series of articles on attacking, defending and interpreting separation agreements. As these articles discuss, while courts are sensitive to the unique pressures of the pre-divorce period, they are nevertheless reluctant to overturn a separation agreement merely because it was a bad bargain. When such a bad bargain is approved by the court, the disadvantaged spouse's next recourse is frequently a malpractice action against his or her attorney.

This article addresses some common complaints alleged against attorneys in malpractice actions arising out of the negotiation and drafting of divorce settlement agreements. Such complaints commonly allege a number of different acts of malpractice, including representation of conflicting interests, failure to fully investigate assets, failure to understand the applicable law, failure to effect the intent of the parties, and failure to adequately protect property to ensure enforcement of the agreement.

This article will not attempt to discuss all matters which should be addressed in drafting separation agreements. The article will instead suggest some of the more practical aspects of effective negotiation and drafting which can reduce the likelihood of future claims against the attorney.

Terminology. As noted in prior articles, courts employ differing terms to describe various types of divorce settlement agreements, including: separation agreements, property settlements, stipulations, consent judgments or other forms of agreement. See 2 H. Clark, The Law of Domestic Relations in the United States 409 (2d ed. 1987). These terms are not precise legal terms and they all refer to means of compromising divorce actions. Id. Therefore, consistent with clarity and prior articles, the terms "separation agreement" and "divorce settlement" in this article are used to refer to all types of settlement agreements made in contemplation of divorce.

Representing Conflicting Interests. The initial step in negotiating separation agreements is determining who will represent the parties in the negotiation process. Due to the emotional nature surrounding the divorce proceedings and the potential for over-reaching by either, or both, of the spouses, it is clearly recommended that both parties be represented by counsel.

Nevertheless, one attorney sometimes represents both parties in preparing the agreement. This situation often arises when the parties believe they are engaged in an amicable divorce, and they both trust a lawyer who is a family friend or who has represented the couple in matters during the marriage. They may seek to avoid the additional cost, or potential litigiousness, of employing another attorney in the matter. These parties often overestimate their goodwill, however, and fail to recognize the clearly adverse interests they possess.

While an attorney may believe he is helping his clients save money or avoid unnecessary adversarial tactics, such dual representation has been strongly criticized by the courts. The opinion in Blum v. Blum, 59 Md.App. 584, 477 A.2d 289 (1984), highlights the problems that can arise in cases of dual representation. There, an attorney represented both the husband and wife in drafting a separation agreement, which the wife later challenged on grounds of unfairness. Although the suit was not a malpractice action against the attorney, the court nonetheless stated:

> Where there is a potential conflict of interest between the parties, as is true in every domestic dispute, it is inappropriate to attempt to represent them both. This is true even where the parties appear to be in full accord at the time . . . In this case, Mr. and Mrs. Blum approached an attorney who had represented them in the past and presented him with their separation agreement. Counsel never informed the parties of their respective rights, never inquired of the assets of the parties, and never advised the parties of any potential conflicts of interest which might arise as a result of his representing both of them.

Id. at 296. The court held that the Rules of Ethics mandated at the very least, that the attorney disclose the possible ramifications of his dual representation and explain the parties' respective rights. Id. at 297. See also Ishmael v. Millington, 50 Cal.Rptr. 592, 241 Cal.App.2d 529 (1966) (attorney representing both parties could be found negligent for failing to disclose possible conflict and possibility of obtaining independent legal advice).

The court in Eltzroth v. Eltzroth, 67 Or. App. 520, 679 P.2d 1369 (1984), followed this lead. The court stated that although the Oregon Code of Professional Responsibility permitted such dual representation in very limited circumstances, the court did not condone such a practice. The court further noted that under the Code of Professional Responsibility, "when the proposed 'agreement' between the parties presents obvious inequities on its face and raises questions and conflicts over the disposition of a substantial marital asset, it is the clear duty of the attorney to withdraw and advise the parties to seek independent counsel." Id. at 1373 n.7. See also Welker v. Welker, 680 S.W.2d 282 (Mo. App. 1984) (better practice is for both parties to be represented by separate counsel); Holmes v. Holmes, 145 Ind.App. 52, 248 N.E.2d 564 (1969) (preparing property agreement for both parties is bad practice as it may lead to fraud and collusion); but cf. Perry v. Perry, 406 N.Y.S.2d 551, 552 (A.D. 1978) (attorney managed to maintain neutrality and agreement was arrived at fairly despite dual representation).

In several cases, dual representation of parties to a divorce has led to sanctions against the attorney. In Willis v. Maverick, 723 S.W.2d 259 (Tex. App. 1986), for instance, the jury awarded $26,568 plus $610,000 in punitive damages against an attorney who was a friend of both parties. The attorney had agreed to draft a formal written agreement based upon the parties' prior informal agreement. In drafting the agreement, however, he made one change which benefitted the husband by permitting him to bring a partition action on the home. The informal agreement had awarded the entire home to the wife for the benefit of the children. Although the appellate court reversed the verdict on limitations grounds, the case nevertheless illustrates the dangers of preparing an agreement on behalf of both parties.

Similarly, in Liles v. Liles, 289 Ark. 159, 711 S.W.2d 447 (1986), an attorney who represented both parties was ordered to return a $10,000 fee and to pay half of the wife's $31,318 attorney's fees in setting aside a property settlement agreement. The attorney led the wife to believe he was representing her, when, in fact, he had begun an investigation into her alleged drug use on behalf of the husband. The court found such conduct to constitute fraud against the wife and awarded damages against the attorney.

Several state have issued ethical opinions concerning dual representation in divorce cases. While some state ethics opinions specifically permit such dual representation, the opinions uniformly require an attorney to obtain the informed consent of the parties after full disclosure of the potential conflicts, and many opinions contain additional restrictions. See, e.g., Oregon State Bar Opinion 218 (6/15/72); Colorado Bar Association Opinion 68 (4/20/85); D.C. Bar Opinion 143 (11/13/84); Kentucky Bar Opinion E-290 (9/84); Montana State Bar Opinion 10 (12/80); Tennessee Formal Ethics Opinion 81-F-16 (8/26/81). Other state ethics opinions have found the potential for conflict so great that they have prohibited dual representation in divorce actions even when the parties give their informed consent. See, e.g., Connecticut Bar Association Formal Opinion 33 (1982); South Carolina Bar Opinion 81-13 (1/82); Wisconsin State Bar Opinion E-84-3 (5/84). Before attempting to represent both parties to a divorce, therefore, an attorney should consult applicable case authority and ethics opinions in his jurisdiction to determine the propriety of such representation.

Full Investigation of Assets. An attorney may also be held liable for damages resulting from undervaluation of one party's estate where he fails to adequately investigate the existence and value of marital assets.

In Helmbrecht v. St. Paul Insurance Co., 122 Wis.2d 94, 362 N.W.2d 118 (1985), for example, the court upheld a jury verdict of $250,000 against an attorney because he failed to employ adequate discovery measures to determine all marital assets. Although the attorney took the husband's deposition concerning the existence of marital property, he did not question the validity of any of the information provided, did not request documentation to verify the husband's information, and did not obtain independent appraisals of the property revealed. The attorney was charged with the value of the wife's share of assets she would have received if the attorney had not been negligent less the amount she received under the agreement.

Similarly, in Pickett v. Haislip, 73 Md.App. 89, 533 A.2d 287 (1987), cert. denied, 311 Md. 720, 537 A.2d 273 (1988), the court upheld a jury verdict of $72,682.50 against a law firm for negligence in failing to fully investigate the existence of marital assets. Again, the firm failed to pursue formal discovery to determine all of the marital assets and further failed to employ any experts to determine the value of the known marital assets. The court found the wife had sufficiently proved that the law firm's negligence was the proximate cause of her damages. See also Sutton v. Mytich, 197 Ill.App.3d 672, 555 N.E.2d 93 (1990) (cause of action against attorney allowed on a claim that the attorney failed to complete discovery of marital assets); but cf. Harris v. Maready, 84 N.C.App. 607, 353 S.E.2d 656, cert. denied, 320 N.C. 168, 358 S.E.2d 50 (1987) (attorney was granted summary judgment where he presented the most accurate and reliable information regarding the husband's finances).

Although full discovery and a thorough valuation of assets is strongly advisable, such information gathering can be very expensive. Thus, while an attorney should strongly advocate full discovery, there may be cases in which such discovery is beyond the client's means. In these cases, the attorney should protect himself by carefully documenting his advice advocating thorough discovery, and documenting any contingent advice if a full investigation and evaluation is rejected.

In Bowen v. Arnold, 380 N.W.2d 531 (Minn.App. 1986), for example, an attorney was ultimately relieved of liability allegations that he inadequately investigated the husband's business assets, but only after a full jury trial and an appeal. The attorney claimed he encouraged the client to obtain an appraisal and that he explained the various discovery methods available to obtain financial information. He did not, however, prevent sufficient documentation of such advice to warrant summary judgment in his favor.

Adequate Knowledge of Relevant Law. Courts have also held attorneys liable for loss to their clients where the attorney fails to discover or understand the applicable law. A domestic relations attorney must have sound knowledge of family law, as well as basic knowledge of property and tax law. It is also essential, as in any other area of law, that an attorney keep abreast of the latest developments in the law.

This point was aptly illustrated in Bross v. Denny, 791 S.W.2d 416 (Mo. Ct. App. 1990), where the court awarded final judgment of $108,000 against the wife's attorney. The attorney had failed to provide for division of the husband's military pension benefits in the separation agreement, believing that such benefits were separate property under McCarty v. McCarty, 453 U.S. 210 (1981). At the time of initial consultation in early 1982, the attorney's advice was correct. Legislation overruling McCarty was enacted on September 8, 1982, before signing of the separation agreement, however, and became effective February 1, 1983, only days after the final dissolution hearing. The attorney admitted that he was not aware of the change in the law.

The Bross decision further illustrated the courts' unwillingness to hold clients contributorily or comparatively negligent when their attorneys are negligent in performing their duties. The court reversed a jury finding that the client was 25% at fault because she did not seek a more advantageous settlement in the original agreement, and therefore that she would not likely have sought any interest in her husband's pension benefits had she known of them. Id. at 423. The court found this evidence irrelevant and increased the award from $81,000 (75% of the total damages) to the full $108,000 damages. See also Helmbrecht v. St. Paul Insurance Co., 122 Wis.2d 94, 362 N.W.2d 118, 133 (1984) (reversing jury finding that client was 25% negligent, holding that "if [the wife] was careless, it was in her misplaced reliance upon [the attorney's] negligent representation of her.")

In some cases, an attorney may be aware of the current law, but the law may be unsettled. In instances where the law is unclear, an attorney can protect himself from negligence claims by informing his client of the ambiguity and allowing the client to decide how to proceed in light of the uncertainty. Again, adequate documentation is essential to adequate defense of such claims.

In Steele v. Davisson, Davisson & Davisson, 437 N.E.2d 493 (Ind.App. 1982), the attorney was subject to a jury trial where he failed to provide documentation of his advice in view of uncertain law. The client requested that the separation agreement include a clause terminating maintenance payments upon remarriage, but no such provision was included in the final agreement. The attorney claimed that he advised the client that he was not sure such a provision would be enforceable based on his interpretation of applicable law. The

client alleged he was never given such advice, and that he had not authorized the omission of the clause in the agreement.

The appeals court held that under a proper reading of the law, termination upon remarriage clauses were valid and enforceable. Although the court held that the attorney's interpretation of the law was wrong, the court did not grant a trial on the attorney's negligence on that basis alone. Rather, the court allowed the cause of action because the attorney had not proved that he told the client the law was unclear and that he allowed the client to make a decision based on the recognized ambiguity.

Although the attorney in Steele was uncertain of the law, he could have prevented a costly trial by documenting his advice that he was unsure of the outcome, and by allowing the client to make the decision whether to include the provision in light of the uncertainty. In addition, he may have prevented the claim by encouraging the client to get a second opinion if he was not satisfied with the attorney's advice.

Meeting the Intent of the Parties. Further claims against attorneys in drafting separation agreements are based on allegations that the agreement simply does not meet the intent of the parties. The key to avoiding or defending these claims is to draft the agreement in as simple and understandable terms as possible, and to explain each provision before having the client sign the agreement.

In Viccinelli v. Causey, 401 So.2d 1243 (La.App. 1981), cert. denied, 409 So.2d 615 (La. 1981), for example, an attorney was found negligent where he knew of an existing judicial mortgage on the marital home which the wife received in a separation agreement, but failed to inform the wife of the judgment or to explain its effect on the value of the property. Although the wife signed the agreement, the court held that the wife would not have signed if she knew of the judgment. The attorney was therefore liable, together with the husband, for the cost of satisfying and removing the mortgage from the property.

Similarly, the court in Erwin v. Frazier, 786 P.2d 61 (Okla. 1989) found the terms of a separation agreement sufficiently ambiguous to create a question of fact whether the agreement met the intent of the parties. The evidence showed that the agreement was intended to provide a $25,000 payment "off the top" of the sale of the marital home with the remaining proceeds divided equally. The divorce decree and the divorce court's ruling, however, required payment of the $25,000 after division of the entire sale proceeds, resulting in a $12,500 loss to the client. The court found that the facts presented a jury question as to whether the attorney was negligent in drafting the agreement.

In several cases, attorneys have avoided liability by drafting the agreement in simple terms, explaining its provisions carefully, and making certain that the client reviewed the agreement before signing it. For example, in Lowry v. Lowry, 99 N.C.App. 246, 393 S.E.2d 141 (1990), the court upheld summary judgment in favor of an attorney who drafted a separation agreement, where the wife claimed she thought the agreement provided her $500,000 net of certain credits due her husband, but the agreement provided for $500,000 gross, less those credits. In affirming summary judgment for the attorney, the court reasoned:

> The plaintiff was given ample opportunity to read and evaluate the Separation Agreement she signed. She is an educated woman and at one time was a licensed realtor. We find it important to note that the error she alleges required no legal explanation and could easily have been discovered by adding four numbers contained in the Appendix to the Separation Agreement.

393 S.E.2d at 145. The court further noted that the attorney sent over 19 letters and held 88 telephone conferences with the client. When the client indicated that she did not understand the terms of the agreement over the telephone, the attorney told her to come to the office where she was given a complete explanation of the document.

Similarly, in Berman v. Rubin, 138 Ga.App. 849, 227 S.E.2d 802 (1976), the court upheld summary judgment in favor of an attorney against a claim that the separation agreement did not meet the husband's instructions. The husband claimed the attorney was negligent in drafting an agreement which provided that if the husband earned more than a stipulated amount in one year, the amount of child support per child and the amount of alimony for that year would be increased by 15% of the excess earnings. The husband claimed the agreement was meant to total only 15% of the increased earnings;

however, a court later interpreted the clause to mean that the husband would pay an aggregate of 60% (15% for each of three children and 15% alimony) of the increased earnings. The court rejected the husband's malpractice claim and affirmed summary judgment in favor of the attorney, holding:

> The agreement in this case is not ambiguous, nor is it technical or laced with "legal jargon." Appellant Berman admits that an initial draft was changed, that he read the changes, that he initialed each and every page, and that he placed his signature on the final page. . .Our decision should not be read to state or imply that an attorney may not be held responsible for his negligent draftsmanship whenever the client can or does read the document. Indeed, where the document requires substantive or procedural knowledge, is ambiguous, or is of uncertain application, the attorney may well be liable for negligence, notwithstanding the fact that his client read what was drafted.

227 S.E.2d at 806. The holdings in Lowry and Berman illustrate the importance of drafting clear agreements which the client, and the court, can understand and effect in the final decree.

Protecting the Property After the Agreement. Despite a proper division of the property, malpractice cases have additionally been brought because the attorney failed to adequately protect property from conversion by the other spouse pending final distribution.

In Rhine v. Haley, 378 S.W.2d 655 (Ark. 1964), the court upheld judgment against an attorney who failed to include a lien or other legal tie on the husband's separate property to ensure payment of $13,000 awarded to the wife under the agreement. Subsequent to the parties' execution of the agreement, the husband sold all his land, took the proceeds and absconded. The court found that the attorney violated his professional duty to effect a lien on the property to ensure satisfaction of the terms of the agreement.

Similarly, in Hilt v. Bernstein, 75 Or.App. 502, 707 P.2d 88 (1985), cert. denied, 300 Or. 545, 715 P.2d 92 (1986), allegations of an attorney's malpractice in preparing a separation agreement presented a jury issue, where the parties were to borrow money to renovate their home and then divide the proceeds of the sale after remodeling was complete. The attorney, who represented both parties in drafting the agreement, advised the wife to sign a power of attorney allowing her husband to borrow money against the house for the renovations and to obligate her on the loans. The husband subsequently borrowed money and absconded, leaving the wife liable on the debt. The court held that the attorney's conduct in advising the wife to sign the power of attorney was actionable negligence, since the attorney knew that the husband was in financial distress and needed money to live on, and it was arguable that the attorney should have foreseen that the husband might convert the funds to his own use.

Moreover, in Bjorgen v. Kinsey, 466 N.W.2d 553 (N.D. 1991), the court awarded $526,964 against an attorney who represented the wife in negotiating a separation agreement. The attorney also had represented the bank which was attempting to foreclose on the marital property subject to the agreement. Due to acts by the attorney, the bank was able to foreclose on the property, which it may not otherwise have been able to do. This caused the wife to lose a substantial portion of the property awarded to her. The court found that the attorney breached his duty to protect the property pending final distribution, and awarded the wife the value of her lost interest due to the foreclosures.

Conclusion. Although there are many inherent difficulties in representing parties in drafting divorce settlement agreements, there are various measures which an attorney can take to limit his malpractice exposure. Communication with the client and documentation of advice alone can avoid many of the grievances which may arise. In addition, careful attention to adequate investigation, knowledge of the law and protecting the enforceability of the property agreement can limit claims against an attorney for negligence.

ATCH 5: ENFORCEMENT OF NO-MOLESTATION CLAUSES IN SEPARATION AGREEMENTS

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Separation agreements often contain a clause providing that the parties will live separately and will not molest, harass, or interfere with each other. Is such a clause enforceable if one of the parties subsequently engages in harassing conduct toward the other? Although reported authority is sparse, the cases that exist indicate that such a clause may be enforced in a number of ways.

No-molestation clause. Separation agreements typically contain a clause similar to this sample from a well-known treatise:

> The parties shall not molest or interfere with each other, nor shall either of them compel or attempt to compel the other to cohabit or dwell with him or her, by any means whatsoever; each party shall live separate and apart from the other for the remainder of their lives, at any location or locations he or she selects.

1 A. Lindey, Separation Agreements and Antenuptial Contracts § 9 [Form 9.02] (Rev. ed. 1964). Some versions of the clause provide further that the covenant not to molest is "of the essence" of the agreement and is interdependent with the agreement's other covenants. Id. [Form 9.03].

Unincorporated Agreements

When the agreement is not incorporated into a divorce decree, a harassed ex-spouse is limited to traditional contract remedies for the other spouse's breach of a no-molestation clause. See generally 2 H. Clark, The Law of Domestic Relations in the United States § 19.8 (2d ed. 1987). Such remedies include excuse of performance of other contract provisions and recovery of damages for the breach.

Breach. The New York decision of Reybold v. Reybold, 45 A.D.2d 263, 357 N.Y.S.2d 231 (1974), contains a clear statement of what kind of conduct by a spouse will constitute a breach of a no-molestation clause. The wife in the case had sent harassing letters to the husband and had also contacted his employer about spousal support payments that she alleged were late. In her subsequent suit for support arrears, the husband argued that his performance under the agreement was excused by the wife's breach of the no-molestation clause. The appellate court set forth the following test:

> For molestation to be actionable it must be substantial, committed in bad faith and not caused by the other's fault . . . and must be such as is calculated seriously to annoy a person of average sensitivity.

357 N.Y.S.2d at 235 (citations omitted).

Excuse of Performance. The court in Reybold also held that the no-molestation and spousal support clauses were interdependent because the agreement so recited. The court then reversed the trial court's grant of summary judgment for the wife and remanded for a factual determination of whether the wife's conduct met the test for breach of the no-molestation clause. If the wife's conduct met the standard, then the husband's contractual obligation to support the wife would be suspended.

Damages. Breach of a no-molestation clause in an unincorporated agreement may also warrant an award of damages to the other spouse. For example, in Verdier v. Verdier, 133 Cal. App. 2d 325, 284 P.2d 94, 100 (1955), the husband recovered $500 in damages for the wife's breach of such a clause. Unfortunately, the opinion does not describe the wife's conduct. In Voshell v. Voshell, 68 N.C. App. 733, 315 S.E.2d 763, 766 (1984), the husband recovered nominal damages for the wife's breach of a no-molestation clause. She had made numerous harassing telephone calls to him and had sent him harassing letters. The appellate court noted that if the husband had proven actual damages, he could have recovered those as well.

Incorporated Agreements

When an agreement is incorporated into a divorce decree, the court's contempt power becomes

available as an additional remedy for breach of the agreement.

No reported decision exists in which contempt was sought for a spouse's breach of a no-molestation clause in an incorporated agreement. A number of courts, however, have held in cases not involving separation agreements that a spouse's violation of an order of no molestation or harassment contained in a divorce decree is punishable as contempt. In Rutledge v. State, 151 Ga. App. 615, 260 S.E.2d 743, 744 (1979), the divorce decree contained such a provision. Nevertheless, the husband made several harassing and threatening telephone calls to the wife and her mother. The Georgia Court of Appeals held that the husband's conduct violated the divorce decree and warranted a civil contempt citation. The court also held that the husband was in criminal contempt for his failure to appear at the hearing. Similarly, the Alaska Supreme Court held in Siggelkow v. State, 731 P.2d 57, 62 (Alaska 1987), that the husband's threatening telephone calls to the wife, together with his name-calling and obscene gestures directed toward her in public, violated a nonharassment provision in the parties' divorce decree and was punishable as criminal contempt. The court explained that the husband's conduct prejudiced the wife's right to be left in peace.

In Lowe v. Lowe, 561 So. 2d 240, 242 (Ala. Civ. App. 1990), the divorce decree contained a "no contact" provision restraining the husband from contacting the wife. The husband nonetheless made numerous harassing and threatening telephone calls to her, and she ultimately brought a contempt proceeding against him. The Alabama Court of Civil Appeals held that the husband's conduct violated the divorce decree and was punishable as criminal contempt. See also Kalupa v. Kalupa, 527 So. 2d 1313, 1317 (Ala. Civ. App. 1988) (husband's violation of restraining order entered during pendency of divorce proceedings by shouting and cursing at wife in public punishable as criminal contempt); Leonetti v. Reihl, 154 A.D.2d 675, 546 N.Y.S.2d 879, 880 (1989) (divorced husband's violation of protection and nonharassment order by appearing at wife's home and creating disturbance punishable as contempt); State v. Stahl, 416 N.W.2d 269, 270 (S.D. 1987) (divorced husband's violation of protection and nonharassment order punishable as contempt).

No reason exists why a no-molestation clause of a separation agreement incorporated into a divorce decree cannot be enforced in the same manner. Once incorporated, such a clause becomes as much as part of the decree as the nonharassment provisions discussed above. Thus the judicial remedy of contempt, as well as contractual remedies, are available to a harassed ex-spouse whose agreement was incorporated into the divorce decree.

Conduct most likely to provoke a contempt citation is an ex-spouse's public harassment or embarrassment of the other. E.g., Kalupa v. Kalupa, 527 So. 2d 1313, 1317 (Ala. Civ. App. 1988) (shouting and cursing at spouse in public); Siggelkow v. State, 731 P.2d 57, 62 (Alaska 1987) (name-calling and obscene gestures directed toward spouse in public); Leonetti v. Reihl, 154 A.D.2d 675, 546 N.Y.S.2d 879, 880 (S.D. 1987) (appearing at spouse's home and creating public disturbance). Counsel for an ex-spouse who has been publicly harassed and whose agreement was incorporated into the divorce decree should consider this remedy.

Conclusion

Given the fairly common practice of including no-molestation clauses in separation agreements, it is somewhat surprising that more decisions have not been rendered concerning the enforceability of such clauses. The cases that have been reported indicate that contractual remedies are available for breach of such clauses in agreements not incorporated into divorce decrees. They also show that judicial remedies such as contempt are available for breach of such clauses in incorporated agreements. These remedies are probably under-utilized, and counsel would do well to consider them more frequently. An ex-spouse who is engaging in harassing conduct might think twice if made aware that jail time could be the penalty.

ATCH 6: "Recent Case Law on Modification and Enforcement of Separation Agreements"

Brett R. Turner and Margaret B. Barrett

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In late 1991, Divorce Litigation published a two part article on attacking and defending separation agreements. In last month's issue, we began a similar two part article on construction and enforcement of separation agreements. This month, we conclude our series on divorce settlements by considering questions of modification by the parties and enforcement by the court. In addition, we are also including in this month's issue a list of specific ambiguous clauses and their construction by the courts.

The relationship between the separation agreement and the divorce decree is fundamental to all issues of construction, modification, and enforcement. This topic was discussed fully in last month's issue, but because the point is so fundamental, it will be briefly reviewed here. There are three possible ways in which the decree can treat the agreement:

- Merger: All provisions of the agreement are treated as provisions of the decree. The agreement is no longer valid as an independent document.

- Approval: The court recognizes the agreement and holds that it is valid. Its validity becomes res judicata, but the terms of the agreement are not part of the decree.

- Incorporation: The court includes the provisions of the agreement as provisions of the decree. The agreement is not destroyed, however, and it continues to be independently valid. Thus, there are two similarly-worded documents to be construed and enforced, a contract and a decree. Many states require the court to choose between merger and approval, and do not recognize the concept of incorporation.

The distinctions between these terms can be concisely summarized by looking at which documents contain the language of the separation agreement after the decree is rendered. With merger, there is a decree but no agreement; with approval, there is an agreement but no decree; and with incorporation, there is both an agreement and a decree. See generally Turner, "Recent Case Law on Construction of Separation Agreements," 4 Divorce Litigation 25, 25-27 (1992); S. Green & J. Long, Marriage and Family Law Agreements § 4.03 (1984 & Supp. 1991).

Unfortunately, courts have greatly confused the law on this subject through imprecise use of terminology. To emphasize that merger, approval and incorporation are terms of art which should be given a uniform meaning, all three terms will be italicized wherever they appear in this article. In addition, incorporation as defined above will sometimes be referred to as "true" incorporation, in order to further distinguish it from the inexact use of that term in states which require either merger or approval.

Like the preceding articles in this series, the present article will not draw confusing distinctions among separation agreements, property settlements, stipulations, consent judgments and the like. Instead, we will use the terms "separation agreement" and "divorce settlement" interchangeably to refer to all private contracts which settle a divorce action. See generally 2 H. Clark, The Law of Domestic Relations 409 (2d ed. 1987).

VI. MODIFICATION BY THE PARTIES

Whether or not the court can modify a separation agreement is mostly an issue of contract construction. The issue was therefore covered in depth in last month's article on construction questions.

An entirely separate question is presented, however, when the parties themselves seek to modify the agreement. Since separation agreements are ordinarily controlled by normal contract law, the parties are free to modify their agreement whenever they desire.

Merger and Incorporation

The parties obviously cannot modify an agreement which was merged into the divorce degree, since the agreement no longer exists as a valid document. See In re Becker, 798 P.2d 124 (Mont. 1990) (attempted modification of merged contract was invalid attempt to circumvent the divorce decree). A merged agreement can be modified only under the normal rules governing the reopening of judgments. Id.

If the agreement was incorporated, the parties can still modify it, but modification of the agreement does not constitute a parallel modification of the decree. Thus, modification may limit the ability of the parties to enforce the agreement with contract remedies, but for purposes of judgment remedies, the original terms still control. See generally S. Green & J. Long, Marriage and Family Law Agreements § 4.07 (1984 & Supp. 1991); but see Brown v. Brown, 796 S.W.2d 5 (Ky. 1990) (parties can modify property settlement agreement without reopening divorce decree).

The same principle generally applies in reverse when the court attempts to modify the judgment part of an incorporated agreement. The modified language controls for purposes of judgment remedies, but either party may still seek to enforce the original language in contract. DeCristofaro v. DeCristofaro, 24 Mass. App. Ct. 231, 508 N.E.2d 104, 109 (1987) ("[e]ven where [the court] properly refuses specific performance and order support . . . different from that called for in the agreement, the party aggrieved by that order has a claim for breach of contract"), cert. denied, 400 Mass. 1103, 511 N.E.2d 620 (1987); Kellman v. Kellman, 162 A.D.2d 958, 559 N.Y.S.2d 49 (1990).

Approval

Where the original decree only approved the agreement, there is no legal obstacle to future modification by the parties. See Klein v. Klein, 169 A.D.2d 817, 565 N.Y.S.2d 186 (1991) (provision giving husband exclusive use of home had been implicitly modified to give use of the home to wife and children), cert. granted, 78 N.Y.2d 853, 573 N.Y.S.2d 467 (1991); but cf. Barnes v. Barnes, 772 S.W.2d 636 (Ky. Ct. App. 1989) (similar conduct held not to be an implicit modification). The modification must, of course, be supported by consideration. Bondy v. Levy, 119 Idaho 961, 812 P.2d 268 (1991).

At common law, modification was possible even where the agreement itself prevented modification, since the no-modification clause itself could always be modified. Some states continue to follow the common law rule. See Clark v. Clark, 535 A.2d 872 (D.C. 1987) (enforcing oral modification, despite clause in contract requiring that modification be in writing). Other states, however, will enforce clauses limiting the future modifiability of the agreement. See Albrecht v. Albrecht, 19 Conn. App. 146, 562 A.2d 528, cert. denied, 212 Conn. 813, 565 A.2d 534 (1989) (noting that clause preventing future oral modifications is enforceable in Connecticut).

Agreements to Agree

An original separation agreement may provide for modification by agreement of the parties at some future time. At common law, an agreement to sign a contract in the future was too indefinite to be enforced. 17A Am. Jur. 2d "Contracts" § 35 (1991). The separation agreement cases, however, tend to construe the common law rule rather liberally. For instance, in Bruce v. Bruce, 801 S.W.2d 102 (Tenn. Ct. App. 1990), the parties agreed to negotiate in good faith to modify the agreement if there was a material change in circumstances. The court rejected an argument that this clause was an unenforceable agreement to agree. See also Bondy v. Levy, 119 Idaho 961, 812 P.2d 268 (1991) (promise to renegotiate agreement if tax law changed was not unenforceable; enforcement was improper on the facts, however, as husband had failed to make formal request for renegotiation); Stevens v. Stevens, 798 S.W.2d 136, 137 (Ky. 1990) (contract required father to pay college expenses in an amount to be agreed upon by father and child; held not an unenforceable agreement to agree).

Although an agreement to negotiate may impose a duty to negotiate in good faith, it clearly does not require anything more. In Rimkus v. Rimkus, 199 Ill. App. 3d 903, 557 N.E.2d 638 (1990), the parties agreed to negotiate an increase in child support if the husband's income became more regular. The court held that this clause did not require the husband actually to begin making support payment when condition in the clause was met.

Abandonment

As a special form of modification, the parties can agree between themselves to abandon their separation agreement completely. See Maruri v.

Maruri, 582 So. 2d 116 (Fla. Dist. Ct. App. 1991) (where husband breached contract and wife instructed her attorney not to enforce it, contract had been abandoned).

Abandonment occurs most often when the parties sign an entirely new agreement. See Stegall v. Stegall, 100 N.C. App. 398, 397 S.E.2d 306 (1990) (second agreement with integration clause supplanted first agreement), cert. denied, 328 N.C. 274, 400 S.E.2d 461 (1991). Where the new agreement is consistent with previous contracts, however, both documents are probably still valid. See Scherl v. Scherl, ___ A.D.2d ___, 569 N.Y.S.2d 192 (1991) (after agreeing that wife's support should cease on cohabitation, parties signed modification agreement; agreement modified support without mentioning cohabitation, but stated that any unmodified provisions of first agreement were still valid; cohabitation clause was not abandoned); Smith v. Smith, 794 S.W.2d 823, 828 (Tex. Ct. App. 1990) (agreement styled as "Addendum to Agreement Incident to Divorce" did not supplant earlier agreement). Abandonment does not occur merely because the parties disagree on the meaning of the agreement. Clark v. Clark, 535 A.2d 872 (D.C. 1987).

VIII. ENFORCEMENT

Separation agreements can be enforced by either contract or judgment remedies. The contract remedies apply if the agreement was approved; the judgment remedies apply if the agreement was merged.

In jurisdictions recognizing the concept of true incorporation, the injured spouse has a choice of using either contract or judgment remedies. The choice may be different for each breach, and a spouse who has used one type of remedy in response to a prior breach may use the other type in response to a subsequent breach. Larson v. Larson, 30 Mass. App. Ct. 418, 569 N.E.2d 406 (1991); see also Lipschutz v. Lipschutz, 391 Pa. Super. 537, 571 A.2d 1046 (1990), allocatur denied, 589 A.2d 692, 589 A.2d 692 (1990). Indeed, the enforcing spouse may even plead both remedies in the alternative. Bondy v. Levy, 119 Idaho 961, 812 P.2d 268 (1991). The ability to enforce the contract as a judgment without destroying the contract as an independently valid document is the single strongest advance of true incorporation over merger and approval.

Contract Law Remedies

Contract law remedies are available only to enforce approved or incorporated agreements. If the agreement has merged into the divorce decree and lost independent validity, it must be enforced as a judgment and not as a contract. See, e.g., Powers v. Powers, 103 N.C. App. 697, 407 S.E.2d 269 (1991) (court cannot order specific performance where contract merged into decree).

Remedies Within the Contract. Separation agreements sometimes contain specific provisions which become effective if one spouse breached other provisions of the agreement. These provisions are generally enforceable. See, e.g., Lang v. Lang, 551 So. 2d 547 (Fla. Dist. Ct. App. 1989) (provision that losing party would pay prevailing party's attorney's fees in any subsequent action on the agreement).

Where the remedy under the agreement itself is so large as to give the innocent spouse an unjust windfall, the provision is unenforceable. For instance, in Cooper v. Smith, 70 Haw. 449, 776 P.2d 1178 (1989), the court strongly suggested that the agreement's penalty provision was unenforceable. That provision provided that if the husband fell behind on alimony by more than four months, he would sell the wife 35% of the assets of a certain trust for only $100. In Cooper, however, the agreement had been approved by the divorce decree, and could be collaterally attacked only if it was void. Because the penalty provision was only erroneous, the court ultimately enforced the provision as written.

A party who is himself guilty of a major breach may not be permitted to rely upon the agreement's own enforcement provisions. See Marcolongo v. Nicolai, 392 Pa. Super. 208, 572 A.2d 765 (1990), allocatur denied, 589 A.2d 692, 593 A.2d 420 (1990).

One frequent type of enforcement provision is an agreement to secure certain obligations with a lien on the obligor's property. If a lien is placed on real property, the lien is effective only if it has been properly recorded. See Vickroy v. Vickroy, 44 Ohio App. 3d 210, 542 N.E.2d 700 (1988). The parties can also agree to the appointment of a receiver to do certain acts in the event of breach. See Young v. Young, 765 S.W.2d 440 (Tex. Ct. App. 1988) (enforcing provision that receiver would divide personal property if parties were unable to agree on a division).

Damages. In addition to the agreement's own provisions, the injured spouse rely on the two traditional contract law remedies: damages and specific performance.

The traditional method for enforcing support contracts is a money judgment for damages. The amount of damages is normally equal to the amount of unpaid support. The award cannot be reduced if the payee's damages are reduced after the fact by benefits from a collateral source. See Gray v. Pashkow, 168 A.D.2d 849, 564 N.Y.S.2d 520 (1990) (in computing damages for husband's failure to pay medical expenses, improper to subtract tax benefit wife may have received for paying the expenses herself). The court can award damages for violation of the spousal support provisions of a separation agreement even if the injured spouse failed to request court-ordered support in the underlying divorce case. Long v. Long, 102 N.C. App. 18, 401 S.E.2d 401 (1991).

Specific Performance. As courts of equity, divorce courts always have the power to grant specific enforcement of separation agreements. Clay v. Faison, 583 A.2d 1388 (D.C. 1990). The remedy at law must be insufficient, but this requirement is generally treated liberally in domestic cases. For instance, one court held that the remedy at law is always insufficient with regard to the property division portions of the agreement. Clay v. Faison, 583 A.2d 1388 (D.C. 1990); but see Allyn v. Allyn, 163 A.D.2d 665, 558 N.Y.S.2d 983 (1990) (where promise to pay college expenses could be adequately enforced by award of damages, error to award specific performance), cert. denied, 77 N.Y.2d 806, 569 N.Y.S.2d 610 (1991).

Specific performance usually takes the form of a court order to perform the contract in question. Allyn v. Allyn, 163 A.D.2d 665, 558 N.Y.S.2d 983 (1990), cert. denied, 77 N.Y.2d 806, 569 N.Y.S.2d 610 (1991). Where a contract to maintain a spouse or child as beneficiary of life insurance is breached and the insured spouse has already died, the designated beneficiary holds the proceeds in constructive trust for the spouse or child. See, e.g., Kruse v. Todd, 260 Ga. 63, 389 S.E.2d 488 (1990); see generally Annotation, "Life Insurance--Divorced Spouse," 31 A.L.R.4th 59 (1984).

Contempt

The most effective method for enforcing a separation agreement is the court's contempt power. Contempt is not available, however, for enforcing private agreements. Thus, in order for contempt to be available, the agreement must be incorporated or merged into the divorce decree. See Caccaro v. Caccaro, 388 Pa. Super. 459, 565 A.2d 1199 (1989); see generally H. Clark, The Law of Domestic Relations in the United States § 19.12 (2d ed. 1987).

When merger or true incorporation is present, the court may enforce the spousal and child support provisions of the agreement by contempt. See Ex parte Manakides, 564 So. 2d 983 (Ala. Civ. App. 1990) (alimony in gross); Hine v. Hine, 558 So. 2d 496 (Fla. Dist. Ct. App. 1990); In re Schrader, 462 N.W.2d 705 (Iowa Ct. App. 1990). The court may even use contempt to enforce provisions of the agreement which the court could not itself order without agreement of the parties. See, e.g., Powers v. Powers, 103 N.C. App. 697, 407 S.E.2d 269 (1991) (post-majority child support).

Most states also allow use of contempt to the enforce the property division provisions. See Brown v. Brown, 305 Ark. 493, 809 S.W.2d 808 (1991) (monetary sum due under property settlement provision); Millner v. Millner, 260 Ga. 465, 397 S.E.2d 289 (1990) (interest on property settlement payments); In re Wiley, 199 Ill. App. 3d 223, 556 N.E.2d 788 (1990) (portion of husband's retirement benefits), cert. denied, 133 Ill. 2d 551, 561 N.E.2d 710 (1990). A small minority of states, however, refuse to permit use of contempt for this purpose. Hine v. Hine, 558 So. 2d 496 (Fla. Dist. Ct. App. 1990); Broyles v. Broyles, 573 So. 2d 357 (Fla. Dist. Ct. App. 1990), cert. denied, 584 So. 2d 997 (Fla. 1991).

When the agreement is merged or incorporated, the defendant may raise only those defenses normally available in an action to enforce a judgment. See Doherty v. Doherty, 9 Va. App. 97, 383 S.E.2d 759 (1989). Normally, therefore, contract law defenses do not apply. In one case where the agreement was incorporated, one court allowed contract law defenses to be considered in assessing damages. Spradley v. Hutchinson, 787 S.W.2d 214 (Tex. Ct. App. 1990) (where both parties breached the agreement, court properly offset their damages and awarded a judgment for the difference).

Courts are reluctant to find a party in contempt for noncompliance with an agreement when the defendant has substantially performed his obligations by other means. For instance, in Henderson v. Henderson, 288 S.C. 190, 379 S.E.2d 125

(1989), the husband agreed to provide the wife with copies of his tax returns. The court upheld a lower court's refusal to hold the husband in contempt for violating this provision, because he had provided the wife with information on his earnings by another method.

Mutual Breach

Parties who have breached separation agreements sometimes attempt to excuse their action by claiming that the other party breached the agreement first. A breach by the one party does not automatically justify the other party in refusing to perform. E.g., Brees v. Cramer, 322 Md. 214, 586 A.2d 1284 (1991). Performance is not required, however, if the provision breached by the other party was a condition, or if the other party committed a material breach of the agreement.

Conditions. The parties are free to agree that certain promises in their agreement shall be enforceable only if certain other promises have already been performed. When two promises have this relationship to each other, the first promise is called a condition to the performance of the second.

Whether or not a promise is conditional is a question of fact. For instance, in Nisbet v. Nisbet, 102 N.C. App. 232, 402 S.E.2d 151 (1991), cert. denied, 328 N.C. 499, 407 S.E.2d 338 (1991), the husband stopped making support payments required by the agreement. When the wife sued to enforce the agreement, the husband claimed that she had breached the visitation provisions of the agreement, which were conditions to his support obligation. The trial court granted summary judgment against the husband, but the appellate court reversed. The case was remanded for a factual hearing on the husband's allegations.

As with any factual issue, the cases on conditional obligations reach varying results. If the clear language of the agreement creates a condition, the court will enforce it. First Union National Bank v. Naylor, 102 N.C. App. 719, 404 S.E.2d 161 (1991) (husband agreed to hold wife harmless from certain debts "[u]pon the said note . . . being paid in full" by wife; husband's promise was clearly subject to a condition). One possible exception is child support, which is generally held not to be subject to conditions. See Nisbet v. Nisbet, 102 N.C. App. 232, 402 S.E.2d 151 (1991) (for policy reasons, adopting a per se rule against conditions on child support obligations). Provisions involving children may, however, be conditions to other obligations. See Carlino v. Carlino, ___ A.D.2d ___, 567 N.Y.S.2d 533 (1991) (husband's support obligation was conditioned upon wife's promise not to relocate more than 50 miles away with children).

If the condition is breached, the conditioned obligation never becomes effective. Where the husband committed an anticipatory breach of the conditioned obligation and the meeting of the condition was only a matter of time, however, one court refused to enforce the condition. First Union National Bank v. Naylor, 102 N.C. App. 719, 404 S.E.2d 161, 162 (1991) (husband agreed to hold wife harmless from certain debts "[u]pon the said note . . . being paid in full" by wife; husband's promise was clearly subject to a condition).

Material Breach. If one party commits a material breach of the contract, the other party has the option to rescind the entire contract. There is no simple rule for defining a material breach, but the provision involved must be central to the entire bargain of the parties. Not surprisingly, most of the cases find that the breach was not sufficient material to justify invalidation of the entire contract. See Brees v. Cramer, 322 Md. 214, 586 A.2d 1284 (1991) (breach of provision to maintain life insurance was not material); Zambito v. Zambito, ___ A.D.2d ___, 566 N.Y.S.2d 789 (1991) (breach of visitation provisions was not material).

Procedural Questions

A number of special procedural concerns are relevant when one spouse seeks to enforce a separation agreement. In states with separate family courts, the family court may lack jurisdiction to enforce a separation agreement with contract remedies. See Zamjohn v. Zamjohn, 158 A.D.2d 895, 551 N.Y.S.2d 689 (1990); cf. Clay v. Faison, 583 A.2d 1388 (D.C. 1990) (family division of trial court is a court of general and not limited jurisdiction, and thus can apply contract remedies).

Separation agreements are not ordinarily specifically included within the statute of frauds. In some states, however, the law may require specific provisions to be in writing. See, e.g., Albrecht v. Albrecht, 19 Conn. App. 146, 562 A.2d 528 (under specific statute, statute of frauds applies to promises to support children after majority), cert. denied, 212 Conn. 813, 565 A.2d 534 (1989).

Standing to enforce the agreement is generally limited to those who benefit from it.

Nevertheless, a parent is always permitted to enforce a provision which benefits only the parties' children. See Winset v. Fine, 565 So. 2d 794 (Fla. Dist. Ct. App. 1990); Stevens v. Stevens, 798 S.W.2d 136 (Ky. 1990); McCaw v. McCaw, 12 Va. App. 264, 403 S.E.2d 8 (1991); but see In re Lazar, 59 Ohio St. 3d 201, 572 N.E.2d 66 (1991) (mother's child support ceased at "majority" as required by contract, despite statute extending duty to support until child graduated from high school; if support was due under the statute, the child and not the mother was the proper plaintiff).

In addition to traditional actions for breach or contempt, separation agreements may also be construed by motions to clarify judgments or in actions for a declaratory judgment. Coscina v. Coscina, 24 Conn. App. 190, 587 A.2d 159 (1991). The action is usually governed by the normal contract statute of limitations, which starts running upon breach and not upon the execution of the agreement. Rosenthal v. Rosenthal, ___ A.D.2d ___, 568 N.Y.S.2d 603 (1991). Where the contract is merged or incorporated, however, the judgment statute of limitations may apply. Hershey v. Hershey, 467 N.W.2d 484 (S.D. 1991) (also noting that the judgment statute usually applies to child support provisions). In addition, relief may be denied by the doctrine of laches. Coscina v. Coscina, supra (laches applies, but delay was not unreasonable where caused by the plaintiff's mental illness); McKiever v. McKiever, 305 Ark. 321, 808 S.W.2d 328 (1991) (husband could not rely on wife's delay in enforcing agreement, where husband had failed to cooperate with wife's previous informal attempts to obtain compliance).

ATCH 7: WHAT HAPPENS TO A SEPARATION AGREEMENT IN A DIVORCE?

ORIGINAL INQUIRY

Subj: Separation Agreements & Divorce
Date: 97-10-10 21:36:16 EDT
From: Law8507@aol.com

"What happens to a separation agreement when the parties divorce?" That's the questions that's most asked by military legal assistance attorneys who prepare these documents for the soldiers and spouses they serve.

I am teaching a legal assistance course in two weeks to about 100 of these officers, many of them recently graduated from law school, and I'd like to share with them a cross-section of the answers from FL Section members in the various states, based on the answer I receive on the Family Law Section's ListServ.

In NC, for example--
>The s/a may or may not be incorporated into the decree; it's an option for the plaintiff's attorney [or defendant's atty if the deft wants this]. In some counties it's the usual practice; in other's it normally doesn't happen.
>Incorporation means that the document is... in the future... modifiable as to executory promises and then only if there's been a change of circumstances.
>The judge doesn't have to incorporate the s/a, and the judge has no power to correct "on the spot" any mistakes or errors of the drafting atty, or any parts of the s/a that one party may not agree with any more, altho' I have seen judge modify upwards the amount of child supt, for example [a child-related term, as opposed to an "adult term."] More on this below.
>As to enforcement, the incorporation makes the s/a enforceable in the same ways as any other ct order -- contempt, garnishment, attachment, etc.
>If it's not incorporated, the s/a is still enforceable by a suit for damages or for specific performance.
>And any terms of the s/a dealing with children are independently modifiable by the court.

What I need to know from you folks out there is:
1. What happens to the s/a when the parties divorce?
2. Must it be incorporated into the decree?
3. Does the judge ask the plaintiff anything about it during the divorce hearing?
4. What powers does the judge have to "correct errors" in the s/a?
5. Ditto as to items that one party may not agree with any more... can the judge modify them? Delete them?
6. How about enforcement of the s/a?
7. How about modification of "child-related" terms? Of "adult" terms [i.e., alimony, equitable distribution]?

Thanks for your help!
Mark Sullivan, Colonel, Army Reserve

RESPONSES

ALASKA

Yes, you can do property division even when no claim pending at time of divorce. I represented a woman whose husband divorced her here 4 years prior to our filing for a property division. All he had asked for was a divorce, and that's all he got. (Actually, she got nothing too, he filed banko as soon as we got a decree for money.)

We have a statute that provides that all property shall be divided. Even if everything is split, if you discover something later that was unknown, it too can be divided. Title 25 something or other. I'm at home, and nothing here to help with cite. The caveat is, if you say there is no property, and the court finds there is no marital property, you can't go back and change it, absent proper Rule 60(b) grounds.

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ARIZONA

From: jherrick@primenet.com (John E. Herrick)

The first thing your attorneys need to review is the law of the individual states from which the military members came or in which they now call home. The statute tends to control the answer to many of your questions. The answer to your specific questions based on Arizona law follows.

1. The s/a is enforced unless one party can prove that one of the exceptions to the law applies: namely that it is unfair to the parties as to property, maintenance and attorney fees; or that it is not reasonable as to provisions for child support, custody and visitation.

2. In Arizona, incorporation merely identifies the agreement for the court. It may still maintain is separate viability for contractual enforcement. However, if it is "merged" in the decree, then the s/a loses its separate identity and becomes part of the decree and is enforceable only through divorce court procedures.

3. In the event of an uncontested case (or else you wouldn't have a s/a), the judge asks only minimal questions for proof of compliance with the law.

4. The judge can correct only errors dealing with children--support, custody & visitation. And even then, the judge may have to accept or reject the s/a as a whole. So if the judge doesn't like it, it may have to go back to be rewritten by the parties. The judge does not have the choice of picking and choosing which pieces he will adopt.

5. Ditto as to #4. If a party objects to the s/a even though he/she signed it, the court must hold an evidentiary hearing to determine if the entire s/a is fair and reasonable. If not, then it is tossed out.

6. If s/a is not merged, then enforce as contract. If merged, then enforce as any divorce decree.

7. Child issues are always subject to modification at a later based on change in circumstances and the best interest standard. Adult issues are not modifiable as to property issues. Adult issues are modifiable as to spousal support only if there is compliance with Arizona law at the time of the adoption of the agreement.

CALIFORNIA
From: susanlj@mta1.snfc21.pbi.net

Now you are down to the hard questions.. In California, if we have a SA, we wouldnot have a trial. If the agreement is signed by all the parties, it is enforceable and very expensive to break. The judge does not have much influence and rarely reads it. We file the final papers and a very knowledgeable clerk reads the docs to make sure that if there are kids, there is child support, etc., but that is about all.

RE "incorporation," you have to know the difference between a "merged" agreement and an "incorporated" agreement. They affect the executory and warranty sections differently. If you do it wrong you may lose the warranties.

Any part of the SA that is not part of the final judgement is enforceable as a regular contract with all the regular contract remedies.

Good luck with your training. Until they closed Naval Air Station Alameda, I had lots of military clients and, because I am also a tax attorney, a substantial number of military pension cases. It was fun and I really liked working with the military. Call if any one needs help with a pension or or a California case.

Susan Jeffries 510/865-6664

COLORADO
From: McGuane.Hogan@lawyernet.com (Kathy Hogan)

Mark - there may not always be a hearing. In Colorado a divorce can be geanted on affidavits, provided the separation agreement is submitted to the court (usually by mail) along with financial affidavits and there are no children involved, or if both parties had lawyers if there are kids.

If you want A LOT of state specific information on separation agreements and the mechanics of what happens I can e-mail you the chapters of my books on separation agreements from the Family Law and Practice sets I write for Colorado and Connecticut. Let me know whether WordPerfet files will work for you.

GEORGIA
From: buddy@sysconn.com (BURTON F. METZGER)

Suggest you check out a recent Georgia Supreme Court case: Mehdikarimi v Emaddazfuli, Case # S97A1421 (9/22/97). In normal fashion, a separation agreement was incorporated into the divorce decree. Later, custody was changed in a modification. Then the custodian sought to set aside the final decree on the ground of duress. Case arose on whether a 3- year statute of limitations on setting aside a judgment applied, or the longer 7 year statute for an action to set aside an agreement for fraud or duress applies. Court said both statutes had already run. Court noted that the rights of the parties after the entry of judgment are founded in the judgment itself, and not on the underlying agreement, citing Paul v Paul, 250 Ga. 54, 296 SE2d 48. Thus, even voiding the separation agreement would not negate obligations

under the judgment even if they arise out of the agreement which was incorporated therein. Hope this helps.
Buddy Metzger

ILLINOIS
From: bobd@cyberconnect.com (bobarb)

In Illinois the parties may enter into a binding postnuptual agreement after the marriage. If the s/a conforms to the statute it certainly can be incorporated into the judgment. We occasionally see the military s/a to which you refer. We feel free to review and make recomendations to our client. As far as the divorce case is concerned, due process still applys so if the parties don't agree (anymore) with the mil. s/a, then it is of no consequence other than the insight it may give as to where the parties were in their negotiation and power balance at a certain point in time. If the parties wish to incorporate an agreement regarding issues of the divorce into the judgment, they certainly can and in 90% of noncontested case this is done. The Court, however, does review, ask questions, and approve.

Sometimes the Court does not approve some or all, in which event the parties either make the change, withdraw their agreement and have a contested trial. Occaisionally a judge will make a change and insist that the non-contested "prove up" proceeding continue to judgment regardless. Rare, and wrong in my judgment but it happens. Certainly if any change is made and the other party is not taking part in the proceeding, or not available to agree, then the Court should not proceed and neither, regardless of what the Court wants to do, should the attorney. Correcting an error, unless it is a typo, is a fancy way to describe a change. Generally speaking, here in Cook County, Ill. the Court approves almost any property settlement as long as it is not unconscionable and can be reasonably understood. Certainly with respect to children, the Court takes a harder look with regard to children's best interest although I have just taken over for appeal a Court-approved joint parenting agreement which was poorly drafted, inequitable, unworkable- in a word- nuts. The parties had waged war, H was an attorney (a "litigator" no less) had hired the rambos, while mom had a lawyer who was apparently preoccupied, or sick of mom, I don't know. There was a guardian ad litem and a mediator involved, and its like they all just gave up. The children's last hope was the Judge- and he blew it. But I digress. Hope this helps.

MARYLAND
From: csc.esq@ix.netcom.com (Coleen Smith Clement)

I usually incorporate but not merge the sep/agr into the divorce degree. That is typical in Maryland. Judges always have done so when requested. After the divorce, depending on the language in the agreement, parts can be modified- anything related to children in md is always modifiable upon a showing of a subtantial change in circumstances.
Coleen Clemente- Westminster - Carroll County

FROM: jatkinson@thecsf.com [Janet Atkinson]
TO: law8507@aol.com

In Maryland the separation agreement or other settlement agreement can, but need not be incorporated or merged into the divorce decree. If it is merged, it becomes an integral part of the decree. If it is incorporated, it can be separately enforced. In either case, it can be enforced by contempt. The agreement must actually be included in the court file. I have seen divorce decrees, which purport to include settlement agreements, which have not been filed in the court. It is my understanding that the

language, absent the physical presence of the agreement in the file, is of no consequence. The agreement is reviewable by the trial judge, who can amend or strike any unconscionable provisions. In fact, busy trial judges are unlikely to challenge an agreement, acknowledged by the parties.

A settlement agreement not made part of the divorce decree is a contract, subject to contract remedies.

Child Support -- agreements providing for the support of minor children are always modifiable in the best interests of the child. Any conditions concerning care custody, education of a minor child are always modifiable by the court.

Alimony -- agreements providing for alimony, incorporated or merged into the divorce decree are always modifiable and enforceable by contempt.

The parties will have to consent to the incorporation or merger of the agreement.

MARYLAND; DISTRICT OF COLUMBIA
From: ksflaw@erols.com (Armin Kuder)

I practice in DC and Md. Each has slightly different rules.

In general, those agreements are enforceable and enforced, without modification. When the divorce is granted, the agreement is accepted unless someone is arguing that the agreement is invalid because of fraud, duress or other extreme ground. The courts also will review them
if there are minor children to make sure there are adequate provisions for support. That usually means guidelines are satisfied. When properly drafted, the agreements are not modifiable, except where the children are concerned.

In DC, agreements are not usually incorporated in the divorce decree. If they are, there is a likelihood that they are "merged" and cease to exist and you only have the court decree. In Md., they are incorporated "insofar as the court has jurisdiction" and the agreement survives along with the court order. There are a number of fine points there, but that is the gist of it.

Agreements are enforced like any contract. Court orders may be enforced with contempt, as well, if it involves support.

The vast majority of people live up to their contract, and no further litigation ensues. Fortunately for lawyers, there is a significant minority who do not, and we have work to do.

Except for the esoteric issues of children (the state can always step in and change things in the best interests of the children), and the issue of "merger" in some states, separation agreements should be viewed in the same way as other legal settlements.

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MASSACHUSETTS

From: ehamada@hamadalaw.com (Ed Hamada)

Mark:
The following Massachusetts answers are a Friday night special from bed, so no case cites to speak of [except my own!]:

> 1. What happens to the s/a when the parties divorce?

Typically, we don't get agreements until eve of divorce trial. An agreement is only as good as the good faith of it's signatories. Hence, the most carefully crafted 60pp document will still go up in smoke when the parties light the flames of anger, revenge, pride, control and 95 other emotions which are counter-rational. Conversely, I have drafted some of the loosest, [I call them granola] agreements which have stood the test of time because the parties were of good will, relatively unselfish and non-self-centered, able to place the kids needs, wants, desires, ahead of their own.

> 2. Must it be incorporated into the decree?
No. Not as a matter of statute law. However, between our dual-level appellate courts, we have evolved a "practice" which virtually, automatically causes incorporation and merger as to all child related issues.

> 3. Does the judge ask the plaintiff anything about it during the divorce hearing?

Always. Although the depth of questioning may differ among the judges, they will typically ask of each party:

Have you read the agreement?
Do you understand all of its terms?
Have you conferred with your attorney and has your attorney explained any questions you may have had?
Has the agreement been explained to you to your satisfaction?
Do you believe the agreement to be fair and reasonable?
Did you sign it voluntarily and without reservation?
Do you understand that the division of property is final?

> 4. What powers does the judge have to "correct errors" in the s/a?

Hard question to answer, as drafted. See below.

> 5. Ditto as to items that one party may not agree with any more... can the judge modify them? Delete them?

Still a hard question to answer, regardless of how you phrase it. Our "old" common law, a shibboleth if you will, maintained that no family court judge had the power to modify an agreement as the judge was not a party to it! If however, a dissatisfied party sought modification of the judgment into which the agreement was incorporated and if that judgment was modified, e.g., by increasing the alimony, then the payor had the right to go into a court of law and obtain a judgment ordering repayment of the increase!! (Our family court only has jurisdiction 'in equity', but not 'at law').

[hey, we brought you witchcraft trials, remember?)

Then we were handed a decision called: Decristofaro v.Decristofaro (198?) which established a new standard: Where a surviving agreement is sought to be specifically enforced, a trial judge is not required

to enforce it if a party has establishes "countervailing equities" - a euphemism for abject tragedy, like going on welfare.

But then Dr. Richard Larson came along. There are 3 Larson appeals, of which I presided over the last two. Well, I'll let you judge for yourself. See Larson v. Larson, ___Mass. App. Ct.___(1995) [Larson III]. There, an early retirement by my Md. client left him without earned income and a 12 year old s/a which survived as to interspousal support and which provided that alimony ended when his earned income ended. As you might imagine, Dr. Larson still had about $50,000 per yr in unearned, sharecropping income from Iowa corn. Ex-wife then brought modification to extend the alimony, claiming that our common law standard for modification of a surviving agreement, entitled: "Countervailing equities" had been established by the evidence at trial. The trial judge found that the issue of the case was "whether the facts were sufficient to establish countervailing equities?" duh! He then never mentioned the issue again and ordered my client to pay alimony for life!!!

I appealed and the appeals court held that this was not a countervailing equity case...b u t went on to say that the early retirement frustrated the original intent and the wife had the right to expect to receive alimony through a normal retirement age! So it reversed the trial court and ruled that Dr. Larson should pay another 16 months and that was that!

> 6. How about enforcement of the s/a?

See Larson.

> 7. How about modification of "child-related" terms?
Decristofaro was a survived agreement as to child related issues. Thus, "countervailing equities". So I guess the answer is yes, but...

Of "adult" terms [i.e.,> alimony,

If not merged, see Larson & Decristofaro. Yes, but...

equitable distribution]?

No. Never. Nada. Not in my lifetime. Well, at least not now.

ED HAMADA, Boston, MA

FROM: sts@divorcenet.com (Sharyn T. Sooho)
TO: law8507@aol.com

> **1. What happens to the s/a when the parties divorce?**

Parties have the option of living apart under the terms of the agreement without filing it.If the agreement is filed with a court, they have an option of requesting the court to incorporate and merge the agreement with a judgment or allowing the agreement to survive the judgment with independent legal significance. Drafters generally include language in the agreement itself as to its status after a hearing on the merits.

An agreement which is merely incorporated but neither merged nor surviving the judgment, is a peculiar hybrid loaded with ambiguities. Drafters are cautioned to pick a merged or surviving status.

> **2. Must it be incorporated into the decree? May it be? And what does "incorporated" mean?**

Not much without qualifing language as outlined above.

> **3. Does the judge ask the plaintiff anything about it during the divorce**
hearing?

Generally speaking this question is reserved for both counsel. If the parties are pro se, the court will read the agreement, look for the appropriate language, and explain merger and survival to the parties.

> **4. What powers does the judge have to "correct errors" in the s/a?**

The courts generally do not correct, but will not approve and incorporate a defective agreement.

> **5. Ditto as to items that one party may not agree with any more, or that the judge doesn't like... can the judge modify them?**

In my experience, the judge will not approve an agreement under these conditions and in Mass. we have a peculiar and possibly unconstitutional provision in our uncontested no-fault divorce statute which states that if the judge does not approve the agreement, then it is void.

> **6. How about enforcement of the s/a? If it's not incorporated, how do you enforce -- breach of contract?**
Yes.
Specific performance?
Yes.
If incorporated... contempt?
Yes.
> **7. How about modification of "child-related" terms [custody, visitation, child support]? Of "adult" terms [i.e., alimony, equitable distribution]?**

The parties are required to agree to a merger of all child related issues. Alimony and property provisions may survive, so we have different parts of the agreement merging and surviving. Furthermore, Mass. alimony remains modifiable even if the agreement survives, but requires "something more than a material change," and probably requires imminent impoverishment and going on the public dole. The amount of alimony awarded would be barely sufficient to keep the recipient off welfare.

Sharyn T. Sooho

NEW HAMPSHIRE
From: ROSSJ@wiggin-nourie.com (Jon Ross)

In New Hampshire, separation agreements are not specifically enforceable. They represent only some evidence of what the parties thought was fair at the time of execution. The Court may make its own decision in divorce on the facts then. See Narins v. Narins.

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NEW JERSEY

From: gasmith@injersey.com (Glen A. Smith)

First there is the term Separation Agreement. I usually call it a Marital Settlement Agreement while others in New Jersey call it a property settlement agreement. It is used for separation purposes primarily because we have a divorce based on living separate and apart for 18 months. Thus a couple enters into the agreement and waits the 18 months so that no dirty linen is exposed in the divorce. This kind of divorce is improperly referred to here as a no-fault divorce, but the fault is separation for 18 months.

In any case it is normal to include wording stating that the agreement will be incorporated into the Judgment of Divorce whenever there is one. If it says this it is normally included. My experience has been that an agreement if no longer agreeable is challenged by one of the parties. The judge hears the arguments and determines whether the agreement is still valid. Normally the judge does not want to know what is in the agreement. In Somerset County, New Jersey the judges require a statement that they have not reviewed the agreement and neither approve nor disapprove it and have taken testimony only that the agreement was entered into voluntarily. In New Jersey all agreements are challengable on the basis of changed circumstances. This would apply to child related items such as custody, visitation, and child support. In the long run it depends mostly on what the scrivener has included in the Agreement.

NEW YORK

From: Loishome@aol.com

In NY the s/a may be incorporated into or merged into. If it is incorporation you can sue on the separate parts but if it it is merged, then you can only sue on the judgement of divorce. Most parties incorporate it into but do not merge it.

From: SCrys@aol.com

*In NY when the parties divorce, separation agreements can be "incorporated" OR "merged" into the divorce decree/judgment. The significance of one or the other is in the way the terms of the agreement may in the future, perchance be enforced, set aside or modified.

* Think of the incorporated agreement as a judgment of the Court.

ENFORCEMENT IN "MATRIMONIAL ACTIONS"

*If the agreement is "merged" into the judgment of divorce, the agreement cannot be enforced in a matrimonial action (A "matrimonial action" in NY includes specific post-divorce actions) since once it "merged" with the divorce judgment, the agreement has been absorbed and only the judgment itself is enforceable in a matrimonial action. So for example if your former spouse refuses to pay you maintenance as provided in the agreement, you cannot ask the Court to hold him in contempt of Court for failure to comply with the terms of the agreement. To be a contempt of Court, among other things, there must be a violation of an Order of the Court. In this situation, your former spouse failed to comply with the agreement of private parties, NOT with a judgment or order of the Court. The agreement may still, however, be enforced in a plenary contract action for specific performance, for example.

*Conversely, as to an incorporated but not merged (in a divorce judgment) agreements (so long as it was the intent of the parties), you have available all the protection of the judicial enforcement devices of the Domestic Relations Law (as the Court retains the authority over its own matrimonial judgment) while also maintaining the right to seek relief, should such be necessary, in a contract action.

*No, the agreement does not have to be incorporated into the decree but so long as the agreement is "incorporated but not merged with the divorce decree" the agreement remains an independent contract enforceable both as a judgment and as a contract separate from the decree.

MODIFIABILITY

*An agreement valid and legal when entered into will generally not be modified by the Court. The Court generally cannot modify the private agreement of the parties absent a showing of clear intent of the parties that the agreement be modifiable as such. However, if a party alleges the agreement was inequitable or unfair when entered into, and in fact the agreement is inequitable or was the product of fraud, duress, misrepresentation or overreaching, for example, the Court will have no problem stepping in AND stepping out the agreement. The Court will not, however, "sua sponte" (on its own initiative) intervene with a private contract of the parties (and that is, at inception, what a separation agreement is).

*Exceptions to the general rule of non-modification are especially relevant in matrimonial matters and under present NY Law include modification of judgments incorporating agreements with provisions for maintenance which, upon a showing of "extreme hardship," the Court may modify to a sum lower or higher than the agreement calls for. Where there is no such incorporation, the standard to modify the judgment here would be the lesser, "substantial change in circumstances."

*The other very important exception is that, regardless of whether the agreement is merged or incorporated, for sound public policy reasons, certain provisions relating to the custody, care, education and maintenence of children are modifiable, at varying standards of review.

*The parties themselves as long as within the bounds of the law, are always free to contract amongst themselves and to mutually agree to modify the terms of their agreement.

*The Court will be very careful make sure the parties understand all the terms of the judgment of divorce whether or not that judgment will include terms incorporated from the parties separation agreement.

TEXAS

From: x8dcc@ttacs1.ttu.edu (D. Cummins)

A separation agreement usually doesn't resolve the entire relationship between the parties or allocate all their property, in that it doesn't look forward to either a decree of separate maintenance or a divorce decree. It usually does not treat all of the property of the parties, separate and community. It well may partition some community property and exchange his
half in X for her half in Y & Z, thus achieving sole ownership of some assets.

When a divorce later occurs and if the separation agreement and its outcomes is not successfully attacked, e.g. vitiated by fraud, duress, undue influence, involuntariness, etc., what's done is done and the divorce court will award each spouse his/her separate property including that created by the separation agreement. The property that remains as community property will be equitably distributed and a QDRO will be executed to apportion any private retirement plan under ERISA and a similar document will be executed to apportion military retirement. If the parties enter into a divorce settlement agreement and it's a novation intended to replace the separation agreement, it will do so if approved by the divorce court. If they enter into a divorce settlement agreement that is intended to supplement the separation agreement and tie up all the loose ends and fully resolve the relationship, and if the divorce court approves that agreement, it will enforce both the separation agreement and the divorce settlement agreement.

The lesson is clear. A separation agreement is an extremely important document and wisdom suggests that it be as limited in scope as possible to deal with what the parties overtly wish to deal with at the time. The heavy lifting should be deferred in hopes that a reconciliation will occur and lifting will be as light as a feather or the full measure of the relationship can be dealt with at divorce.

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VIRGINIA
From: lawyer@patriot.net (John Crouch)

In Virginia, you should ordinarily include in the Separation Agreement that --

in the event either party ever files for divorce, separate maintenance, custody or support, legal separation or bed & board divorce, this agreement shall be presented to the court by that party to be affirmed, ratified, and incorporated, but not merged, into the divorce decree and/or other court order.

(Some of this wording may be a relic from the days when public policy said that agreements were not supposed to encourage divorce. Or that public policy may be lingering around somewhere -- we're not sure.)

If the party who files doesn't present the agreement to the court for some reason, the Defendant can present it and file a Motion to Incorporate it in the decree or order.

Virginia follows what I think is pretty much the universal rule -- anything concerning children under 18 can be modified based on a change of circumstances, but in practice it hardly ever will be modified in the first 6 months or so after the agreement is reached.

>**2. Must it be incorporated into the decree? May it be? And what does "incorporated" mean?**
It must unless both spouses agree otherwise. "Incorporated" makes it part of the court order, enforceable by contempt proceedings. "Merged" lets it also continue to be a contract, enforceable as such.

>**3. Does the judge ask the plaintiff anything about it during the divorce hearing?**
Usually not -- the plaintiff's lawyer asks nearly all the questions in an uncontested divorce grounds hearing. The judge or commissioner asks some questions, but nothing like that. As for the substantive issues besides divorce grounds and child-related issues, if there is a hearing on them at all, the judge will assume there is no separation agreement. If there is one but the plaintiff didn't say so in the pleadings, I would think that would be fraud upon the court.

>**4. What powers does the judge have to "correct errors" in the s/a?**
That's a big question. Better to ask the list as a whole about that. Generally separation agreements are treated like any other contracts when it comes to things like that.

>**5. Ditto as to items that one party may not agree with any more, or that the judge doesn't like... can the judge modify them?**
No, except regarding children.

>**6. How about enforcement of the s/a? If it's not incorporated, how do you enforce -- breach of contract? Specific performance? If incorporated... contempt?**
All of those.

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