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A Step Toward Simplification Of Separation Agreements*

CASE COMMENTS

A STEP TOWARD SIMPLIFICATION OF SEPARATION AGREEMENTS*

When a husband and wife sever their marital relation, they may contractually determine the extent of the husband's continuing obligation to support the wife by means of a separation agreement, in the form of either a property settlement or a support agreement.[1] A *property settlement* establishes by contract what the parties consider a fair distribution of the realty and personalty of ascertainable value owned by them, and, because the wife may release her right to support in order to secure a more favorable settlement,[2] may serve as a means in determining the husband's duty to support. A *support agreement,* on the other hand, is a contract by which the parties determine the amount of alimony which the husband should pay the wife in satisfaction of his legal obligation to support her.[3] The payments usually continue for an indefinite time,[4] and therefore the amount a husband

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*The importance of separation agreements may be measured to some extent by the importance of the general subject of domestic relations. A recent survey of a limited number of lawyers showed that of forty subjects listed, domestic relations ranked eighth in importance as measured by the frequency with which problems arose in that area. Laughlin, A Day's Work, 16 Wash. & Lee L. Rev. 192, 199 (1959). As of 1953, divorces were being granted in the United States at the rate of four hundred thousand per year—a ratio of one divorce in every four marriages, as compared with one divorce for every thirteen marriages in 1900. Lindley, Foreword to Lindley, Separation Agreements and Ante-Nuptial Contracts at v (1953). It has been estimated that the number of separation agreements signed each year approximates the number of divorces granted. Id. at vi.

[1]This determination is not binding on the courts, and the agreement may be set aside if unfair. Cronin v. Hebditch, 195 Md. 607, 74 A.2d 50 (1950); Halstead v. Halstead, 74 N.J. Eq. 596, 70 Atl. 928 (Ch. 1908); Haas v. Haas, 298 N.Y. 69, 80 N.E.2d 337 (1948).

[2]Courts are loathe to permit the wife to bargain away her right to support. Thus, in Dworkin v. Dworkin, 247 App. Div. 213, 286 N.Y. Supp. 982 (1st Dep't 1936), it was held that an agreement which attempts to relieve the husband of the obligation to support his wife is void if the husband gives an inadequate consideration. But in Adams v. Adams, 29 Cal. 2d 621, 177 P.2d 265 (1947), it was held that the court had no power to change the agreement of the parties when the contract was basically for the settlement of property rights, and had been approved by the divorce court. The validity of a waiver of the wife's claims against the husband's estate has been upheld in numerous cases. See, e.g., In re Sturmer's Estate, 303 N.Y. 98, 100 N.E.2d 155 (1951).

[3]The law imposes a duty upon the husband to support his wife in conformity with his status in life. Astor v. Astor, 89 So. 2d 645 (Fla. 1956); State v. Lucas, 242 N.C. 84, 86 S.E.2d 770 (1955); Bundy v. Bundy, 197 Va. 795, 91 S.E.2d 412 (1956).

[4]The wife's support payments are usually terminated at her death or upon her remarriage. Kuert v. Kuert, 60 N.M. 432, 292 P.2d 115 (1956); Austad v. Austad, 2

may have to pay under a support agreement is not immediately ascertainable, although with the use of actuarial tables one may determine the present cash value of such an annuity. Both types of agreement offer benefits to the parties by way of reducing litigation, curtailing expenses, and eliminating a controversy that may cause scandal. However, these advantages may be lost because of conflicting interpretations of the provisions of the agreement and the decree that embodies the agreement.

In the recent case of *Flicker v. Chenitz*,[5] the Appellate Division of the Superior Court of New Jersey considered the rights of an ex-wife[6] against her former husband's estate under a separation agreement. While a divorce suit was pending, the husband and wife entered into an agreement[7] the first clause of which provided that the husband should pay the wife one hundred and forty dollars per week during her life "in lieu of all support, alimony and maintenance . . . ."[8] The next five clauses settled the rights of the parties in a substantial amount of property.[9] The agreement was approved[10] by the trial court

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Utah 2d 49, 269 P. 2d 284 (1954). The parties may provide by the contract that payments shall continue regardless of remarriage, but this provision when incorporated in a decree may be modified at a later date, Adler v. Adler, 373 Ill. 361, 26 N.E.2d 504 (1940). As to whether alimony survives the death of the husband, see note 13 infra. The reader should note that "lump sum settlements," sometimes called "alimony in gross," constitute another method of meeting the obligation to support, and are subject to different rules from those governing property settlements and periodic alimony.

[5]55 N.J. Super. 273, 150 A.2d 688 (App. Div. 1959).

[6]For convenience, the parties will hereafter be referred to as husband and wife, although divorced.

[7]The contract was not labeled either "support agreement" or "property settlement." Such a designation might have aided in determining the intent of the parties.

[8]150 A.2d at 690.

[9]The agreement between Sol and Hilda Flicker provided for property settlement as follows: clause (2) gave the wife an undivided one-half interest in realty located in Arlington, New Jersey; (3) gave the wife about ten thousand dollars to be received from the sale of realty; (4) gave the wife all of the husband's interest in realty situated at three consecutive street numbers in Newark, New Jersey; (5) conveyed to the husband all the wife's interest in property other than that heretofore mentioned; (6) disposed of tax considerations as to property. Thus it is apparent that there are substantial provisions as to support and property settlement, but the agreement must be treated as either one or the other, unless the two types of provisions can be treated independently as suggested later in this comment. See note 38 infra, and accompanying text.

[10]The agreement may be incorporated in the decree so as to give it the full force and effect of a decree (see, e.g., Flynn v. Flynn, 42 Cal. 2d 55, 265 P.2d 865 (1954)), or merely approved, thereby establishing the validity of the contract, but denying decretal effect (see, e.g., McWilliams v. McWilliams, 110 Colo. 173, 132 P.2d 966 (1942)).

in a subsequent divorce action, and the husband made payments in accordance with the agreement until his death. At that time the husband's executor refused to continue the weekly payments, contending that the obligation was for the payment of alimony and as such ended with the death of the husband. The wife sued for overdue payments and sought an adjudication that she was entitled to receive payments until her death. The wife's claim was denied, but on appeal the Superior Court held that the agreement could be specifically enforced after the death of the husband, and further, that the wife or the husband's estate could apply to the court for an order modifying the payment provision.[11]

In reaching the decision that the agreement could be enforced and modified after the death of the husband, the appellate court determined three issues which are pertinent to practically any discussion of separation agreements: (1) whether the agreement survived the death of the husband; (2) whether the agreement merged into the decree of divorce; and (3) whether the provisions for monthly payments could be modified. In the following discussion an effort will be made to illustrate how an initial determination of the nature of the agreement, *i.e.*, property settlement or support agreement, would have aided in the disposition of each issue.

1. *Did the agreement survive the death of the husband?* The Superior Court held, in accordance with the general rule, that a property settlement survives the death of the husband.[12] The court also held that an agreement in the nature of alimony could likewise be enforced after the death of the husband where, as here, the parties manifested that intention.[13] The latter rule is supported by authority and seems

[11]150 A.2d at 699.

[12]Anthony v. Anthony, 94 Cal. App. 2d 507, 211 P.2d 331 (Dist. Ct. App. 1949); Kuchenbecker v. Estate of Kuchenbecker, 4 Ill. App. 2d 314, 124 N.E.2d 52 (1955). Cf. Moore v. Crutchfield, 136 Va. 20, 116 S.E. 482 (1923). The property agreement also survives the remarriage of the wife, unless otherwise specified in the agreement. Eisinger v. Eisinger, 95 So. 2d 502 (Fla. 1957); Goldfish v. Goldfish, 230 N.Y. 606, 130 N.E. 912 (1921).

[13]In re Mesmer's Estate, 94 Cal. App. 97, 270 Pac. 732 (Dist. Ct. App. 1928); Ramsay v. Sims, 209 Ga. 228, 71 S.E.2d 639 (1952); Storey v. Storey, 125 Ill. 608, 18 N.E. 329 (1888); Southard v. Southard, 262 Mass. 278, 159 N.E. 512 (1928); Foster v. Foster, 195 Va. 102, 77 S.E.2d 471 (1953) (dictum). It has been stated that since the power to grant alimony is statutory, courts have no power to bind the estate of a husband to continue the alimony payments unless the power is granted by statute, or the parties so agree. North v. North, 339 Mo. 1226, 100 S.W.2d 582 (1936); Foster v. Foster, 195 Va. 102, 77 S.E.2d 471 (1953). Some courts require a definite statement that alimony is to survive the husband's death. Thus an agreement to pay the wife "so long as she shall remain single" was held not to bind the husband's estate in Parsons v. Parsons' Estate, 70 Colo. 333, 201 Pac. 559 (1921). The same result was reached when the promise was to pay the wife "so long as she shall live."

clearly just, inasmuch as parties may generally bind their estates by contract.[14] *But the court did not determine whether it was dealing with a property settlement or a support agreement,* nor did it follow the trial court's determination of that question.[15] While that determination was not essential to the decision as to survival, since this separation agreement would survive regardless of its nature, it seems only logical that the court would dispose of this basic question at its first opportunity, thereby eliminating the discussion of the other type of agreement from the case entirely.

2. *Was the agreement merged in the decree so as to lose its character as a contract?* If the agreement is one settling property rights, the majority rule is that it may not be merged in the decree to such an extent that it loses its character as a contract.[16] This rule is based upon the logic that the contract is primarily concerned with a matter over which the courts have no control, and therefore the acquiring of such control by merging the agreement in the decree would be an unwarranted extension of the court's power.[17] It has also been held that even though the property settlement has been merged in the decree for divorce, the intent of the parties prevails.[18] However, if the separation agreement is one which only provides for support, most courts agree that a decree incorporating (as opposed to merely approving or adopting) the agreement becomes solely a decree that the husband pay alimony,[19] and thereafter the rights of the parties are governed by the decree and not the agreement.[20]

Wilson v. Hinman, 182 N.Y. 408, 75 N.E. 236, 237 (1905). Other courts have not been so strict. See Storey v. Storey and Southard v. Southard, supra.

[14]6 Williston, Contracts § 1945 (rev. ed. 1938).

[15]The trial court held that "the essence of the agreement was the discharge of the marital obligation to pay alimony . . . ." 150 A.2d at 691.

[16]Gillespie v. Gillespie, 74 Ariz. 1, 242 P.2d 837 (1952); Adams v. Adams, 29 Cal. 2d 621, 177 P.2d 265 (1947); Burke v. Burke, 32 Del. Ch. 320, 86 A.2d 51 (1952); Kuchenbecker v. Estate of Kuchenbecker, 4 Ill. App. 2d 379, 124 N.E. 2d 52 (1955); Gloth v. Gloth, 154 Va. 511, 153 S.E. 879 (1930).

[17]In some states, the legislature has given the courts power to modify property settlements incorporated in the decree. In these states the property settlement may be merged in the decree and subsequently dealt with as an order of the court. See Fla. Stat. Ann. § 65.15 (1943), and Iowa Code Ann. § 598.14 (1954).

[18]Kuchenbecker v. Estate of Kuchenbecker, 4 Ill App. 2d 314, 124 N.E.2d 52 (1955).

[19]The power of the court to grant alimony inconsistent with an agreement between the parties may be limited by statute. See, e.g., Va. Code Ann. § 20-109 (1950), providing that if there is a contract between the parties and no objection is raised as to its terms, no order directing payment of alimony shall be entered except in accordance with that contract. It has been stated, however, that this statute does not preclude a later modification of the decree incorporating the alimony provision. Brinn v. Brinn, 147 Va. 277, 137 S.E. 503 (1927).

[20]Herbert v. Riddell, 103 F. Supp. 369, 386 (S.D. Cal. 1952); Gavette v. Gavette,

The language of the court in *Flicker* indicates that the agreement merged in the decree for the purpose of subsequent modification, but did not merge to the extent that it became alimony which ended at the death of the husband.[21] The distinction is a novel one, and not necessary to the determination of the case if the court follows the rule that the decree will survive the husband's death if based upon an agreement which embodies this intention.[22]

It can be seen from the foregoing discussion that the question of merger may turn upon whether the agreement is a property settlement or a support agreement. In the *Flicker* case the court discussed the problem of merger as it related to support agreements,[23] but this is in total conflict with the first sentence of the opinion which refers to the agreement as a property settlement.[24] It follows that *because of the failure to determine the nature of the agreement,* no sound legal principle can be drawn from this area of the case.

3. *May the decree be modified?* The determination of the nature of the agreement is essential to the proper disposition of this facet of the case. If the contract is an unmerged property settlement, practically all authorities agree that it may not be modified without the consent of the parties, as there is nothing in the decree to be modified.[25] Conversely, if the court is dealing with a support agreement which has by merger become court-decreed alimony, practically all authorities agree that it may be modified.[26] Modification of a support agreement may be more difficult to justify when one of the parties is dead, but the better rule would seem to be that death of a party is

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104 Colo. 71, 88 P.2d 964 (1939). But see, Sureau v. Sureau, 305 N.Y. 720, 112 N.E.2d 786 (1953). When both parties are before the court and the court ratifies or incorporates the agreement, the court is deemed to have passed on its legality and collateral attack will be denied. Richards v. Richards, 85 Ga. App. 605, 69 S.E.2d 911 (1952); Schaht v. Schaht, 295 N.Y. 439, 68 N.E.2d 433 (1946); Wallihan v. Hughes, 196 Va. 117, 82 S.E.2d 553 (1954). But when the agreement, although brought to the court's attention and mentioned in its findings, is not incorporated in the decree, it is not immune from collateral attack. Flood v. Thiesing, 298 N.Y. 700, 82 N.E.2d 790 (1948).

[21]150 A.2d at 697.

[22]See note 13 supra and accompanying text.

[23]150 A.2d at 697.

[24]150 A.2d at 690.

[25]Erwin v. Erwin, 179 Ark. 192, 14 S.W.2d 1100 (1929); North v. North, 339 Mo. 1226, 100 S.W.2d 582 (1936); Moore v. Crutchfield, 136 Va. 20, 116 S.E. 482 (1923). The rule may be modified by statute. See note 17 supra.

[26]Goldman v. Goldman, 282 N.Y. 296, 26 N.E.2d 265 (1940); Gloth v. Gloth, 154 Va. 511, 153 S.E. 879 (1930). The modification is only of the decree, and to the extent that the agreement then differs from the decree, the agreement may be enforced as a contract right. See, Gummerson v. Gummerson, 14 Cal. App. 2d 450, 58 P.2d 394 (Dist. Ct. App. 1936); Goldman v. Goldman, supra.

only a factor to be considered by the court, and is not an absolute bar.[27]

If the court had determined that this was a support agreement, there would have been no difficulty in justifying modification. However, since there had been no decisive adjudication as to the nature of the agreement in *Flicker,* it was necessary that the court attempt to justify modification on a ground consistent with principles governing property settlements. In doing so the court based its decree permitting modification upon the theory that the decree was for specific performance, a remedy which may be ordered on terms inconsistent with the agreement sued upon in order to reach a just result.[28] While this rule is applied in contract law in cases of necessity, the operation of the decree is usually *conditioned* upon the consent of the party prejudiced by the modification.[29] If that consent had been made a prerequisite to modification in the instant case there would be no departure from the usual rules governing property settlements, for the agreement may always be changed with the consent of the parties.[30] But the fair inference from the language of the case is that if the trial court does not abuse its discretion in modifying the decree, it will be upheld regardless of consent of the parties.[31] An early determination that the contract was a support agreement might have eliminated the necessity for this questionable language.

4. *Other problems.* Custody provisions,[32] tax implications, [33] and

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[27]Pingree v. Pingree, 170 Mich. 36, 135 N.W. 923 (1912); Gunderson v. Gunderson, 163 Minn. 236, 203 N.W. 786 (1925).

[28]150 A.2d at 699.

[29]City of La Follette v. La Follette Water, Light & Tel. Co., 252 Fed. 762, 773 (6th Cir. 1918); Coppage v. Equitable Guarantee & Trust Co., 11 Del. Ch. 373, 102 Atl. 788 (1917); Barnett v. Cloyd's Ex'rs, 125 Va. 546, 100 S.E. 674 (1919).

[30]17 Am. Jur. Divorce and Separation § 733 (1957).

[31]"Therefore the decree of specific performance . . . will provide that the wife or the estate of the husband may apply to the court for modification of the decree. . . ." 150 A.2d at 699.

[32]The court has broad discretionary powers as to custody of children and no agreement by the spouses can deprive the court of its jurisdiction. Koser v. Koser, 148 Neb. 277, 27 N.W.2d 162 (1947); Kunker v. Kunker, 230 App. Div. 641, 246 N.Y. Supp. 118 (3d Dep't 1930).

[33]Periodic payments in the nature of alimony are taxable to the wife and deductable by the husband unless the payments are installments of a specific sum, and are to be completed in a period of ten years or less after the divorce decree or agreement requiring the payments. On the other hand, payments pursuant to property settlements are unaffected by this section of the Internal Revenue Code unless made in conjunction with the husband's obligation resulting from the marriage. Int. Rev. Code of 1954, § 71(a) and (c). See Hines, Tax Aspects of Property Settlement Agreements, 12 So. Cal. L. Rev. 386 (1939), based on similar provisions of the Internal Revenue Code of 1939.

the use of contempt power as a means of enforcement[34] are several other important problems concerning separation agreements which were not raised in the instant case. In some of these areas the court's interpretation of the nature of the agreement is also a decisive factor in determining the rights of the parties, thus magnifying the importance of a clear decision on that basic issue.

Conclusion. It is submitted that the conflicting language in *Flicker* is a result of the apparent dilemma in which the court found itself. On its face the agreement appeared to be a property settlement,[35] and that interpretation effectuated the intent of the parties by providing payments to the wife after the husband's death. However, the enforcement of the agreement as written placed an undue burden on the husband's estate, and therefore a means of revising the agreement had to be found. The court's solution was to use the terms property settlement and support agreement almost interchangeably in an effort to reach a just result.

The problem could have been avoided had the appellate court followed the determination of the trial court that the agreement was basically one to pay alimony.[36] By following the better rule that alimony survives the death of the husband if based upon an agreement to that effect, the problem of giving effect to the intent of the parties would have been eliminated. Further, the alimony decree could be modified where, as here, justification is shown.[37]

It may well be true that the Superior Court found it difficult to follow the trial court's ruling as to the nature of the agreement. If that difficulty is insurmountable, it is suggested that while the agreement as a whole may be a property settlement, the one clause dealing with support payments may be treated as an *independent* clause subject to separate considerations as to enforcement, survival, merger and modification. While there is little direct authority to support this

[34]If the order to make money payments is pursuant to a property settlement agreement, a majority of courts hold that enforcement by contempt violates constitutional immunity from imprisonment for debt. Goldfish v. Goldfish, 193 App. Div. 686, 184 N.Y. Supp. 512 (1st Dep't 1920). Cf. Dickey v. Dickey, 154 Md. 675, 141 Atl. 387 (1928). But if an alimony agreement has been incorporated in a decree, enforcement by contempt is permissible, the distinction being that alimony is not a debt. Ex parte Dukes, 155 Ark. 24, 243 S.W. 863 (1922); Estes v. Estes, 192 Ga. 94, 14 S.E.2d 681 (1941). See Knabe v. Knabe, 176 Md. 606, 6 A.2d 366 (1939), and Gloth v. Gloth 154 Va. 511, 153 S.E. 879 (1930).

[35]See note 9 supra.

[36]See note 15 supra.

[37]See note 27 supra.