October 2011

Considering Public Policy When Drafting Separation Agreements

Part One of a Two-Part Article

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Separation agreements differ from other kinds of post-nuptial agreements because they are contracts between a husband and wife who remain married but live separate and apart. Where they contain the provisions required by law, these agreements have long been recognized in New York as being valid and binding, and not contrary to public policy.

New York's public policy regarding separation agreements has changed significantly over the last 150 years, along with the changing mores of our society. Many tenets of former policies have fallen away as women gained equal rights to men in marriage relationships. However, the aspects of New York public policy regarding separation agreements that remain today must still be taken into account when drawing up these contracts.

Some of these considerations can be found in New York's case law. Others are contained in New York General Obligations Law (GOL) § 5-311 (titled "Certain agreements between husband and wife void"). In all kinds of matrimonial agreements, provisions that violate this statute are absolutely void. The statute currently in place reads:

> Except as provided in New York Domestic Relations Law §236, a husband and wife cannot contract to alter or dissolve the marriage or to relieve either of his or her liability to support the other in such a manner that he or she will become incapable of self support and is therefore likely to become a public charge. An agreement, heretofore or hereafter made between a husband and wife, shall not be considered a contract to alter or dissolve the marriage unless it contains an express provision requiring the dissolution of marriage or provides for the procurement of grounds of divorce.

Separation Agreements

Under present New York law, two competent adults who have actually separated, or who intend to separate immediately after the execution of a separation agreement, may enter into a valid separation agreement. A similar arrangement may be made between a husband and wife where they have not separated, in contemplation of a future separation or divorce that may or may not occur. See Domestic Relations Law (DRL) § 236 (B)(3). However, only separation agreements may serve as the predicate for a "separation and living apart" divorce under DRL § 170(6). Section 170(6) provides that an action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on the ground that the husband and wife have lived separate and apart pursuant to a written agreement of separation, subscribed and acknowledged by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded, for a period of one or more years after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such agreement. Other kinds of marital agreements do not qualify as a ground for divorce because they do not confirm that separation has occurred.

The Duty to Support

General Obligations Law § 5 311, in its original 1964 form, stated that "[a] husband and wife cannot contract … to relieve the husband from his liability to support his wife or to relieve the wife of liability to support her husband provided that she is possessed of sufficient means and he is incapable of supporting himself and is or is likely to become a public charge." The New York Court of Appeals interpreted the law in McMains v. McMains, 15 NY2d 283 (1965), in which it held that a divorce decree, predicated upon a separation agreement that survived the judgment, might be modified by the court where the agreement

was "valid and adequate when made" and therefore "unassailable," but later there arose a "dire need" for additional support. The court said that although such an agreement continues to bind the parties when its terms have been written into a subsequent divorce judgment, this does not prevent a later modification increasing alimony (maintenance) where it appears that the former wife is unable to support herself on the amount previously allowed, and she is in actual danger of becoming a public charge. It was pointed out that New York courts have the power to modify the alimony set by a divorce judgment, and although courts may not modify a judgment when it has incorporated or merged a separation agreement, where the separation agreement contains a non merger stipulation, the court may change the alimony provision of the judgment even though the agreement was exhibited to the court and the court embodied its terms in the judgment.

The statute was altered in 1980 to equalize the responsibilities of both husbands and wives, requiring both to support their spouses or former spouses only if those spouses are, or are in danger of becoming, public charges. Thereafter, wives could contract away their rights to support in a separation agreement. That is what the wife did in Diamond v. Diamond, 2009 NY Slip Op 4370 (2d Dept. 2009). The Diamond parties had been married 32 years when they entered into an agreement in contemplation of divorce. It gave to the husband all of the parties' assets, whether separate or marital. That would have been the final word, had the wife not later suffered economic hardships that required her to enter a nursing home, and had GOL § 5-311 not been in force. In affirming the Supreme Court's decision to set aside the agreement, the Second Department explained that "[t]he agreement rendered the [wife] incapable of self support and therefore was in violation of the provisions of General Obligations Law § 5-311."

Thus, while the support obligation language of GOL § 5-311 may not affect a settlement agreement at the outset, counsel and their clients must remain aware that later-occurring circumstances could intervene to require the provision of support that was not originally agreed upon.

Contracts to Induce Divorce

Following the 1964 enactment of GOL § 5 311, complications quickly ensued, due to the Court of Appeal's decision in Viles v. Viles, 14 NY2d 365 (1964). In that case, in a four-to-three decision, the State's high court affirmed the trial court's finding that a separation agreement was illegal and void, because of evidence that it had been conditioned upon an oral side agreement that the wife would obtain a Virgin Islands divorce, and because she was provided with transportation expenses to obtain that divorce.

From the practitioner's point of view, the majority thus posed a threat to the stability of thousands of separation agreements, because it was not uncommon for there to be a tacit or oral understanding between the parties to separation agreements that the written contract would take effect only if plans for the divorce were carried out. A 1966 amendment to GOL § 5 311 eliminated the substantial threat to separation agreements posed by the Viles decision, by amending the statute to require that a contract to alter or dissolve the marriage contain an express provision requiring the dissolution of the marriage in order to void the agreement under this statutory prohibition. By adding the last sentence — "An agreement, heretofore or hereafter made between a husband and wife, shall not be considered a contract to alter or dissolve the marriage unless it contains an express provision requiring the dissolution of the marriage or provides for the procurement of grounds for divorce" (Laws of 1966 Ch 254, § 12, effective April 27, 1966) — the legislature created a distinction between agreements having a direct tendency to dissolve the marriage and those that merely suggest it will occur. The requirement that there be an express, direct, verbatim provision in the agreement itself eliminated most of the uncertainty occasioned by prior decisions.

Despite the 1966 amendment, care must still be taken to assure that no provision can be construed as creating a contractual obligation to divorce. For example, in Taft v. Taft, 156 AD2d 444 (2d Dept 1989), the Appellate Division held that a provision in a separation agreement that the parties "shall proceed" with a divorce on the ground of abandonment violated GOL § 5 311, as it constituted an express provision obligating the parties to obtain a divorce.

More recently, another settlement agreement was deemed invalid and the courts refused to enforce it because it violated GOL § 5 311's prohibition on contracts to procure divorce. In Charap v. Willett, 2011 NY Slip Op 4190 (2d Dept. 5/17/11), the parties had been divorced by

judgment in March 2009. Unbeknownst to the court, the parties had entered into a side agreement prior to their divorce, which was signed by them and notarized. However, in accordance with its own provisions, it was kept confidential. This stipulation required the husband to pay the wife $65,000 over and above what she would be awarded as equitable distribution, and to pay her attorney $10,000. As consideration for these promises, the wife agreed promptly to prepare an amended answer to her husband's divorce petition and to counterclaim for a divorce on the basis of cruel and inhuman treatment. As soon as the court placed the matter on its calendar, the parties were to proceed to inquest, whereby the grounds for a divorce would be finally and irrevocably determined. The husband apparently did not comply with the terms of this side agreement, so, by order to show cause, the former wife moved in July 2009 for an order directing the former husband to perform on the contract. The Supreme Court denied the former wife's motion, finding the stipulation unenforceable. Citing to Taft v. Taft, the Second Department affirmed, stating, "The May 7, 2007, stipulation is void as against public policy, since it expressly required the former wife to seek dissolution of the marriage and 'provides for the procurement of grounds of divorce' (General Obligaitons Law § 5 311). As the offending provision represents the only consideration provided by the former wife for the agreement, which does not contain a severability provision, the stipulation is void in its entirety."

Next month we will discuss other aspects of New York public policy that may affect the validity of separation agreements.

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