Manifestly Unfair Marital Agreements

By Bari Brandes Corbin

Part One of a Two-Part Article

In December 2006, Justice Laura Visitacion-Lewis of Supreme Court, New York County, held that a modification to a separation agreement was void ab initio and unenforceable. D.M. v. K.M., 14 Misc.3d 1206(A), Slip Copy, (Sup. Ct., N.Y. Cty. 12/12/06). That case involved a woman who agreed to give up her rights under the original agreement according to which she would have received a large monthly maintenance payment, child support and custody of the couples' children.

Although the Special Referee who first analyzed the case considered the modified agreement unenforceable because the ex-wife, an alcoholic, might have been impaired at the signing, the appellate court rescinded the agreement on another basis: The amended agreement was a product of the ex-husband's overreaching. We are reminded by the holding in D.M. v. K.M. that there is a strict surveillance of all transactions between married persons, especially separation agreements. The appearance of equity is so zealous in this respect that a separation agreement may be set aside on grounds that would be insufficient to vitiate an ordinary contract. But when is a separation agreement so unfair that New York's courts will set it aside?

CHRISTIAN V. CHRISTIAN

The seminal case on the issue of separation agreement unconscionability is Christian v. Christian, 42 NY2d 63 (1977), in which the Appellate Division declared that a portion of the parties' separation agreement — which stipulated that there would be an equal division of certain securities — was null and void. Although the entirety of the agreement was not set aside as "unconscionable," the Court of Appeals' Justice Cooke, citing to cases involving commercial contracts, redefined that term in the context of marital agreements as being anything that was "manifestly unfair." At the time the Christians entered into their agreement, New York was a common law property state (equitable distribution was enacted effective July 19, 1980). The parties, who had been married for 14 years, entered into the agreement in January 1972, at a time when the husband earned $40,000 a year, the wife earned $10,000 a year, and each had separate unearned income. The agreement provided for $100 a week for child support but made no provision for alimony. The last paragraph of the document provided that, in the event of a divorce, all assets held by the parties in their joint and/or individual names on Jan. 1, 1972 should be divided equally so that each would take one-half of the individual assets held by the other in his/her individual name on that date. In August 1972, the wife commenced the action for a divorce on the grounds of cruel and inhuman treatment. The husband interposed an amended counterclaim for a divorce pursuant to DRL 170(6), predicated on the parties living separate and apart for a period of one year since the execution of the agreement and his substantial performance of its terms. The wife denied the

essential allegations of the counterclaim and asserted the affirmative defenses of fraud, misrepresentation,

concealment, coercion, duress, lack of consideration and that the agreement violated public policy. After anon-jury trial, the court dismissed both the complaint and counterclaim for divorce, while setting aside the agreement, in its entirety, for fraud. The trial court found that the husband was aware that his stocks listed were worth $200,000, while those of the wife had a value of $800,000 to $900,000. The wife contended that she had no idea of the relative value of the securities. The court also found that the husband caused the wife to retain the

attorney who represented her and drew up the agreement, and that neither party informed the attorney of the values of the stock being split. It ultimately found that the husband's conduct constituted such fraud as to vitiate the agreement completely. The Appellate Division, Second Department, reversed that portion of Supreme Court's holding that set aside the agreement. The Second Department held instead that although adequate evidence of fraud and overreaching with regard to the formulation or signing of the separation agreement was absent from the record, that portion of the agreement pertaining to the division of property was so unconscionable as to be unenforceable. While ordinarily the division contemplated would not be deemed inequitable, in this case the wife, who did not have the advice of independent counsel, had securities worth $900,000 and the husband's holdings were worth only $200,000. The court concluded that although the agreement as a whole should not be set aside, the unconscionable provisions of it should be. An appeal followed. The Court of Appeal reviewed the finding by the Appellate Division that the last paragraph of the agreement was so unconscionable as to be unenforceable. Noted the court, the parties had a right to and did make the agreement severable, by expressly stipulating that if any provision of the separation agreement were held invalid or unenforceable all other provisions should nevertheless continue in full force. The court, in accordance with the contract terms, was therefore free to adjudge the validity of the suspect paragraph of the separation agreement without consequential effect on the remainder of the writing. It reversed the order of the Appellate Division and remitted to the Supreme Court forfurther proceedings. It did not find that the offending clause was "unconscionable."

STATUTORY LAW

Domestic Relations Law Section 236, Part B, Subdivision 3, was enacted in 1980 and applies to agreements executed on or after July 19, 1990. It attempts to modernize the New York Law applicable to antenuptial and postnuptial agreements, to ensure fair dealing and to encourage settlement. Such agreements may include: 1) a contrct to make a testamentary provision of any kind, or a waiver of any right to elect against the provisions of a will; 2) a provision for the ownership, division or distribution of separate and marital property; 3) provision for the amount and duration of maintenance or other terms and conditions of the marriage relationship, subject to theprovisions of § 5-311 of the

General Obligations Law, and provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment; and 4) provision for the custody, care, education and maintenance of any children. To be valid and enforceable to serve in lieu of equitable distribution in a matrimonial action, the agreement must be in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded. (In Matter of Sbarra, 17 AD3d 975 (3d Dept. 2005), the court held that an unacknowledged agreement is enforceable in other actions. In Kelly v. Kelly, 19 AD3d 1104 (4th Dept. 2005), the court held that an unacknowledged custody agreement was valid and enforceable as an open court stipulation pursuant to CPLR 2104. The First and Second Departments have sustained the validity of stipulations in lieu of formal agreements. See Sanders v. Copley, 151 AD2d 350 (1st Dept 1989); Harrington v. Harrington 103 AD2d 356 (2d Dept 1984); See also, Josephson v. Josephson, 121 Misc2d 572 (Sup. Ct., N.Y. Cty. 1983). The Third and Fourth Departments have rejected open court stipulations. See Lischynsky v. Lischynsky, 95 AD2d 111 (3d Dept 1983); and Hanford v. Hanford, 91 AD2d 829 (4th Dept. 1982). In Charland v. Charland, 267 AD2d 698 (3 Dept. 1999), the Third Department appears to have relaxed its restrictive rule.)

WHAT DO 'UNFAIR' AND 'UNCONSCIONABLE' MEAN?

The express provisions of the Equitable Distribution Law mandate that the circumstances surrounding

all of the terms of an agreement be fair and reasonable when made and

not unconscionable at the time of judgment. The decisions since Christian have made it clear that the advice of independent counsel and equality in bargaining position are important factors in resolving issues relating to fairness and overreaching. There are few reported cases setting aside agreements as unfair or unconscionable, probably due in large part to the application of the doctrine of ratification, which precludes a party from challenging the validity of an agreement where he has accepted its benefits for a lengthy period of time. Nevertheless, we shall review the reported cases, which appear to focus more on the terms of the relevant agreement, and attempt to reach a conclusion as to what is

necessary to set aside an agreement as manifestly unfair.

In Yuda v. Yuda, 143 AD2d 657 (2d Dept., 1988), the Appellate Division set aside a 1986 oral stipulation of settlement entered on the record, in open court, by the 63-yearold husband, acting pro se, and the 64-year-old wife, who was represented by counsel. The parties had been married for 30 years. According to the terms of the agreement, the husband was obligated to leave the marital home by May 1987, and the wife was given the right to the home's exclusive occupancy until its sale, which was to occur at her sole discretion. Upon the sale of the premises, the husband was to receive one-half of the proceeds. After the plaintiff husband moved from the marital home, he was required to pay defendant $800 per month maintenance for life. For her equitable distribution, the wife was to receive, inter alia, 50% of the husband's pension benefits when he retired, in addition to the $800 per month maintenance payment. On the basis of the record, it appeared that after his retirement the plaintiff's sole income would be his pension of $416 per month, and his obligation to the defendant would be approximately $1008 per month. Viewing this stipulation in its entirety, and "examining the totality of the circumstances in this case," the court found the entire agreement unconscionable and set it aside. It found that the provision giving the wife control over the house — the parties primary asset — for life, and the fact that the husband might neverrealize any income from this property, to be "particularly disturbing" in light of the plaintiff's limited financial resources. The court also found it "shocking that after he retires (and he is about 63 years old), the plaintiff is to pay the defendant $800 per month plus one-half of his pension." The court concluded that the "circumstances under which the stipulation was entered into" lent support to its conclusion because ""the pro se plaintiff was put under some pressure by the court to settle at a time when the circumstances should have alerted the court to take a more active role in insuring that a conscionable result would be received."

In Weinstock v. Weinstock,167 AD2d 394 (2d Dept. 1990), the Second Department affirmed an order of the Supreme Court denying the husband's application for a conversion divorce, and set aside the parties' separation agreement. The court held that the parties' 1988 separation agreement was "patently unconscionable" based on the standard of an "unconscionable bargain," as defined in Christian, because the wife of 22 years waived all rights with respect to equitable distribution, thereby relinquishing any share in the husband's assets, which were estimated to be in excess of $2 million. Pursuant to the agreement, the wife's receipt of maintenance was conditioned

on her being employed and simultaneously taking at least six college credits, and further limited the husband's obligations by providing that, even if those stringent requirements were met, he would only have to pay the difference between the wife's other income and the sum of $15,000 per year. Further evidence of the agreement's unconscionability was the requirement that the wife transfer her share of the jointly held marital home to the husband and the provision that she grant to him an irrevocable power of attorney, allowing him to sign her name to any documents, checks, deeds, leases and instruments required to effectuate the intent that the wife return to the husband any assets held by her, and which only required the husband to return to the wife those personal

items specifically set forth in the agreement. After the agreement was signed, the husband (an attorney) induced the wife to sign a loan agreement for a mortgage of $85,000 on a second home purchased by him, and kept for himself the entire proceeds from this transaction. The wife's psychiatrist, who testified at the hearing, characterized the wife as being very trusting of the husband and emotionally dependent on him. The husband's direct testimony in Weinstock indicated a "fatal lack of disclosure" concerning his financial affairs. The record was also replete with evidence of the wife's diminished capacity due to her periods of dependence on Valium and alcohol. The Appellate Division held that the agreement was "so manifestly unfair and the apparent product of coercion and overreaching" on the part of the husband, that it was properly set aside. It concluded that, as the agreement was void ab initio, it could not serve as the predicate for a conversion divorce. (We note that the court applied the doctrine of unconscionability to the property distribution and maintenance provisions, and did not find itself limited by the language of DRL Section 236(B)(3) Subdivision 3.)

In Tchorzewski v. Tchorzewski, 278 A.D.2d 869 (4th Dept. 2000), the Supreme Court had granted the husband a default judgment of divorce incorporating the separation agreement.The Appellate Division found that there were sufficient indicia of the husband's overreaching to require rescission of the financial provisions of the agreement. The court

pointed out that the fact that the defendant wife was not represented by counsel did not, by itself, invalidate the agreement, but that it was a "significant factor to be taken into consideration in determining whether the separation agreement was freely and fairly entered into." The separation agreement provided that each party had made independent inquiry into the other's financial circumstances and that full disclosure had been made. Notwithstanding that provision, the testimony of plaintiff's attorney, who drafted the agreement, established that plaintiff's pension was never valued at that time. The parties did not own real property, and the pension was the largest marital asset. In exchange for her waiver of any share in the pension, defendant received $15,000 from plaintiff's 401K account, the furniture in the marital residence (valued at $10,000), and her own 401K account, valued at $16,000. Plaintiff received the remainder of his 401K account, valued at $28,000, as well as the pension, and was held responsible for $6000 in marital debt. The Appellate Division held that the great disparity in the distribution of the marital assets, the fact that no disclosure was made concerning the value of the pension, and that defendant was not represented by counsel when she signed the agreement provided sufficient indicia of plaintiff's overreaching to require rescission of the agreement. In next month's issue, we'll look at more interpretations of Christian v. Christian and its progeny, and the courts' use of their guidance in deciding whether a separation agreement may be set aside as manifestly unfair.

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