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Article 6

Note: Separation Agreements and New York Public Policy

NOTES AND COMMENTS

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Introduction

Married parties who because of irreconcilable difficulties desire to alter their relationship have several courses of conduct open to them: they may procure a divorce; they may seek a judicial decree of separation; or they may voluntarily enter into a separation agreement. While a divorce will dissolve the marital bond, both the separation decree and agreement leave it intact.

In New York, separation agreements are subject to the general rules applicable to all contracts,[1] and are under the particular governance of Section 5-311 of the General Obligations Law.[2] This section embodies the public policy of the state that neither a husband nor a wife may contract to alter or dissolve their marital status. Although this has been the declared public policy of New York since 1896,[3] its application to concrete fact situations has been fraught with considerable difficulty.

It is the purpose of this article to discuss these difficulties, with particular reference to separation agreements and their tendency to alter or dissolve an existing marriage, and also to propose a reasonable approach toward solving them.

Development of the Law

At early common law, few separation agreements were executed.[4] Three primary factors combined to produce this dearth:

(1) the existence and influence of the ecclesiastical courts, which had exclusive jurisdiction of matters relating to the marital res, and which were adverse to upholding any private agreement for separation;[5]

(2) the persistent legal fiction that a husband and wife were one person, and hence could not contract with each other;[6]

(3) the strict public policy supporting the sacrosanct character of marriage.[7]

However, separation agreements were entered into then, as they are now, because situations arose resulting in intolerable hardship for one or both of the parties to the marriage. These agreements came to

[1] Gary v. Gary, 6 Misc. 2d 669, 670, 160 N.Y.S.2d 877, 878 (Sup. Ct.), *aff'd*, 4 App. Div. 2d 948, 167 N.Y.S.2d 807 (2d Dep't 1957).

[2] This section was formerly contained in N.Y. DOM. REL. LAW § 51. See 23A McKINNEY'S GEN. OBL. LAW § 5-311, commentary 116.

[3] See Winter v. Winter, 191 N.Y. 462, 467, 84 N.E. 382, 384 (1908).

[4] Peaslee, *Separation Agreements Under the English Law*, 15 HARV. L. REV. 638 (1902).

[5] *Ibid.*

[6] Hendricks v. Isaacs, 117 N.Y. 411, 416, 22 N.E. 1029, 1030 (1889).

[7] Peaslee, *supra* note 4, at 638-39.

the attention of the courts because one of the parties would not keep his bargain.[8] In the case of the wife, objectionable consequences would ensue upon her spouse's repudiation of the obligation to support under the agreement, *i.e.,* since the contract was void *ab initio,* due to the prohibition against husband-wife contracts, accrued payments thereunder could not be recovered.

The courts of equity, absorbing the jurisdiction of the ecclesiastical courts,[9] recognized the inequitable nature of the wife's position. Utilizing their broad powers, they placed another fiction in the law. If the wife was to nominate a trustee to act for her in contracting with the other spouse, the resulting agreement would not be between husband and wife, but rather between the husband and a third party for the benefit of the wife. Therefore, the agreement would not be subject to the proscription of contracts between married persons.[10] These courts, however, still had to contend with the public policy supporting marriage's sacrosanct character. This was accomplished by recognizing that where an agreement was executed after the physical separation itself had been established, there was no longer any public policy to uphold.[11]

Originally, in New York, the validity of a separation agreement was therefore contingent upon the existence and convergence of four factors:

(1) that a valid cause for separation existed;[12]

(2) that the parties to the agreement were living apart at the time of its execution, or were immediately about to separate;[13]

(3) that the agreement was made through the agency of a trustee;[14] and

(4) that the agreement itself was by its nature fair and equitable.[15]

However, when the first Domestic Relations Law was passed, contracts between husband and wife were therein sanctioned.[16] This, of course, obviated the necessity for the intervention of a trustee, and the law courts thereafter recognized and enforced separation agreements.[17] Since the passage of this statute, the prohibition of contracts which tend "to alter or dissolve the marriage," now embodied in Section 5-311 of the General Obligations Law, has remained constant. Nevertheless, the problem of determining which contracts are those altering or dissolving a marriage still presents great difficulties. Since an examination of this statute yields little more than a broad pronouncement of policy, it is necessary to turn from the legislature to the judiciary for a construction of the law.

Separation Agreements and the Courts

In general, the courts countenance separation agreements, since the law looks with disfavor upon unnecessary litigation, and with favor upon amicable settlement of dis-

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[8] *Id.* at 640.
[9] *Id.* at 639.
[10] Winter v. Winter, *supra* note 3, at 470-71, 84 N.E. at 385.
[11] Galusha v. Galusha, 116 N.Y. 635, 642, 22 N.E. 1114, 1115-16 (1889).
[12] See Clark v. Fosdick, 118 N.Y. 7, 16, 22 N.E. 1111, 1114 (1889).
[13] *Id.* at 13-14, 22 N.E. at 1113.
[14] Winter v. Winter, *supra* note 3, at 470, 84 N.E. at 385.
[15] Hungerford v. Hungerford, 161 N.Y. 550, 553, 56 N.E. 117, 118 (1900).
[16] DOM. REL. LAW OF 1896, ch. 272, § 21.
[17] Winter v. Winter, *supra* note 3, at 474-75, 84 N.E. at 386-87.

putes out of court.[18] Thus, the separation agreement is both theoretically and practically desirable within our legal framework. With this in mind, the New York courts have uniformly enforced reasonable and fair agreements and their incidental provisions relating to custody, support and property rights.[19] However, notwithstanding the reasonableness or fairness of the agreement, the courts will strike it down if, on its face, or *sub rosa* (through the instrumentality of a prior or contemporaneous contract),[20] the agreement's sole purpose is to induce one of the parties to procure a divorce,[21] or is part of a scheme to obtain or facilitate a divorce.[22] Indicia of such a scheme are present when the alimony payments provided in the agreement, or other money or property payments, are bestowed, not as support, but as a premium or bribe for obtaining a divorce.[23]

In determining which agreements are enforceable and which are not, an analysis of the applicable case law presents four categories into which, ostensibly, all separation agreements will fall:

(1) simple;
(2) contemplative;
(3) conditional;
(4) promotive.

It will be seen that the courts are prone to enforce the first two, but may hold the latter two violative of section 5-311.

A. *Simple and Contemplative Agreements*

The simple separation agreement includes a cessation of cohabitation, but contains no provisions concerning divorce. Furthermore, there is no parallel agreement relating to divorce.[24] As long as the agreement was not made while the parties were living together and the separation did not take place because of the agreement, the law will enforce it.[25] This type of agreement, since there is no provision for divorce within or without the instrument, has no tendency to alter or dissolve the marriage bond.

The contemplative separation agreement provides for its own continuance in the event one of the parties should seek a judicial separation, or a decree of absolute divorce.[26] Preservation of the effectiveness of the instrument may be accomplished by a clause within the instrument itself, *e.g.*, "The provisions of this agreement shall not be construed to prevent either party from suing for an absolute divorce . . . but no decree . . . obtained by either party shall in any way affect this agreement or any of the terms. . . ."[27] It may also be accomplished by a separate agreement manifesting the intention that if a divorce is

[18] Shapiro v. Shapiro, 8 App. Div. 2d 341, 342, 188 N.Y.S.2d 455, 457 (1st Dep't 1959); Besant v. Wood, 12 Ch. D. 605, 617 (1878).
[19] *E.g.*, Haas v. Haas, 298 N.Y. 69, 72, 80 N.E.2d 337, 339 (1948).
[20] If such collateral agreements were not admissible in evidence, a party would have the power to render an illegal agreement enforceable by concealing his real objective in another contract. Niman v. Niman, 15 Misc. 2d 1095, 1097, 181 N.Y.S.2d 260, 264 (Sup. Ct. 1958), *aff'd*, 8 App. Div. 2d 793, 188 N.Y.S.2d 948 (1st Dep't 1959).
[21] Schley v. Andrews, 225 N.Y. 110, 121 N.E. 812 (1919).
[22] Matter of Rhinelander, 290 N.Y. 31, 37, 47 N.E.2d 681, 684 (1943).
[23] *Ibid.*
[24] *E.g.*, Yates v. Yates, 183 Misc. 934, 51 N.Y.S.2d 135 (Sup. Ct. 1944).
[25] Clark v. Fosdick, *supra* note 12, at 12-14, 22 N.E. at 1112-13.
[26] Marson v. Marson, 9 Misc. 2d 599, 601, 173 N.Y.S.2d 416, 419 (Sup. Ct. 1957), *modified*, 6 App. Div. 2d 786, 175 N.Y.S.2d 82 (1st Dep't 1958), *aff'd*, 6 N.Y.2d 925, 161 N.E.2d 212, 190 N.Y.S.2d 998 (1959).
[27] CLS GEN. OBL. LAW § 3-301, form 1 ¶ 7.

later obtained, the provisions of the original agreement shall survive or, in the alternative, be incorporated as part of the decree.[28]

This type of agreement is not void as violative of the public policy expressed in section 5-311 because there is no inducement, in the form of consideration for its execution, to dissolve the marriage bond. The agreement, by prudent draftsmanship or forethought, merely keeps its property and support provisions intact through and beyond any litigation which may subsequently ensue.[29]

B. *Conditional and Promotive Agreements*

The conditional separation agreement is one whose provisions either become effective or cease to be operative upon the happening of a prearranged contingency.[30] In the case of the agreement which is activated, this contingency may be the procurement of a divorce by the wife, whereas in the case of the agreement which is deactivated, this contingency may be the non-procurement of a divorce decree.[31]

In *Schley v. Andrews,*[32] a husband, in order to induce his wife to procure a divorce, agreed to pay $200 per month for her lifetime if she did not remarry. As collateral security for her monthly payments, the husband confessed judgment for $35,000. The agreement also provided that if the wife did not procure a decree of divorce, both the agreement and confession of judgment would have no effect. After the entry of a divorce decree, the husband made several payments, but discontinued after the wife's remarriage. The wife then entered judgment on the confession and the husband brought an action to enjoin the collection of said judgment. In granting the injunction, the court reasoned that the original agreement and confession, being founded on an illegal consideration (inducing the wife to obtain a divorce), were both void. Consequently, the judgment entered on them was also invalid.

This agreement clearly contravenes public policy since the wife gains no benefit from the contract unless the marriage is dissolved.[33] Such a contingent agreement may be further labeled as *promotive,* since its natural tendency is to induce the procurement of a divorce which would not otherwise have occurred.[34] Promotive agreements[35] consequently contravene Section 5-311 of the General Obligations Law and are invalid.

However, not all contingent agreements are within the prohibitory scope of the statute. Evidence may be introduced which will indicate that an agreement is non-promotive and consequently enforceable. In *Hammerstein v. Equitable Trust Co.,*[36]

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[28] Marson v. Marson, 9 Misc. 2d 599, 173 N.Y.S. 2d 416 (Sup. Ct. 1957).

[29] The parties to a separation agreement, in addition to keeping its provisions intact through divorce proceedings, may provide that any dispute under the agreement be subject to arbitration. Lasek v. Lasek, 13 App. Div. 2d 242, 244, 215 N.Y.S.2d 983, 985 (1st Dep't 1961).

[30] *Compare* Temple v. Liebmann, 17 Misc. 2d 740, 741, 186 N.Y.S.2d 533, 535 (Sup. Ct. 1959), *with* Butler v. Marcus, 264 N.Y. 519, 191 N.E. 544 (1934) (memorandum decision).

[31] *Ibid.*

[32] *Supra* note 21.

[33] *Ibid.*; Lake v. Lake, 136 App. Div. 47, 49-50, 119 N.Y. Supp. 686, 688 (3d Dep't 1909) (dictum).

[34] See Viles v. Viles, 14 N.Y.2d 365, 370, 200 N.E.2d 567, 570, 251 N.Y.S.2d 672, 676 (1964) (dissenting opinion); Yates v. Yates, *supra* note 24.

[35] *E.g.,* Gould v. Gould, 261 App. Div. 733, 27 N.Y.S.2d 54 (1st Dep't 1941).

[36] 156 App. Div. 644, 141 N.Y. Supp. 1065 (1st Dep't), *aff'd,* 209 N.Y. 429, 103 N.E. 706 (1913).

the husband agreed to pay $200 weekly to a trust company for the use of his wife or, in the event of her death, for the use of his daughters. Although this agreement was contingent upon the procurement of a final decree of divorce, it was deemed valid and binding since the evidence showed that it was executed subsequent to the commencement of divorce proceedings. Thus, evidence of a pending divorce action is sufficient to prove the non-promotive nature of an agreement.[37] Other evidence may also take a contingent agreement outside the scope of section 5-311. For example, evidence indicating that at the time the agreement was entered into the spouse had already decided to obtain a divorce may be adequate to prove it non-promotive.[38]

Application of Section 5-311

Is there a thread running through these agreements which may be used to draw them together and render them more susceptible to accurate analysis? Turning again to the statute, it appears that it could not possibly be directed against divorce, as such, for the state, upon proper grounds, will grant a decree of divorce.[39] Therefore, it would seem that it was also not intended to prohibit parties, already desirous of divorce and having grounds therefor, from executing an agreement settling their affairs which is merely contingent upon the procurement of a divorce.[40]

The policy underlying section 5-311 is the prohibition of any agreement which will promote a divorce that was not desired by *both* parties *before* the agreement was made. Where the reluctant party is induced to assent to divorce because of an agreement, such agreement is promotive and necessarily invalid in view of the statute.[41] But how is a court to determine, in the face of conflicting testimony, whether the agreement is essentially promotive?

New York seems to rely heavily upon evidence found *within* the agreement itself when determining its promotive or non-promotive nature.[42] Under this approach, the courts primarily concentrate on the financial provisions and, when they are substantially in excess of what a divorce court would allow, the agreement may be held promotive and therefore invalid.[43] However useful this evidence may be in some cases, it may prove irrelevant in others. For example, in *Hammerstein,* evidence of the financial benefits conferred by the agreement appeared to be a relatively unimportant factor in the face of evidence which proved that a divorce proceeding was already pending at the time the agreement was executed. Furthermore, indiscriminate reliance on this method of construction, even in cases where it is applicable, may prove harmful and restrictive since a court, by focusing upon the agreement itself, is narrowly confining its attention to but one of many factors which may have a substantial bearing on the issue in question.

An alternative approach is found in those jurisdictions which rely primarily upon evi-

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[37] Yates v. Yates, *supra* note 24, at 938-39, 51 N.Y.S.2d at 139-40.

[38] *Cf.* Howard v. Adams, 16 Cal. 2d 256, 105 P.2d 971 (1940).

[39] N.Y. DOM. REL. LAW § 170.

[40] *E.g.,* Hamlin v. Hamlin, 224 App. Div. 168, 230 N.Y. Supp. 51 (4th Dep't 1928); Hammerstein v. Equitable Trust Co., 156 App. Div. 644, 141 N.Y. Supp. 1065 (1st Dep't), *aff'd,* 209 N.Y. 429, 103 N.E. 706 (1913).

[41] Schley v. Andrews, *supra* note 21.

[42] Yates v. Yates, *supra* note 24, at 939, 51 N.Y.S. 2d at 140.

[43] *Ibid.*

dence found *without* the agreement.[44] Under this procedure, evidence on the issue of whether or not the traditionally recognized ends of marriage are still capable of attainment is controlling. Thus, where the court finds that those ends are no longer attainable, it will enforce an agreement contingent upon divorce. Although this approach appears to be less confining than New York's, its usefulness to New York courts is questionable. In cases where the recognized goals of marriage are deemed unattainable, New York courts would probably be justified in enforcing the agreement since it evidently was not the primary inducement for the subsequent divorce. However, such an approach is ineffective in determining whether or not an agreement is promotive where a court initially finds that the possibility of realizing the purposes of marriage has not been wholly destroyed. Surely, the parties in such a case may have decided to dissolve their marriage in spite of that possibility without being influenced in any way by the separation agreement.

Although both these approaches are legitimate attempts at solving a difficult construction problem, it seems that neither attains the universality of application and flexibility necessary to make it truly useful. It is submitted that there is a procedure which, if followed, will prove helpful to courts in applying section 5-311. In the first instance, the courts should pose this question: Would the divorce have occurred if there had been no separation agreement? If the answer is clearly in the affirmative, the agreement should be upheld, since it apparently was not the primary promoting factor in the subsequent divorce. If clearly answerable in the negative, it should be denied effect, since it is promoting a divorce which would not otherwise occur, and it seems that this is specifically what section 5-311 is designed to prevent. However, when the answer is not clearly apparent, the courts should avoid relying on restrictive approaches which, as is the case in New York, may prove either limited in application or confining. Such an approach may result in diverting the court's attention from factors which are truly relevant and in focusing it inordinately on others which may not warrant such concentration.

Illustrative of this proposition is *Viles v. Viles*,[45] a recent New York Court of Appeals decision. There, the husband and wife entered into a separation agreement, valid on its face. The husband also orally agreed to pay his wife's travelling expenses to the Virgin Islands in order for her to procure a divorce; in addition, he agreed to pay her counsel fees. The signing of the separation agreement was conditioned upon the wife's going to the Virgin Islands to obtain the divorce. The majority of the court seemed to hold that the agreement to pay travel expenses and counsel fees per se invalidated the separation agreement. Thus, the majority, in focusing its attention primarily on the benefits provided by the agreement, seems to have overlooked the real intention of section 5-311. Certainly, if the wife was going to obtain a divorce in any event, an agreement granting her travel and counsel fees would not contravene New York's policy.[46] Thus, any

[44] Hill v. Hill, 23 Cal. 2d 82, 142 P.2d 417 (1943).

[45] 14 N.Y.2d 365, 200 N.E.2d 567, 251 N.Y.S.2d 672 (1964).

[46] Yates v. Yates, *supra* note 24, at 938, 51 N.Y.S.2d at 139.

holding which implies that such an agreement per se contravenes section 5-311 appears inconsistent with the true intent of the statute,[47] viz., the proscription of only those contracts which tend to *induce* divorce or separation proceedings which would not have occurred in their absence.

The dissenting opinion in *Viles*[48] appears to recognize this inconsistency and hence criticizes the majority's impractical approach. The minority concluded that the payment of travel expenses and counsel fees was not what precipitated the divorce, since it did not have a manifest tendency to promote a divorce which would not otherwise have occurred.[49] Instead of relying on the inflexible approach of the majority, they appear to have weighed *all* the evidence educed, consequently finding that there existed an irrevocable breach between the parties.[50] Perhaps if the majority had taken a less restrictive approach and had not relied so heavily on the provisions within the agreement, the result would have been the opposite.

Conclusion

Undoubtedly, there is a close, if not direct, relationship between the permanency and sanctity of marriage and the stability of society. The law holds marriage in high esteem, and has an abhorrence of contracts which tend to dissolve the marital bond. However, the state will grant a divorce when it believes that society's interest will be promoted thereby. Thus, there is no public policy militating against an agreement contingent on the dissolution of a marriage already *in extremis,* where the parties have legal grounds and both desire divorce. Such an agreement cannot be considered the promoting cause of a divorce which would not otherwise occur, for the parties, if financially able and not religiously bound, will in any event proceed to sever their marital ties.[51]

In addition, if these parties are not allowed to settle their affairs beforehand, they must engage in an adversary proceeding in which their most personal and intimate problems and emotions are exposed.[52] Section 5-311 should not frustrate the parties' attempts to privately settle their affairs. Since the participants in a divorce action, which is not solely the result of the execution of a separation agreement, know and understand the ramifications of their situation, they are more perfectly equipped

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[47] *Cf.* Tanburn v. Tanburn, 114 N.Y.S.2d 670 (Sup. Ct. 1952). Such a holding also appears inconsistent with the approach taken in other jurisdictions. See Howard v. Adams, 16 Cal. 2d 256, 105 P.2d 971 (1940); see also Reighley v. Continental Ill. Nat'l Bank & Trust Co., 323 Ill. App. 479, ——, 56 N.E.2d 328, 330 (1944), *aff'd*, 390 Ill. 242, 61 N.E.2d 29 (1945).

[48] Viles v. Viles, *supra* note 34, at 367, 200 N.E.2d at 569, 251 N.Y.S.2d at 674.

[49] *Id.* at 370, 200 N.E.2d at 570, 251 N.Y.S.2d at 676.

[50] *Id.* at 368, 200 N.E.2d at 570, 251 N.Y.S.2d at 674.

[51] *Foreword* to LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS at v-vi (1964).

[52] See Alexander, *The Follies of Divorce: A Therapeutic Approach to the Problem,* 36 A.B.A.J. 105, 107 (1950). However, at present, there are twenty states which allow voluntary separation for a certain period to serve as a basis upon which divorces are granted. Kohut, *Family Courts and Separation Statutes: Correlatives or Non-Correlatives,* 4 J. FAM. L. 71, 72 (1964). There are excellent materials available to the Catholic attorney who becomes involved in divorce or separation litigation. *E.g.*, Dailey, *The Catholic Attorney and the Moral Lawfulness of the Civil Divorce Case,* 38 U. DET. L.J. 255 (1961); Hiegel, *Ready Rules of Morality for Civil Action of Separation and Divorce,* 11 LOYOLA L. REV. 37 (1962).

than the courts to solve their property, support and custody problems. If this is so, the separation agreement seems to be a functionally adequate vehicle which will satisfy the needs of the involved parties, the courts and society at large.