

Domestic Relations--Effect of Change of Custody on Support Provisions of Separation Agreements (Nichols v. Nichols, 306 N.Y. 490 (1954))

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The courts should not direct the parties to arbitrate unless the terms of the contract clearly indicate that the parties intended to waive their inherent right to resort to the law courts. In an attempt to defeat the prospect of deception being practiced by various business groups on unsuspecting parties, the Court of Appeals has reaffirmed the restrictions set forth in the *Level* case with respect to an attempted incorporation of an arbitration requirement.



DOMESTIC RELATIONS — EFFECT OF CHANGE OF CUSTODY ON SUPPORT PROVISIONS OF SEPARATION AGREEMENTS.—Under the terms of a separation agreement, plaintiff-wife was to have custody of the children and the defendant was to pay plaintiff the lump sum of \$2,500 per month for herself and for the “support, education and maintenance” of the children. When the defendant was awarded custody of the children in a subsequent habeas corpus proceeding,¹ he reduced the monthly payments to the plaintiff by one half. Plaintiff brought this action to recover the full amount due under the agreement. *Held*: The change in custody does not warrant a reduction in the payments since the separation agreement does not provide for any such reduction and the plaintiff in no way breached the agreement. *Nichols v. Nichols*, 306 N.Y. 490, 119 N.E.2d 351 (1954).

Separation agreements are to be construed according to the basic rules of contract construction. If the terms of the agreement are unambiguous, the intent of the parties must be found therein.² The courts will not imply or insert conditions which the parties themselves chose not to insert.³ Moreover, the courts will not modify one provision and leave the rest of the agreement intact.⁴ Accordingly, if one of the parties breaches the agreement, the aggrieved party's remedy is not reformation.⁵ However, adhering to the applicable prin-

¹ The children, having refused to make their home with the mother, went to live with the father. When he refused to return them, the mother instituted the habeas corpus proceeding to regain their custody.

² See *Brainard v. New York Central R.R.*, 242 N.Y. 125, 151 N.E. 152 (1926); *Hartigan v. Casualty Co. of America*, 227 N.Y. 175, 124 N.E. 789 (1919); *Matter of Brown*, 153 Misc. 282, 274 N.Y. Supp. 924 (Surr. Ct. 1934).

³ *Stoddard v. Stoddard*, 227 N.Y. 13, 124 N.E. 91 (1919); see *Raner v. Goldberg*, 244 N.Y. 438, 155 N.E. 733 (1927).

⁴ *Stoddard v. Stoddard*, *supra* note 3; *Johnson v. Johnson*, 206 N.Y. 561, 100 N.E. 408 (1912).

⁵ “Such agreements, lawful when made, will be enforced like other agreements unless impeached or challenged for some cause recognized by law. It is not in the power of either party acting alone and against the will of the other to destroy or change the agreement.” *Goldman v. Goldman*, 282 N.Y. 296, 300, 26 N.E.2d 265, 267 (1940).

ciple of contract law, the courts have held that a breach of a material part of the agreement relieves the innocent party of his obligations under the agreement.⁶ This rule has consistently been applied where the wife has interfered with the husband's visitation rights⁷ and in cases where the wife violated custody provisions⁸ or provisions relating to claims against the husband.⁹

However, this principle of contract law is seldom, if ever, applied in cases in which the wife is alleged to have breached the support provisions of the agreement. Apparently following the maxim that "[a] separation agreement should be given a strict rather than a broad construction in so far as it may tend to limit the rights of the wife,"¹⁰ the courts have, by a process of narrow construction, practically eliminated breaches in this area. The duties of the wife towards her husband and children have been minimized.¹¹ The courts refuse to look

⁶ *Duryea v. Bliven*, 122 N.Y. 567, 25 N.E. 908 (1890); *Muth v. Wuest*, 76 App. Div. 332, 78 N.Y. Supp. 431 (2d Dep't 1902). However, there is some authority to the effect that the breach must be malicious. See *Benesch v. Benesch*, 106 Misc. 395, 173 N.Y. Supp. 629 (N.Y. Munic. Ct. 1918). It is to be noted that the breach of a separation agreement provision differs in some respects from the breach of a similar provision in a court order or decree of separation or divorce. One important distinction is that a material breach of a provision contained in a judicial decree will not necessarily result in the loss of all rights under the decree, whereas a breach of the same provision in a separation agreement would result in such a loss. This variation has been attributed to the contractual nature of the separation agreement. "But that ruling is based on a doctrine of the law of contracts concerning the mutual dependency of all promises in a bilateral agreement (see *Cole v. Addison*, 153 Ore. 688, Note, 105 A.L.R. 901). The essentially different paramount consideration of the welfare of the child governs any case arising, instead, out of a court judgment or order (*Altschuler v. Altschuler*, 248 App. Div. 768)." *Almandares v. Almandares*, 186 Misc. 667, 673, 60 N.Y.S.2d 164, 170 (N.Y. Dom. Rel. Ct. 1946).

⁷ See, e.g., *Duryea v. Bliven*, *supra* note 6; *Muth v. Wuest*, *supra* note 6; *Matter of Noel*, 173 Misc. 844, 19 N.Y.S.2d 370 (Surr. Ct. 1940).

⁸ See *Haskell v. Haskell*, 207 App. Div. 723, 202 N.Y. Supp. 881 (1st Dep't 1924), *aff'd mem.*, 254 N.Y. 569, 173 N.E. 870 (1930) (wife harbored the son who was supposed to be in the custody of the father for purposes of education).

⁹ See *Schmidt v. Schmidt*, 74 Misc. 423, 132 N.Y. Supp. 424 (App. T. 1st Dep't 1911) (wife instituted divorce proceedings and asked for alimony whereas the separation agreement stipulated that she was to make "no claim" against the husband).

¹⁰ *Matter of Brown*, 153 Misc. 282, 284, 274 N.Y. Supp. 924, 930-931 (Surr. Ct. 1934).

¹¹ ". . . [N]or will a duty to make specific apportionment [of the support money] for any purpose be implied in the absence of language requiring it in the separation agreement. . . . The children have no direct interest in the money paid to the mother even though it be wholly or partly for their benefit. . . . The payment belongs entirely to the mother and is given to her for her own support and to recompense her for the discharge of the duty of caring for the children. Doubtless she is obliged to provide for them in accordance with their needs and station in life within the limitations of her monthly allowance . . . but she is not subject to an accounting like a trustee." *Yates v. Yates*, 183 Misc. 934, 937, 51 N.Y.S.2d 135, 138-139 (Sup. Ct. 1944).

upon the wife's failure to support the children, due to circumstances beyond her control, as a breach of her duty under the support provisions of the agreement.¹² The effects of this construction are not too far reaching in cases involving allocated support payments,¹³ but are of serious consequence in cases concerning lump sum support payments.¹⁴ If the payments are allocated, and the wife's failure to support the children is covered by the terms of the agreement, there is no problem—the agreement controls.¹⁵ If the wife's failure was not anticipated, and hence not provided for in the agreement, the sums allocated for the support of the children are paid to the wife as *trustee* for the children.¹⁶ On the other hand, in lump sum cases, where the agreement does not specifically provide otherwise, the wife continues to receive the lump sum without a reduction, even though she is no longer supporting the children.¹⁷ The end result is that the wife is permitted to retain, for her own benefit, money formerly given to her for the support of herself *and* the children. The courts have based their refusal to reduce lump sum support payments upon the ground that the agreement does not provide for any reduction.¹⁸

¹² Under the contract doctrines of failure of consideration and involuntary breach, the wife's failure to support the children would normally result in her losing all rights under the agreement. See note 6 *supra*. But as a practical matter these rules are not applied in cases involving matters of support. This results in the paradox of New York courts applying contract principles to breaches of visitation provisions and not to breaches of support provisions, when the latter seem to be, if anything, more material than the former.

¹³ "Allocated support payments" are payments which are specifically apportioned among the wife and children by the terms of the separation agreement.

¹⁴ "Lump sum support payments," as used in this article, pertains to unallocated sums paid periodically to the wife, out of which she is to support both herself and the children.

¹⁵ See, *e.g.*, *Matter of Herzog*, 301 N.Y. 127, 93 N.E.2d 336 (1950) (The court construed the separation agreement to mean that the sums allocated for the support of the children were to be paid to the one having actual custody of the children. When a habeas corpus proceeding resulted in the awarding of the children to the father, the sums allocated for their support became payable to him.)

¹⁶ "With respect to any benefits intended for the boy [son drafted into service], her position would be that of a trustee charged with the duty, both legal and moral, to effect collection so as to make available to the boy the benefits intended for him." *Harwood v. Harwood*, 182 Misc. 130, 135, 49 N.Y.S.2d 727, 731 (App. T.), *aff'd mem.*, 268 App. Div. 974, 52 N.Y.S.2d 573 (1st Dep't 1944).

¹⁷ See, *e.g.*, *Rehill v. Rehill*, 306 N.Y. 126, 116 N.E.2d 281 (1953) (both children had reached their majority and were no longer living with the mother); *Eisenberg v. Eisenberg*, 59 N.Y.S.2d 534 (Sup. Ct. 1945) (son entered the service). By contrast, had the support payments in the above cases been based solely upon a court decree, the husband ". . . could have obtained a modification of the order eliminating the requirement to pay for his son's [children's] support. . . ." *Stavis v. Stavis*, 61 N.Y.S.2d 634, 635 (Sup. Ct. 1946).

¹⁸ See, *e.g.*, *Rehill v. Rehill*, *supra* note 17; *Hoyt v. Hoyt*, 301 N.Y. 589, 93 N.E.2d 492 (1950). The courts are powerless to modify the support payments if the agreement does not provide for such a modification, since that

In the instant case, the Court followed settled law and refused to reduce the lump sum payments. Limited to the dispute between the parties, the decision is just. The plaintiff was ready, willing and able to perform her part of the agreement.¹⁹ The defendant prevented her performance by refusing to return the children. Therefore, he should not be heard to complain. However, the courts should not deny reductions in every case simply because the agreement does not specifically provide for the reductions. The rights of the wife must be protected, and in the absence of any evidence to the contrary, it should be presumed that no reduction was intended. Nevertheless, the courts should look to the entire agreement, and wherever possible, give effect to reductions which are not specifically spelled out but which were obviously intended by the parties.²⁰ One such instance would be an agreement which provides for a reduction when the children reach their majority. Such a provision logically leads to the conclusion that the parties intended that a reduction take place when the wife was no longer supporting the children. Consequently, a reduction could be granted if the wife failed to support the children, despite the fact that the children had not yet reached their majority. By giving the intended effect to this and like provisions, the courts will be accomplishing practical justice without interfering with the sanctity of contracts.



TORTS — FELA WRONGFUL DEATH RECOVERY PRECLUDES SUBSEQUENT STATE ACTION AGAINST EMPLOYER. — The plaintiff-administratrix recovered damages but no funeral expenses in a prior action under the Federal Employers' Liability Act¹ for injuries resulting in the death of her intestate, an employee of the defendant. In a subsequent wrongful death action² for damages and funeral ex-

would be tantamount to reforming one provision of the agreement while leaving the rest of the agreement intact. See note 4 *supra*.

¹⁹ There was no showing or claim of any unfitness on the part of the wife to care for the children. The decision and order in the habeas corpus proceeding were based upon a finding that the happiness, welfare and best interests of the children would be served if their custody, at least for the present, were awarded to the father. This finding in turn seemed to be based upon the children's refusal to live with the mother and their manifest preference for the father.

²⁰ This method was employed with notable success in *Matter of Herzog*, 301 N.Y. 127, 93 N.E.2d 336 (1950).

¹ 35 STAT. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1952) (hereinafter referred to as FELA). This Act was declared constitutional in *Second Employers' Liability Cases*, 223 U.S. 1 (1912).

² N.Y. DEC. EST. LAW §§ 130-134.