
LAW AND THE FAMILY

Survival or Merger of Agreements

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Although matrimonial agreements about maintenance and property settlements are not usually subject to judicial modification, there is a threshold question as to the life and present status of the support and maintenance provisions of an agreement when enforcement or modification is sought. Did the agreement survive and does it still exist, or was it merged into a court order or judgment? The answer, which affects the court's power to enforce and modify the agreement, depends on the intention of the parties as expressed in the agreement. [FN1]

In *Goldman v. Goldman*, the Court of Appeals held that where a valid and unimpeached separation agreement was incorporated into the divorce judgment and survived, the Supreme Court, in the exercise of its statutory powers, could modify the alimony provisions of the judgment downward, based upon a substantial change in the husband's financial circumstances, without impeding the contractual provisions of a surviving agreement.

The agreement could neither limit the statutory power of the Court nor could it confer power. The downward modification of the judgment did not affect the rights of the wife to recover in an action to enforce the agreement. As it had not been modified and was still an enforceable contract, the wife could sue on the contract for the difference between the contract amount and the reduced amount set by the modified judgment. [FN2]

Rulings on Modification

In *McMains v. McMains*, the Court of Appeals held that the Supreme Court could modify the alimony provisions of the judgment upward, where the former wife "is actually unable to support herself on the amount heretofore allowed and is in actual danger of becoming a public charge." [FN3] It held that, notwithstanding a

valid separation agreement, a wife who had not remarried could obtain a modification of the alimony provision contained in a divorce judgment where it was necessary to prevent her from becoming a public charge. The Court reasoned that its modification of the alimony award was independent of and did not vary the terms of the agreement, but was merely a recognition of the husband's statutory duty imposed by General Obligations Law s5-311. [FN4]

In *Schmelzel v. Schmelzel*, the Court of Appeals held that where an agreement was incorporated into and survived a judgment, and was sustained by the Court as free of fraud and duress, and where the defendant was not in default under the agreement nor had abandoned or acquiesced in the efforts of the other spouse to repudiate the agreement, and there was no question of inadequacy, as in *McMains*, the separation agreement is in full force and effect, and the Court cannot increase the amount provided for alimony. Although the husband's income and finances had improved, the Court could not modify the alimony provisions of the judgment upward.

However, where a separation agreement executed before July 19, 1980, was merged by the court into its judgment, the agreement no longer existed as an independent contract; it became a part of the judgment, separate from the contract and subject to all the rules and regulations respecting such a judgment, and the court could modify the alimony provision upward or downward based merely upon a showing of a substantial change of circumstances. [FN5]

Legislative Change

Domesitic Relations Law s236 (B)(9)(b), which applies to all agreements, orders and judgments entered into or made in actions commenced on or after July 19, 1980, provides that a court-ordered provision for maintenance may still be modified upward or downward upon a showing of the recipient's inability to be self-supporting or a substantial change of circumstances, including financial hardship. This modification power exists where an agreement has been incorporated into an order or dissolution judgment and merges into it. Since 1980, DRL s236 (B)(9)(b) expressly authorizes the court to modify the maintenance provisions of a judgment where there is a surviving agreement, which is incorporated into it, upon a showing of extreme hardship, and in that case the terms of the judgment as modified supersede those in the agreement for such period of time and under such circumstances as the court determines. This provision may not survive a constitutional challenge. [FN6]

The Supreme Court does not have the authority to modify an agreement on the ground of extreme hardship where there is no dissolution, or where a separation agreement or stipulation of settlement survives the entry of the judgment of divorce but is not incorporated into it. [FN7]

The advantage of having the agreement survive is that in the event that one party fails to perform the contract, it gives the other party the remedy of an action on the contract, in addition to the relief provided in the DRL for the enforcement of judgments. Where there is an intention to merge the agreement as to support into the divorce judgment and the judgment embodies the agreement as to support, no right to enforce the support provisions of the agreement survives. [FN8]

The advantage to the supporting party if the agreement survives is that, ordinarily, it precludes an upward modification of maintenance (due to a change in circumstances) so that the financial obligation is relatively fixed and certain, unless the #12; supported party becomes destitute and is a candidate for public assistance.

Usually, a matrimonial agreement provides that its terms shall be incorporated into the court order or judgment and that the agreement shall either survive or merge into it. In order to avoid any question as to whether an agreement survives or merges into a court order or judgment, the parties should clearly express their intentions in the agreement or stipulation.

The Second Department's rule is that where the stipulation or agreement is silent as to survival or merger, it is merged into the judgment. It is error to provide in a divorce judgment that a stipulation shall survive and not be merged in the judgment, where there is no reservation in the stipulation that it should survive after entry of the judgment. [FN9] In *Fishman v. Fisher*, [FN10] an unsigned stipulation that was dictated into the record contained no statement by the court or either counsel that it was to survive such incorporation. The judgment of divorce set forth, in separate paragraphs, all of the agreed-upon provisions, without mention of the stipulation, based "upon the findings of fact and conclusions of law heretofore signed herein." The Second Department held that under the circumstances there was a merger of the stipulation with the divorce decree.

The Fourth Department has followed the rule of the Second Department. It has held that merger occurs unless the agreement expressly provides otherwise. In *Cooper v. Cooper*, [FN11] the Supreme Court denied the wife's application for an upward modification of alimony and denied her a hearing on whether the parties' financial stipulation survived the divorce judgment. The Appellate Division held that because the parties' agreement was silent as to merger or survival, it must be deemed to merge into the divorce judgment and did not survive as a separate and independent contract.

It stated that "merger occurs unless the parties" agreement expressly stipulates against it.

In *Steinard v. Steinard*, [FN12] the Appellate Division, Third Department, agreed with the Fourth Department when it affirmed an order of the Supreme Court that granted the wife's motion for summary judgment enforcing the financial

provisions of the parties' 1989 open court stipulation. Both the judgment of divorce and the stipulation were silent as to whether the stipulation was to be incorporated and survive or merged into the parties' judgment of divorce. The Third Department stated that "it is well settled that merger occurs unless the parties' agreement expressly stipulates against it."

This year in *Von Schaaf v. Von Schaaf*, the Third Department rejected the Second Department's rule and adopted the presumption that an agreement or stipulation is presumed to survive. The parties reached a separation agreement in Schoharie County, by which plaintiff was to receive \$800 per month in support and maintenance via a bank transfer from defendant's pension deposits. The agreement, which was to be construed according to the laws of the State of New York, provided that it would be incorporated by reference into any resulting divorce decree.

Defendant thereafter relocated to North Carolina where, in 1995, he sued plaintiff for divorce. Plaintiff consented to the requested relief, and a judgment of divorce was granted to the parties in 1996, incorporating the separation agreement by reference the separation agreement.

Beginning in November 1996, defendant initiated various proceedings in North Carolina relative to the support and maintenance provisions of the separation agreement, which culminated in an order staying defendant's obligations thereunder pending plaintiff's compliance with certain outstanding discovery demands. Plaintiff thereafter commenced this action against defendant and, in January 1998, moved for an order sequestering defendant's pension assets, a qualified domestic relations order to effectuate the distribution of such pension and two money judgments for arrears and legal fees, respectively.

Defendant cross-moved for dismissal, contending that the separation agreement had merged into the North Carolina divorce decree and that the Supreme Court lacked subject matter jurisdiction. The Supreme Court denied the cross-motion and granted defendant 20 days to respond to plaintiff's motion. Following receipt of defendant's answering affidavit, Supreme Court granted plaintiff the requested relief finding, among other things, that the parties' separation agreement survived the North Carolina judgment of divorce and provided a contractual basis upon which plaintiff could seek enforcement of the agreement in New York.

The Third Department held that where a judgment of divorce is silent as to whether the underlying separation agreement is to survive or merge therein, the court must, consistent with basic principles of contract interpretation, attempt to glean the parties' intent from within the four corners of the agreement itself. If the agreement is clear and unambiguous on its face, the inquiry is at an end. Should an ambiguity be evident, a factual hearing should be held where extrinsic evidence may be received in an effort to determine the parties' intent.

The court held that in the event that no extrinsic evidence is available, or a review of such evidence fails to resolve the issue of the parties' intent, the separation agreement is presumed to survive the resulting decree. In a footnote the court stated, "to the extent that this court's prior decision in *Steinard v. Steinard* (221 AD2d 835) holds to the contrary, we reject the reasoning employed therein."

In its view, a review of the separation agreement plainly evidenced the parties' intent that the agreement was to survive the resulting judgment of divorce, that the separation agreement remained a separate and enforceable contract upon which plaintiff could seek relief and provided the Supreme Court with a valid basis for exercising subject matter jurisdiction over this dispute.

Footnotes

FN(1) See *McMains v. McMains*, (1965) 15 NY2d 283 *Goldman v. Goldman*, 282 NY 296.

FN(2) *King v. Schultz*, 29 NY2d 718.

FN(3) *McMains v. McMains*, supra. *Gardner v. Gardner* (4th Dept.), 40 AD2d 153, affd 33 NY2d 899.

FN(4) *McMains v. McMains*, supra.

FN(5) *Staehr v. Staehr*, (1932), 237 AD 843, 261 NYS 103; *Holahan v. Holahan* (1932), 234 AD 572, 255 NYS 693; *Kunker v. Kunker* (1930), 230 AD 641, 246 NYS 118.

FN(6) In *Busetti v. Busetti*, 108 AD2d 769 (2d Dept., 1985), the Second Department, stated that there was some question as to whether this is constitutional. See also *Cohen v. Seletsky*, 142 AD2d 111 (2d Dept., 1988).

FN(7) *Arnold v. Fernandez*, __ AD2d __ , 584 NYS2d 231 (3d Dept., 1992).

FN(8) *Bishop v. Bishop*, 15 AD2d 494 (2d Dept., 1961).

FN(9) *Nicoletti v. Nicoletti*, 43 AD2d 699 (2d Dept., 1973), citing *Kunker v. Kunker*, 230 AD 641.

FN(10) 77 AD2d 596 (2d Dept., 1980). FN(11) 179 AD2d 1035 (AD4th, 1992).

FN(12) AD3d, 1995.

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