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Family Law—Separation Agreement—Invalid Where Payments to Spouse Induced Divorce

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withstanding a motion to dismiss. The factual distinctions between such a common law marriage case and the present case are evident, and while decision in each case would rely upon the same competing values of (1) the need for the plaintiff to be redressed, and (2) the percentage of fraudulent cases that would come about by allowing such actions, these factual distinctions should lead to a distinction of law. The present case *is* significant, however, when seen in the light of the twenty-nine year history of the Anti-Heart Balm Act. The courts appear to have bent over backward to protect the integrity of the statute in its early years, denying causes of action which only collaterally approach the traditional breach of promise suit. The instant case suggests that new stock is being taken of cases that approach the outlawed actions. The ever present fear that the statute would be undermined is virtually unwarranted. The statute has withstood the test of time and can now be viewed objectively. Specifically, cases involving suits for the return of gifts made in reliance of marriage promises,[34] at least when such promises are breached by the defendant or mutually rescinded, should be reappraised by the courts[35] or the legislature.[36] By denying relief to a party, who seeks only the return of gifts given in consideration of marriage, little social benefit is attained; in fact, ultimate harm to society would be the more probable result. Few, if any, of the elements of fraud, associated with the breach of promise suit asking for personal damages, are present when the relief sought is the return of property. Furthermore, under the present law, the remediless party is at the mercy of unscrupulous individuals. An "enriched" party can breach the promise of marriage, and openly admit fraud in doing such, without fear of action. In this respect the Anti-Heart Balm Act has become, rather than a shield to save, a sword to desecrate.

STEPHEN KELLOGG

SEPARATION AGREEMENT—INVALID WHERE PAYMENTS TO SPOUSE INDUCED DIVORCE

The parties, husband and wife, became estranged after the husband admitted his interest in another woman. Plaintiff wife at first decided to obtain a divorce, but then changed her mind and consulted counsel with a view toward

claimed reliance . . . as to the validity of a common law or other putative marriages." Tuck v. Tuck, 18 A.D.2d 101, 107, 238 N.Y.S.2d 317, 323 (1st Dep't. 1963).

34. Cases cited note 12 *supra.*

35. As the courts have "made" the law in regard to these cases (see note 13 and accompanying text), they can judicially overrule it. Few courts in other states agree with the New York court's view of the Anti-Heart Balm Act and its application to recovery of ante-nuptial gifts, *e.g.*, Pavlicic v. Vogtsberger, 390 Pa. 502, 136 A.2d 127 (1957) and its interpretation of a similar statute. See generally Annot., 72 A.L.R.2d 956 (1960); Note, 48 Cornell L.Q. 186 (1962).

36. The New York Law Revision Commission in 1947 suggested an amendment to the statute: "This article shall not be deemed to prevent a court in the proper case from granting restitution for property or money transferred in contemplation of the performance of an agreement to marry which is not performed." 1947 Report of N.Y. Law Revision Commission 225. After this amendment had passed both houses, the bill was vetoed by the Governor, without memorandum. *Public Papers of Thomas E. Dewey*, p. 286 (1947).

continuing the marriage. The defendant husband, however, desired to end the marriage to his wife and the parties separated, defendant agreeing to pay temporary support. Negotiations were carried on by their attorneys resulting in a written separation agreement that provided slightly higher support payments to the wife on a permanent basis. Less than two months after the execution of this agreement the plaintiff obtained a Virgin Islands divorce. The divorce decree did not incorporate the separation agreement. Plaintiff's present suit was brought to recover arrears due her under the written separation agreement. At the trial, defendant's counsel testified that he and plaintiff's counsel had made certain collateral oral agreements in the course of their negotiations. Defendant's counsel testified that they had orally agreed that subsequent to the separation agreement plaintiff would go to the Virgin Islands to obtain a divorce, that defendant's signature to the separation agreement was conditional upon plaintiff's taking such a trip for that purpose, and that defendant would pay plaintiff's traveling expenses to the Virgin Islands. The plaintiff, however, denied knowledge of any such oral agreements and could offer no evidence concerning them because the attorney who had represented her during the negotiations died before the commencement of the present action. Defendant moved to dismiss the complaint on the grounds that there existed a collateral oral agreement which had a direct tendency "to alter or dissolve" the marriage and therefore the written agreement was invalid.[1] The trial court admitted the testimony of the defendant's counsel concerning the provisions of the oral agreement, and found that, ". . . the conclusion is inescapable that the separation agreement was entered into as part of a plan to obtain or facilitate the divorce."[2] The complaint was dismissed on the merits on the law and the facts. The Appellate Division unanimously affirmed without opinion.[3] On appeal by permission to the Court of Appeals, *held*, affirmed, three judges dissenting. A written separation agreement is invalid as an inducement to divorce where the evidence shows the existence of a collateral oral agreement to pay spouce's expenses incurred in traveling to another jurisdiction to obtain a divorce where such a trip was a condition of the separation agreement. *Viles v. Viles*, 14 N.Y.2d 365, 200 N.E.2d 567, 251 N.Y.S.2d 672 (1964).[4]

Because husband and wife were considered a single entity at common law they could not contract with each other.[5] Courts of equity, however, did enforce contracts between spouses, even recognizing separation agreements between already separated parties, if valid grounds existed for separation and the demands

1. N.Y. Dom. Rel. Law § 51, Repealed L. 1963, ch. 576, substance transferred to N.Y. Gen. Oblig. Law § 5-311.
2. Viles v. Viles, 36 Misc. 2d 731, 233 N.Y.S.2d 112 (Sup. Ct. 1962).
3. Viles v. Viles, 20 A.D.2d 626, 245 N.Y.S.2d 981 (1st Dep't 1963).
4. The Court of Appeals also held that plaintiff's counsel had sufficient authority to make such an agreement. Viles v. Viles, 14 N.Y.2d 365, 367, 200 N.E.2d 567, 568, 251 N.Y.S.2d 672, 673 (1964).
5. Winter v. Winter, 191 N.Y. 462, 84 N.E. 382 (1908); Hendricks v. Isaacs, 117 N.Y. 411, 22 N.E. 1029 (1889); see, 1 Blackstone, Commentaries 442.

of equity were met.[6] However, agreements to separate made between husband and wife while living together were rejected by the equity courts as contrary to public policy.[7] In 1896 New York, by statute, made contracts between husband and wife enforceable at law.[8] The statute, however, specifically prohibited spouses from contracting in two areas. They could not contract to "alter or dissolve the marriage" or make agreements that relieved the husband's obligation to support his wife.[9] These two statutory limitations embodied the public policy considerations of the equity courts. Attempts to contract away the husband's obligation of support,[10] and agreements altering or dissolving the marriage contract,[11] were declared by the law courts to be contrary to the public policy of the state and void under the statute. An extensive body of case law has developed from attempts by husbands to alter the financial obligations to their wives.[12] The instant case falls within the other statutory limitation on contracts between husbands and wives, namely, agreements to "alter or dissolve the marriage." The statute does not specify what factors should be considered in deciding whether a particular agreement so alters or dissolves a marriage as to be prohibited by law. An early case concerned an agreement in which the husband stipulated that if his wife would obtain a divorce, he would pay her a monthly sum for life, make her beneficiary of a large insurance policy and confess judgment for a substantial sum as security for the monthly payments.[13] The Court of Appeals held that the agreement was clearly made for "the sole purpose of inducing . . . a divorce," and therefore fell within the statutory prohibition.[14] Similarly, agreements in which the wife promised as part of the consideration to seek a divorce,[15] where she agreed to cooperate and confer jurisdictions on courts of a foreign country[16] and where the husband promised to pay his wife a large sum when she obtained the divorce,[17] were declared contrary to public policy as agreements made to "alter or dissolve the marriage." In *Butler v. Marcus*,[18] the Court of Appeals, in a memorandum decision, upheld the validity of a separation agreement which provided that the benefits to the wife under the agreement would cease if a divorce had not been

6. Galusha v. Galusha, 116 N.Y. 635, 22 N.E. 1114 (1889); Daggett v. Daggett, 5 Paige 509 (N.Y. 1835).
7. Whitney v. Whitney, 4 App. Div. 597, 39 N.Y. Supp. 1136 (4th Dep't 1896).
8. N.Y. Sess. Laws 1896, ch. 272, § 21.
9. *Ibid.*
10. Hungerford v. Hungerford, 161 N.Y. 550, 56 N.E. 117 (1900).
11. France v. France, 79 App. Div. 291, 79 N.Y. Supp. 579 (3d Dep't 1903); Train v. Davidson, 20 App. Div. 577, 47 N.Y. Supp. 289 (2d Dep't 1897).
12. See, generally, Roberts, *The Validity and Utility of Separation Agreements in New York Law*, 16 St. John's L. Rev. 185 (1942); McNiece & Thornton, *Separation Agreements & Changed Conditions*, 25 St. John's L. Rev. 1 (1950).
13. Schley v. Andrews, 225 N.Y. 110, 121 N.E. 812 (1919).
14. Schley v. Andrews, *supra* note 13, at 113, 121 N.E. at 812.
15. Murthey v. Murthey, 287 N.Y. 740, 39 N.E.2d 941 (1942).
16. Harris v. Harris, 287 N.Y. 444, 40 N.E.2d 245 (1942).
17. Fuqua v. Fuqua, 86 N.Y.S.2d 245 (Sup. Ct. 1949).
18. 264 N.Y. 519, 191 N.E. 544 (1934).

obtained by either party within a year of the agreement.[19] The Court thus held the agreement was not one to "alter or dissolve the marriage" so as to fall within the statute. Because the decision was rendered without opinion it is difficult to determine what factors kept the agreement outside the statute.[20] A later case,[21] in attempting to distinguish *Butler* stated that the agreement there "did not in any way stimulate the procurement of a divorce by either party."[22] The Court of Appeals endeavored to distinguish *Butler* and to set forth a more explicit interpretation of the statutory language.[23] In an oft quoted opinion Judge Desmond, speaking for a majority of the Court, reviewed the policy behind the earlier cases and outlined the evolutionary development of the law concerning separation agreements:

> We have, . . . consistently refused enforcement to a separation or support agreement shown to be part of a scheme *to obtain or facilitate a divorce*, as when the husband promises to pay alimony as a reward to his wife for getting the divorce, or when the money provisions for her support are a premium or award, inducement or advantage to the wife for procuring a divorce.[24]

The opinion then cautions that the Court will only invalidate such agreements if they have a *"direct"* tendency toward dissolving marriages.[25] The agreement in *Butler* is distinguished as one not directly tending toward a dissolution and therefore not invalid. Thus, in striving to give a clear interpretation of the statutory language, the Court introduced a new standard to be used in deciding whether an agreement violated the statute. If the agreement directly tended to dissolve the marriage it would be invalid, but if it only indirectly tended to do so the agreement would stand. The utility of this distinction in determining the legality of separation agreements has been questioned.[26] The uncertainty as to what may be legally provided in these agreements was not disspelled by the direct-indirect criteria established in *Matter of Rhinelander*.[27] The circumstances that existed in the *Butler* agreement to justify its validity were not clearly delineated.

A subsequent attempt was made in a later case to formulate a definite test of the legality of separation agreements.[28] That case stated that agreements should be examined to see if the benefits derived by one party would be "substantially in excess" of what would normally be awarded that party by a court

19. *Ibid.*
20. Compare Abeles v. Abeles, 197 Misc. 913, 96 N.Y.S.2d 423 (Sup. Ct. 1950), where the trial judge, although convinced that the agreement was a substantial inducement to divorce, felt "compelled" to hold the agreement valid under Butler v. Marcus, *supra* note 19.
21. Gould v. Gould, 261 App. Div. 733, 27 N.Y.S.2d 54 (1st Dep't 1941).
22. Gould v. Gould, *supra* note 21, at 736, 27 N.Y.S.2d at 57.
23. Matter of Rhinelander, 290 N.Y. 31, 47 N.E.2d 681 (1943).
24. Matter of Rhinelander, *supra* note 23, at 37, 47 N.E.2d at 684.
25. *Ibid.*
26. See Boardman's New York Family Law, 573 (1964): "This exercise in semantics is less than helpful."
27. 290 N.Y. 31, 47 N.E.2d 681 (1943).
28. Yates v. Yates, 183 Misc. 934, 51 N.Y.S.2d 135 (Sup. Ct. 1944).

in a divorce action.[29] If excessive benefits to one party are provided in the agreement, it may then be void as tending to promote divorce.[30] Whether this "excessive benefit" analysis is a more helpful guide in determining the legality of separation agreements than the direct-indirect rule that had been laid down by the Court of Appeals in *Rhinelander* has been doubted.[31] The difficulty encountered in attempting to find the legal line of demarcation between valid and invalid agreements is compounded by cases upholding separation agreements even though they contemplated and were conditional upon a future divorce.[32] At least one federal court has expressed difficulty in determining how New York law distinguishes between separation agreements that are invalid because they promote divorce and valid separation agreements.[33]

The Court of Appeals in the instant case, after briefly summarizing the testimony of defendant's counsel concerning the oral agreement stated, "it was for the trial court to assess the credibility of the witnesses and we are powerless to disturb the finding that there was in fact an agreement relating to a divorce."[34] In the Court's opinion the "circumstance" of a divorce obtained within two months of the separation agreement supported the plaintiff's contention that the agreement induced the divorce.[35] The dissent, on the other hand, contends that as a matter of law, the agreement could not be invalid as against public policy.[36] Because the separation agreement did not provide more to the wife than she could have obtained in a divorce action, the minority would not have invalidated it as contrary to public policy.[37] The dissent would determine the validity of such agreements by the "excessive benefit" rule.[38] There was, in the view of the dissent, nothing in the case to indicate that the agreement contained any excessive benefits to the wife. There was "nothing sinister" in the defendant's agreement to pay his wife's traveling expenses to the foreign jurisdiction.[39] Public policy is not offended because the parties did not attempt

29. Yates v. Yates, *supra* note 28, at 940, 51 N.Y.S.2d at 141.

30. This test seems to employ language that had been used in *Matter of Rhinelander* merely to describe one example of an illegal agreement, as determinative of the validity of all separation agreements.

31. Feld, *An Appraisal of the Separation Agreement in New York*, 15 Brooklyn L. Rev. 210, 212 (1948) views the "excessive benefit" test as ". . . just so much judicial jargon."

32. Graham v. Hunter, 266 App. Div. 576, 42 N.Y.S.2d 717 (1st Dep't 1943); Baumgartner v. Baumgartner, 16 Misc. 2d 400, 183 N.Y.S.2d 621 (Sup. Ct.), *aff'd mem.*, 4 A.D.2d 941, 167 N.Y.S.2d 1000 (1st Dep't 1957); MacPherson v. MacPherson, 207 Misc. 662, 140 N.Y.S.2d 55 (Sup. Ct.), *aff'd mem.*, 286 App. Div. 991, 144 N.Y.S.2d 696 (4th Dep't 1955).

33. Commissioner v. Hyde, 82 F.2d 174 (2d Cir. 1936).

34. Viles v. Viles, 14 N.Y.2d 365, 367, 200 N.E.2d 567, 568, 251 N.Y.S.2d 672, 673 (1964).

35. *Ibid.*

36. Viles v. Viles, 14 N.Y.2d 365, 368, 200 N.E.2d 567, 569, 251 N.Y.S.2d 672, 674 (1964).

37. *Ibid.*

38. The "excessive benefit" rule was established in Yates v. Yates, 183 Misc. 934, 51 N.Y.S.2d 135 (Sup. Ct. 1944) by Judge Van Voorhis, author of the dissenting opinion in the instant case.

39. Viles v. Viles, 14 N.Y.2d 365, 370, 200 N.E.2d 567, 570, 251 N.Y.S.2d 672, 675 (1964).

to conceal these payments to the wife, ". . . it is commendable that they were straightforward about it."[40]

This decision leaves unresolved the uncertainties surrounding separation agreements in New York. The Court has reaffirmed the broad "direct tendency" rule of *Rhinelander*. The task of deciding whether a particular agreement violates the statutory prohibition against contracts "to alter or dissolve the marriage" remains with the trier of fact and he must approach this determination with but a bare indication of the applicable legal standard. Those agreements which are part of a plan to obtain or facilitate a divorce must be condemned, but only if they "directly" tend to dissolve the marriage. The Court rejected the more rigid legal rule that would test the validity of such agreements by the presence of some undue benefit to one party. Considering the equitable origin of these agreements and the unique relationship of the parties who enter into them, it is perhaps not possible to establish an absolute measure of their validity. The Court, cognizant of the impossibility of establishing a strict legal standard that would insure an equitable result in every case, left the final decision to the discretion of the fact finder. Practical human experience, more so than any legal "test," can best ascribe the proper force to be given the various factual elements in each case. However, it is not a mere academic wish for symmetry and exactness that prompts the desire for a more explicit standard by which these agreements may be interpreted. There is a very real and practical need for clarification of what may be provided in a separation agreement under New York law. In the present state of uncertainty New York residents who have settled their marital differences by contract and who wish to insure that such an agreement will not be upset by a New York court as promotive of divorce, are forced to incorporate the separation agreement in a divorce action brought in another state. The foreign divorce decree will then act as a binding adjudication of the validity of the incorporated separation agreement.[41] Such a burdensome and undesirable procedure could be eliminated to a great extent by a clearer interpretation of the presently ambiguous language of the law governing separation agreements in New York.

PAUL T. MURRAY

LIBEL AND SLANDER

JUDICIAL EXTENSION OF ABSOLUTE PRIVILEGE IN DEFAMATION

The plaintiff, an appraiser for the City of New York, submitted an appraisal report of certain land known as Edgemere Park, located in the Borough of Queens. At the time, the city was planning to condemn and purchase the land described in the report. Shortly thereafter, in March of 1958, the defendant,

40. *Ibid.*

41. Hess v. Hess, 276 N.Y. 486, 12 N.E.2d 170 (1937); Hoyt v. Hoyt, 265 App. Div. 223, 38 N.Y.S.2d 312 (1st Dep't 1942).