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Family Law—Reformation of Void Provisions of Support Agreements Not Granted—Issue Of Severability To Be Determined At Trial

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the procedure in the past and how his performance on the date of the accident differed from his past performance? Is it also permissible to introduce rules and operating procedures of other railroads in the same situation. By introducing the regulation of the defendant, the same result occurs. The written rule is just another evidentiary tool to prove the way in which the defendant treated the situation in the past and has the same probative value as the customs and procedures of defendant's competitors.

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FAMILY LAW

REFORMATION OF VOID PROVISIONS OF SUPPORT AGREEMENTS NOT GRANTED—ISSUE OF SEVERABILITY TO BE DETERMINED AT TRIAL

An extended period of marital discord between the plaintiff wife, and defendant husband, culminated in an action for separation initiated by the wife based on her husband's cruel and inhuman treatment. By assuring his wife of his intention to alter his conduct and provide adequate support for her and their children the husband induced his wife to discontinue the pending separation action. Shortly thereafter and while living together, the parties entered a written agreement providing in the Fourth Clause for payments of $30,000 per year from the husband to the wife for her personal use and maintenance. It also stated that if and when the wife should bring an action to alter or dissolve the marriage, the husband would be relieved of his obligations under the contract and the wife would be free to assert in court, all her marital rights against her husband for support and maintenance. By a supplemental agreement the stipulated sum was amended to provide the wife $37,500 annually. Presently, the wife seeks to reform these agreements in several respects, including reformation of the Fourth Clause. At Special-Term[1] the husband's motion to dismiss for insufficiency was denied and the Appellate Division[2] affirmed, certifying this question on appeal: "Whether the lower court erred as a matter of law in denying the husband's motion?" *Held*, affirmed two judges concurring, the certified question being answered in the negative. By the instant holding the Fourth Clause was summarily declared invalid. A cause of action to reform a contract would be insufficient at law if it merely concerned reformation of a void clause providing for payment of annual sums by the husband to his wife for her personal use and maintenance while living with the husband. However, where the proceedings are to reform valid clauses in the agreement also, the issue of

1. Lacks v. Lacks, 30 Misc. 2d 398, 217 N.Y.S.2d 655 (Sup. Ct. 1961), *aff'd mem.*, 16 A.D.2d 646, 227 N.Y.S.2d 895 (1st Dep't 1962), *aff'd*, 12 N.Y.2d 268, 189 N.E.2d 487, 238 N.Y.S.2d 949 (1963).

2. Lacks v. Lacks, 16 A.D.2d 646, 227 N.Y.S.2d 895 (1st Dep't 1962), *affirming*, 30 Misc. 2d 398, 217 N.Y.S.2d 655 (Sup. Ct. 1961), *aff'd*, 12 N.Y.2d 268, 189 N.E.2d 487, 238 N.Y.S.2d 949 (1963).

whether an agreement is entire or severable with regard to the valid clause is a matter to be decided after the trial rather than upon a motion addressed to the pleading. *Lacks v. Lacks*, 12 N.Y.2d 268, 189 N.E.2d 487, 238 N.Y.S.2d 949 (1963).

At Common Law a married woman was totally unable to form a contractual relationship and no liability was imposed upon her because her contracts were legally void.[3] This principle was supported by the doctrine of unity of husband and wife whereby the legal existence of the wife was deemed to be merged in that of her husband, preventing them from contracting with each other as if they were two independent persons.[4] Beginning in 1848,[5] married women were empowered to own property, to conduct business, and to enter into contractual relationships with regard to their separate property with third persons, but this extension did not effect their inability to contract with their husbands.[6] Legislation continued and by 1884,[7] enabling statutes had expanded a married woman's competency so that she could legally contract freely with third persons to the same extent as an unmarried woman.[8] In addition, she could enter into agreements with her husband, but only to the extent that such contracts affected property which was not jointly owned by them.[9] Finally in 1896,[10] married women were granted power to contract freely with their husbands with respect to real or personal property with two exceptions;[11] the "husband and wife cannot contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife." This has been the status of the law in New York ever since.[12]

A husband's duty to support his wife according to his financial ability originates in the marriage itself,[13] and ". . . as a matter of public policy and as an obligation imposed by law" cannot be altered by agreement.[14] Although this is the general proposition of law in New York it seems that the court looks to the consequence of the agreement to determine its validity; if it favors reconciliation rather than separation the court tends to uphold it.[15] Therefore, a contract between a husband and wife while living together which provides for

3. Martin v. Divelli, 6 Wend. 9, 21 Am. Dec. 245 (N.Y. Ct. for the correction of err. 1832); *accord*, Dickerson v. Rogers, 114 N.Y. 405, 21 N.E. 992 (1889).
4. Winter v. Winter, 191 N.Y. 462, 466, 84 N.E. 382, 384 (1908); 15 N.Y. Jur. *Dom. Rel.* § 208 (1960).
5. N.Y. Sess. Laws 1848, ch. 200.
6. Hendricks v. Isaacs, 117 N.Y. 411, 22 N.E. 1029, 16 L.R.A. 559 (1889); see generally Winter V. Winter, 191 N.Y. 462, 84 N.E. 382 (1908).
7. N.Y. Sess. Laws 1884, ch. 381.
8. Blaechinska v. H. Mission & Home, 130 N.Y. 497, 29 N.E. 755, 15 L.R.A. 215 (1892).
9. *Ibid.*
10. N.Y. Sess. Laws 1896, ch. 272, § 21.
11. Winter v. Winter, 191 N.Y. 462, 84 N.E. 382 (1908).
12. N.Y. Dom. Rel. Law § 51.
13. Garlock v. Garlock, 279 N.Y. 337, 340, 341, 18 N.E.2d 521, 522, 120 A.L.R. 1331 (1939) (dictum); *accord*, Haas v. Haas, 298 N.Y. 69, 71, 80 N.E.2d 337, 338, 4 A.L.R.2d 726 (1948).
14. Garlock v. Garlock, *supra* note 13, at 340, 18 N.E.2d at 522.
15. See Stahl v. Stahl, 221 N.Y.S.2d 931 (Sup. Ct. 1961) (not otherwise reported).

future separation is not permissible as it is inconsonant with public policy[16] and because such an agreement practically dissolves the marriage itself.[17] However, where the parties are already living apart with a marital action pending and thereafter enter into an agreement providing for support and maintenance of the wife, such an agreement cannot of itself cause the separation;[18] it looks forward to reconciliation. In *Garlock v. Garlock*,[19] the leading case in this area, the couple without any thought or idea of separation and while still living together, entered into an agreement whereby the husband agreed to pay his wife a specified sum annually "in lieu of and in release of any and all obligations" which the husband had or would have to support or maintain his wife.[20] The Court invalidated the agreement. It declared that when a couple, living together as husband and wife with no conscious thought of separation, enter into an agreement whereby the husband is to provide the wife an annual sum "in lieu of and in release of any and all obligations" to his wife, the agreement is void.[21] Although this is the general rule, in analogous situations the courts have upheld such agreements.[22] However, in each of these cases the couples were separated and living apart and a marital cause of action was pending.[23] Under these agreements the wife had to discontinue the marital proceedings against her husband and resume the marital relation in order to receive the consideration from the husband. In effect, these agreements directly restored the marriage, which finds favor under the law. None of these reconcilatory agreements provided that the benefit flowing to the wife was to replace the husbands legal obligation to maintain and support the wife, nor were they to supply the basis for support in the event of future marital discord resulting in separation or divorce. Instead, the consideration going to the wife was distinct and separate from the marital obligation and it was intended solely as an inducement to the wife to discontinue her action and continue the marriage. On this basis the agreements were held valid and in accord with public policy. Thus, it seems there are two factually distinguishable lines of authority. Where the contract is made while the couple is living together with no thoughts of future separation, the contract is invalid, but where the agreement is entered into while the parties are living apart and legal proceedings have already been initiated the

16. Winter v. Winter, 191 N.Y. 462, 87 N.E. 382 (1908); *accord*, Whitney v. Whitney, 4 App. Div. 597, 39 N.Y. Supp. 1136 (4th Dep't 1896); *accord*, Poillon v. Poillon, 49 App. Div. 341, 63 N.Y. Supp. 301 (1st Dep't 1900); *accord*, Maney v. Maney, 119 App. Div. 765, 104 N.Y. Supp. 541 (3d Dep't 1907).

17. Whitney v. Whitney, *supra* note 16.

18. Pettit v. Pettit, 107 N.Y. 677, 14 N.E. 500 (1887); *accord*, Effray v. Effray, 110 App. Div. 545, 97 N.Y. Supp. 286 (1st Dep't 1905); *accord*, Lawson v. Lawson, 56 App. Div. 535, 67 N.Y. Supp. 356 (2d Dep't 1900).

19. Garlock v. Garlock, 279 N.Y. 337, 18 N.E.2d 521 (1939).

20. *Ibid.*

21. Garlock v. Garlock, 279 N.Y. 337, 18 N.E.2d 521 (1939).

22. See Adams v. Adams, 91 N.Y. 381, 43 Am. Rep. 675 (1883); see Rodgers v. Rodgers, 229 N.Y. 255, 128 N.E. 117, 11 A.L.R. 274 (1920); see Sommers v. Sommers, 87 App. Div. 434, 84 N.Y. Supp. 444 (1st Dep't 1903).

23. See Stahl v. Stahl, 221 N.Y.S.2d 931, 943, 944 (Sup. Ct. 1961) (not otherwise re-reported). See generally, cases cited note 22.

agreement is held legal and valid although the terms of both contracts are alike. Therefore, it becomes a problem of fitting the facts of the instant case into one of the two lines of authority.

Judge Van Voorhis in his opinion for the majority sustained the husband's contention that the Fourth Clause was void on the authority of the *Garlock* case and notes that void provisions of a contract are not susceptible to reformation. In reaching this conclusion, Van Voorhis states that the wife's action for reformation would be insufficient if it was directed solely to the Fourth Clause, but since it is also concerned with reformation of other clauses, and those clauses may be susceptible to reformation, the denial of the husbands motion to dismiss for insufficiency is affirmed. In holding as it does, the majority summarily declares the fourth clause invalid without discussing its merits, but the two concurring opinions of Judges Dye and Fuld give full consideration to its merits. In examining the two concurring opinions, it appears, although it wasn't stated, that the concurrence was merely in result. That is, they seemed to acquiesce in the majority's conclusion that the contract was susceptible to reformation, but it appears they were of the opinion that the Fourth Clause could also be reformed because it was not within the prohibition of the Domestic Relations Law[24] nor was it contrary to public policy. Therefore, both concurring judges upheld the clause's validity, basing their conclusion upon its accordance with public policy. Judge Dye points out that the contractual language does not purport to relieve the husband from his liability to support his wife. In fact, it was expressly provided that:

> if and when the wife instituted legal proceedings to alter or dissolve the marriage the husband was to be relieved of further payments under the contracts and the wife was to have 'the right in any such legal proceeding to assert all of her marital rights against Harold (the husband) for support and maintenance as any court having jurisdiction over such proceedings may therein determine'.[25]

It is further noted in Judge Dye's concurring opinion that the *Garlock* case which was submitted by the husband to invalidate the Fourth clause as contrary to public policy was not intended to extend to the facts of the instant case. As he pointed out, in *Garlock*, the payments were in "lieu of and release of any and all obligations . . . which the husband otherwise has or shall have to support and maintain . . ." (his wife), which is wholly different from the clause now under consideration. Judge Fuld's concurring opinion further supports the clause by stating that it is wholly different from that which is invalidated by New York's Domestic Relations Law, because this contract was reconciliatory and entered into after legal proceedings had been initiated.

Although it is not elucidated it appears that Van Voorhis, in speaking for the majority catagorizes the disputed clause with those which provide for future

24. N.Y. DOM. REL. LAW § 51.
25. Instant case at 272, 189 N.E.2d at 489, 238 N.Y.S.2d at 951.

separation, as in the *Garlock* decision, and he thereby summarily declares the clause invalid and void. However, the instant case lies somewhere between the facts of the *Garlock* case and the reconciliatory cases because here the couple was not living part when they entered into the written agreement.[26] Nevertheless, this clause could be appropriately classified on a factual basis with those which are upheld because of their reconciliatory nature. The fact that the couple was still living together appears unimportant because it seems to have resulted from the successful attempt at settling their differences before the contract itself was written. Therefore, the ultimate reconciliation seems to have been the consequence of the combining force of the husband's promises to make amends and the wife's discontinuance of the separation proceedings; and the written contract appears to codify the couple's efforts to support their promises and strengthen their marriage. Factually, the instant case is clearly distinguishable from *Garlock*. In that case the payments were to be "in lieu of and in release of any and all obligations which . . . the husband" had at that time or would have in the future. However, in the instant case as distinguished from *Garlock*, the payments were only to continue unless and until the wife should institute a marital action. This difference in contractual language is significant because should the wife in either case, *Garlock* or instant, begin separation proceedings, in the latter case she would be allowed to seek her remedy in court whereas in the former case she would be denied such remedy by the agreement. The wife in a *Garlock* situation would have her rights settled by the agreement and that is precisely what law and public policy prohibit. Furthermore, in *Garlock* the couple was living together without any apparent marital problems at all when they entered into the agreement. However, in the instant case, although the couple was living together at the time the agreement was made, a portion of the consideration for the contract was to provide for the discontinuence of the separation action initiated by the wife. Thus, it becomes apparent that in *Garlock* the agreement was entered into in order to determine the wife's rights should a future separation occur; that is, looking forward to separation. In contrast to that, the instant agreement was the means for reconciling the couple's differences. Therefore, the instant agreement is completely different in intent, purpose and potential effect than the *Garlock* agreement. Since this agreement was merely intended to resume the marital relation and strengthen the marriage it seems to be more appropriately categorized with those decisions which uphold such agreements. In addition, the instant case, like the reconciliatory cases which were held legal and valid, provided for a pecuniary benefit to the wife, but this was not to replace the husband's legal duties nor was it to supply the basis for support in the event of future marital separation as in *Garlock*. Instead, the consideration to the wife was intended solely as an inducement for her to resume the marital relation and continue the marriage; it is upon this basis that the agreement should be held valid.

26. See cases cited at note 22 *supra*; Stahl v. Stahl, 221 N.Y.S.2d 943, 944 (Sup. Ct. 1961).

> Public policy is more tolerant towards agreements made while the parties are living apart or in prospect of immediate separation, (which) is conditioned upon a recognition that in such cases public policy is not offended because the contract does not bring about the separation nor promote the marital discord . . . The law encourages the resumption of marital relations and agreements which bring about such reconciliations will be upheld.[27]

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VIOLATION OF NON-MOLESTATION COVENANT OF SEPARATION AGREEMENT NOT DEFENSE IN SUIT TO RECOVER SUPPORT PAYMENTS

Mrs. Shedler brought an action in Westchester County to recover payments claimed to be due under a separation agreement. The agreement stated "that neither party shall molest the other, nor compel nor endeavor to compel the other to dwell or cohabit with him or her by any legal proceeding or otherwise," and that "a default in any part of this agreement may at the option of the non-defaulting party, be deemed a default under the entire agreement." Mr. Shedler claimed the contract was void since Mrs. Shedler had violated the covenant not to molest, and further that she had regularly molested, annoyed, and interfered with defendant's family and business relations. Mrs. Shedler moved for an order to strike the defense. *Held*, The wife's breach of non-molestation provision of a separation agreement was no defense to wife's suit even though the separation agreement provided that default of any part of the agreement might at the option of the non-defaulting party be deemed a default under the entire agreement, since these are independant clauses. *Shedler v. Shedler*, 12 N.Y.2d 828, 187 N.E.2d 311, 236 N.Y.S.2d 348 (1962).

Since matrimonial actions are concerned with the stability of the family, the basic unit of society, the state has a vital interest in the existing marital status of the parties.[1] Such actions are not merely concerned with the private rights of one of the parties, but with public rights. The public policy of the state entails preservation of the existing marital relationship.[2] Generally separation agreements which are supported by consideration or inducements which tend to encourage divorce or separation or destroy the marital relationship are against public policy. New York has consistently refused enforcement of a separation or support contract 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 a divorce, or when the money provisions for her support are a premium or award, inducement or advantage to the wife for procuring a divorce."[3] However, the usual provisions for support payments do not by them-

27. Stahl v. Stahl, *supra* note 26, at 931, 939.

1. Senor v. Senor, 272 App. Div. 306, 316, 70 N.Y.S.2d 909, 917 (1st Dep't 1947), *aff'd*, 297 N.Y. 800, 78 N.E.2d 20 (1948).
2. N.Y. Dom. Rel. Law § 51.
3. *In re* Rhinelander's Estate, 290 N.Y. 31, 37, 47 N.E.2d 681, 684 (1943). *Cf.*