

10-1-1958

Domestic Relations—Separation Agreements—Breach of Covenant Not to Molest

Buffalo Law Review

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Family Law Commons](#)

Recommended Citation

Buffalo Law Review, *Domestic Relations—Separation Agreements—Breach of Covenant Not to Molest*, 8 Buff. L. Rev. 138 (1958).
Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol8/iss1/80>

This The Court of Appeals Term is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

further reasoned that it was improbable that this result was intended by the settlor.

While the result in this case reduced the income of the income beneficiaries because of the provision in the trust instrument allocating stock dividends to the estate of the settlor, the operation of the rule of this case in the ordinary trust will cause shares issued in this manner to go to principal.⁵⁴ Therefore, in general, this case effects no substantial harm to the beneficiaries of a trust agreement, while following the established law of this state.

DOMESTIC RELATIONS

Separation Agreements—Breach of Covenant Not to Molest

In *Borax v. Borax*,¹ the plaintiff-wife and defendant-husband had a separation agreement containing a covenant that "neither party shall, in any manner or form whatever, molest or trouble the other." It is alleged that the defendant breached this covenant by obtaining a Mexican divorce without jurisdiction, purporting to marry another woman, and giving his name to her child. Based on this alleged breach, the plaintiff brought an action to set aside the existing separation and another action for separation on grounds of adultery or on the grounds of cruel and inhuman treatment.

The Special Term, holding that no molestation was established, dismissed the complaint on the ground that it did not state facts sufficient to constitute a cause of action.² The Appellate Division³ assumed molestation but held that the "molestation clause" was an independent covenant and a breach of this clause was not a rescission of the separation agreement.⁴ Their judgment was, therefore, for affirmance, because an existing separation agreement containing a valid and subsisting provision for support and maintenance is a bar to a subsequent action for separation.⁵

Historically, the "molestation clause" was used exclusively to prevent a separated spouse from compelling the restoration of conjugal rights. As the law favors resumption of marital relations, such clauses were of doubtful validity and,

54. N. Y. PERSONAL PROPERTY LAW §17-a states that unless otherwise provided for all stock dividends go to principal. (Effective as to instruments executed after effective date of statute.)

1. 4 N.Y.2d 113, 172 N.Y.S.2d 805 (1958).

2. N. Y. R. CIV. PRAC. 106, subd. 4.

3. *Borax v. Borax*, 3 A.D.2d 404, 161 N.Y.S.2d 232 (1st Dep't 1957).

4. *Fearon v. Aylesford*, 14 Q.B.D. 792 (1884).

5. *Drane v. Drane*, 207 App. Div. 217, 201 N.Y.Supp. 756 (1st Dep't 1923).

COURT OF APPEALS, 1957 TERM

therefore, considered independent covenants so as not to vitiate an entire separation agreement.⁶ Today, there is authority recognizing molestation in a broader sense and the perfect validity of molestation clauses when applied to other than the historic area.⁷ Hence, the question posed by this case to the Court of Appeals is, "If molestation can be construed as a broad term, appearing in a valid covenant of a separation agreement, must this covenant be still considered as independent, or may it be considered a dependent covenant such as visitation rights?"⁸

The Court of Appeals differentiated visitation rights from "molestation clauses" on the basis of historical growth and a closer connection of the support provision with a visitation right. A possible example of this closer connection, appearing to this writer, could be the utilization of the visitation right by the separated spouse, to perceive if the support payments were actually utilized as agreed.

Continuing, the Court said, "Consistency requires that a covenant against all kinds of molestation should be treated as independent." Consistency of law, in the opinion of the writer, is the virtuous end result of similarly reasoned cases, but is not a reason for a decision itself. The case is justified, in actuality, by the lack of any benefits to be derived from a change from the historic pattern. As the Court pointed out, separated spouses are a troublesome relationship where bitter invectives or humiliating behavior can be expected. If such acts were allowed to become a litigious basis for ending a separation agreement, the effect would be to destroy their primary objective—some stability where little appears to exist. Such destruction is unnecessary inasmuch as protection against grievous molestation is still provided the spouse, based on tort law or upon the independent covenant itself.

Support Order for Resident Spouse Against Whom Ex-Parte Divorce Is Given

Section 1170-b of the New York Civil Practice Act⁹ allows a wife to bring an action for support and maintenance after an *ex parte* divorce decree is obtained

6. *Landes v. Landes*, 94 Misc. 486, 159 N.Y. Supp. 586 (Sup. Ct. 1916).

7. Lindey, *SEPARATION AGREEMENTS AND ANTI-NUPTIAL CONTRACTS* 108-109 (1953), also proclaims such covenants are to be considered independent.

8. *Duryea v. Bliven*, 122 N.Y. 567, 25 N.E. 908 (1890).

9. N. Y. CIV. PRAC. ACT §1170-b provides:

In an action for divorce, separation or annulment, or for a declaration of nullity of a void marriage, where the court refuses to grant such relief by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, the court may, nevertheless, render in the same action such judgment as justice may require for the maintenance of the wife . . .