

# Spousal Agreements

May 2017

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## Contracts Between Spouses

- ▶ Premarital agreements
- ▶ Postnuptial agreements
- ▶ Separation Agreements



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Remember the Magnolias.

When Wilma filed for Divorce and ED, Henry filed an answer alleging that Wilma's claim is barred by a prenuptial agreement signed by the parties. In the agreement both waive all spousal support and equitable distribution. Wilma admits signing the agreement, but she says it is no longer appropriate because she needs spousal support in order to be able to care for Henry Jr. Do you dismiss Wilma's claims?

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## Premarital agreements

- ▶ Uniform Premarital Agreements Act
  - GS 52B
  - Applies to contracts after July 1, 1987
- ▶ No consideration required
- ▶ Can contract re: everything except child support



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## Prenuptial Agreements

- ▶ Waiver of ED and alimony must be explicit
- ▶ General waiver of "all rights" not sufficient
- ▶ See GS 50-16.6 (b)
  - Waiver must be definitely and explicitly stated



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## Impoverished Spouse

- ▶ GS 52B-7(b)
  - If provision in premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility - assuming requirements of PSS and alimony statutes are met.

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Question 2:  

Instead, Wilma argues that the prenuptial agreement should be set aside because she did not know what she was signing at the time the agreement was executed. She tells you that Henry and his father presented it to her to sign the day before the wedding. She thought she had to sign it and she has not looked at it since. Should you set aside the prenuptial?

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**GS 52B-7(a)**

- ▶ A premarital agreement is not enforceable if the party against whom enforcement is sought proves:
  - That party did not execute the agreement voluntarily
  - Or .....



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**GS 52B-7(a)**

- ▶ The agreement was unconscionable when entered, and before execution, that party:
  - Was not provided fair disclosure, AND
  - Did not expressly waive disclosure, AND
  - Did not have, and reasonably could not have had, knowledge of the property or financial obligations of the other

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Question 3

Rather than a prenuptial, Henry and Wilma signed a contract after they had been married five years. In the contract, both waived all rights to alimony and equitable distribution. Wilma argues the agreement is now unconscionable in light of the present circumstances and should not be enforced. Does the agreement bar Wilma's claims?



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Postnuptial agreements

- ▶ GS 52-10(a)
  - Contracts valid unless violate public policy
- ▶ GS 50-20(d)
  - Agreements re: property division allowed "before, during or after marriage"
- ▶ No alimony agreement unless separated



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Agreements

- ▶ *Dawbarn*, 175 NC App 712 (2006)
  - Postnuptial agreement
- ▶ Violates public policy?
  - *Cf. Williams*, 120 NC App 707 (1995)
  - *Cf. Matthews*, 2 NC App 143 (1968)



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### Dawbarn

- ▶ Fraud, duress, undue influence
  - 3 year statute of limitation
- ▶ Unconscionability
  - Need procedural AND substantive
- ▶ Breach of fiduciary duty



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### Question 4

What if Wilma argues that the agreement should be set aside because she had no idea what the mill and marital home were worth when she signed the contract. She paid very little attention to financial matters because she spent so much time taking care of the children. She also testifies that Henry told her repeatedly that the mill was worth nothing because he could never sell it. Can you set aside the agreement?



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### Failure to Disclose as Defense

- ▶ Prenuptial
  - Also need procedural and substantive unconscionability
- ▶ Postnuptial
  - Duty to disclose as long as there is a fiduciary relationship
  - If breach duty, failure to disclose may be defense

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Question 5

No agreements during the marriage. However, the week before Henry moved out of the house, the Magnolias signed what it titled a "Separation and Property Settlement Agreement". The agreement divides all of the property and debt between Henry and Wilma, and it sets alimony and child support to be paid by Henry, and grants primary physical custody of both children to Wilma.

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Question 5(a)

Henry files for ED. Wilma answers that the agreement is a bar to Henry's claim. Henry states that he signed the agreement when he was feeling very guilty about the end of the marriage and he now feels he gave Wilma too much. He wants you to "ignore the agreement" and proceed with ED, or he wants you to at least modify the agreement to make it fair. Can you do either?



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## Separation Agreements

- ▶ Executed while separated or when separation imminent
- ▶ Can resolve all issues
- ▶ Contracts principles apply generally
- ▶ Modified only by written agreement between the parties



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## Defenses to Enforcement

- ▶ Fraud, undue influence, duress
- ▶ Lack of mental capacity
- ▶ Unconscionability
  - Nee both procedural and substantive
- ▶ Failure to disclose when in fiduciary relationship
- ▶ Vagueness



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### Question 5(b)



Instead, Henry testifies that while they had intended to separate when they signed the agreement, he and Wilma actually continued living together for 6 months after the signing because they wanted to try to 'work things out'. Does this fact make a difference?

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## Separation Agreements

- ▶ Reconciliation voids all executory provisions of the agreement
- ▶ What is executory?



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## Property Settlement Provisions

- ▶ If agreement is integrated, reconciliation voids *all* executory provisions of the agreement
- ▶ If agreement is not integrated, property settlement provisions will remain enforceable



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## Integrated?

- ▶ Are the separation provisions in consideration of the property provisions?
- ▶ Unequivocal integration clause controls
- ▶ If no clause, presumption is that agreement is NOT integrated



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### Question 6

There has been nothing between Henry and Wilma except Wilma's action for absolute divorce. At the summary judgment, Wilma's lawyer requests that the divorce judgment incorporate the separation agreement signed by the parties after they separated. Henry and his attorney are not present in court. Do you incorporate the agreement?

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## Incorporated Agreements

- ▶ Become court orders and lose their status as a contract
- ▶ Treated for all purposes as a consent judgment
- ▶ No requirement that judge allow incorporation



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### Question 7



After the divorce judgment is entered incorporating the agreement, Wilma files a motion to modify the provisions dealing with child support and alimony. She alleges there has been a substantial change of circumstances since she signed the agreement. Henry argues that you cannot modify a contract. Can you modify?

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## Incorporated Agreements

- ▶ Child custody, child support, and alimony subject to modification
- ▶ Moving party must show substantial change in circumstances since date of incorporation



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## Incorporated Agreements

- ▶ Property settlement provisions cannot be modified by the court
- ▶ If agreement is integrated, provisions labeled as alimony may not be 'true alimony'
- ▶ If the 'alimony' payments are really property settlement, the payments cannot be modified by the court

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### Question 8

Assume the agreement was never incorporated. Among other things, the agreement requires that Henry continue to pay child support for Henry Jr. as long as Wilma remains the primary caretaker of Henry Jr. Wilma files a complaint, asking that you hold Henry in contempt because he stopped paying child support altogether when their youngest child turned 18. Can you hold Henry in contempt?



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## Unincorporated Agreements

- ▶ Can enforce provisions even if they are provisions a court could not order
- ▶ Cannot enforce contract by contempt
  - First: Breach of Contract
  - Second: Remedy of Specific Performance
  - Third: Contempt for violation of order of specific performance



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