

Separation Agreements

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Contracts Between Spouses

▸ 3 (now probably 4) types of Contracts:

- *Prenuptial* Agreements
- *Postnuptial* Agreements
- Separation Agreements
- Reconciliation Agreements (??)



Prenuptial Agreements

- Executed before marriage
- Governed by Chapter 52B
- Can settle all issues and waive all claims except child support
- Can be modified only by agreement of the parties in writing
- Invalidated pursuant to GS 52B-7

Postnuptial Contracts

- Authorized by NC Gen. Stat. 52-10 and 50-20(d)
- Executed during marriage, before or after separation
- Can be modified only by written agreement of the parties
- Cannot include provisions that violate public policy
 - No waiver of support rights
 - No provisions that encourage separation
- Not affected by separation or reconciliation

Separation Agreements

- Authorized by NC Gen. Stat. 52-10.1 and common law
- Consideration for contract is the agreement to separate
 - Therefore, reconciliation terminates all provisions in contract, except those fully executed at time of reconciliation
- Can resolve all issues, including support rights
- Can only be modified by consent of the parties in writing

Reconciliation Agreements (?)

- New G.S. 52-10(a1), applicable to agreements executed on or after June 19, 2013:

“A contract between husband and wife made, with or without consideration, during a period of separation to waive, release, or establish rights and obligations to post separation support, alimony, or spousal support is valid and not inconsistent with public policy. A provision waiving , releasing, or establishing rights and obligations to post separation support, alimony, or spousal support shall remain valid following a period of separation and subsequent separation, if the contract [is in writing, properly acknowledged, and the provision waiving support is clear].

All Contracts

- Contract principles apply generally
- Enforced through contract remedies
- Courts have no authority to modify terms
- Subject to invalidation based on formation problems like
 - Fraud, duress, undue influence
 - Lack of capacity or voluntariness
 - Breach of fiduciary duty
 - [premarital governed by GS 52B-7]
 - Unconscionability (procedural and substantive)

Separation Agreements



Mother filed action alleging father breached the terms of a separation agreement by failing to pay college expenses of the daughter. The agreement states that father will pay 90% of the child's tuition, room and board, and books for a four-year college education as long as the child "diligently applied herself to the pursuit of such education." Father paid the required amount for the child's first year of college but refused to pay the second year because the child had a cumulative GPA of 2.0 and was on academic probation. Mother paid the child's expenses and requests a judgment for father's share pursuant to the contract.

How do you rule?

Interpretation of Terms

- Party seeking damages has burden of proof
Contract, Breach of Contract, Damages
- Terms must be given their ordinary meaning
- When contract is unambiguous, trial court interprets intent of parties as a matter of law
Trial court limited to the "four corners of the document"
- Evidence allowed only if contract is ambiguous

Wife filed complaint seeking postseparation support and alimony. Husband filed a motion to dismiss wife's claims based on his allegation that the separation agreement between the parties waived all rights of either party to alimony.

The contract states "each party does hereby release and discharge the other of and from all causes of action, claims, rights or demands whatsoever, at law or in equity, which either of the parties ever had or now has against the other, by reason of any matter, cause or thing up to the date of the execution of this agreement, except the cause of action for divorce based upon the separation of the parties. It is the intention of the parties that henceforth there shall be, as between them, only such rights and obligations as are specifically provided for in this agreement, and the right of action for divorce. ... [This] is an agreement settling [our] property and marital rights."

Do you dismiss wife's claims?

Waiver of spousal support rights

- Support can be waived in a premarital agreement, a separation agreement and an agreement pursuant to G.S. 52-10(a)
- No contract can waive the right/obligation to support spouse while parties are married and living together
- G.S. 50-16.6 states that "postseparation support and alimony can be waived by an express provision in a valid separation agreement".
- G.S. 52-10(a1) states that the waiver must be "clear"

Father filed complaint alleging mother breached terms of separation agreement regarding alimony and child support. The agreement provides mother will pay father \$1,500 each month for child support and \$3,000 each month as alimony. Father claims mother owes \$15,000 in past due alimony and child support. The agreement contains a provision stating that the remedy of specific performance will be available should either party breach the agreement. Husband's complaint asks for an order of specific performance for all past due arrears as well as prospective payments.

What does husband have to prove to be entitled to an order of specific performance?

Breach of Contract

- ▶ Elements
 - Contract
 - Breach of contract
 - Damages

- ▶ Remedies
 - Money Judgment (remedy at law)
 - Specific Performance (equitable remedy)

Specific Performance

- ▶ Elements
 - Remedy at law is inadequate
 - Person seeking the remedy has complied with contract
 - Person being ordered to perform has ability to comply with the terms of the order

- ▶ Contempt is available when party fails to comply with the order of specific performance

What if mother argues that she did not pay because father has failed to comply with the custody provisions of the agreement?



Reciprocal Breach

When does breach by one excuse performance of the other??

- ▶ When both parties breach material, interdependent terms, neither can recover for the breach of the other
- ▶ Terms are presumed NOT interdependent
- ▶ Intent of the parties determined by language in the contract
 - No evidence of intent unless contract is ambiguous

Material Breach

- ▶ Breach must be material and substantial
 - Must “substantially defeat the purpose of the contract or be characterized as a substantial failure to perform”
 - Must “go to the very heart of the agreement”
 - Breach that might otherwise excuse performance will not excuse performance if the breach was waived



What if mom asks that separation agreement be set aside because father failed to disclose to her before or at the time they were negotiating the separation agreement that he owns a retirement account of substantial value from his employment before they were married? Is husband's failure to disclose a basis for rescinding the contract?

Duty to Disclose

- ▶ Breach of duty to disclose material facts can support rescission of contract
- ▶ Duty to disclose exists only while parties are in a fiduciary relationship
- ▶ "There is no bright line that marks the end of the fiduciary relationship" between spouses
- ▶ Ratification waives all objection to breach of duty to disclose

What if instead of \$1,500 in child support and \$3,000 per month in alimony, the agreement provides that mom will pay father \$2,000 in child support and \$10,000 per month in alimony? Mom argues that since her monthly income now and at the time the agreement was executed was only \$13,000 per month, the agreement is unconscionable and should be set aside. In the alternative, she asks that you modify the amounts she must pay.

How do you rule?



Unconscionable

- ▶ Must have both:
 - Procedural misconduct, and
 - Substantive unfairness
 - Harsh, oppressive, one-sided
 - Sufficient to “shock the conscious” of a reasonable person

- ▶ So is extreme unfairness really a defense??



Can you modify the contract?

Mother files a claim for equitable distribution. Husband files a motion to dismiss stating that the parties have a contract waiving all rights to equitable distribution. The contract is titled "Property Settlement and Separation Agreement" and it was executed when the parties were living separate and apart. In addition to providing for custody, child support and alimony, it divided property between the parties and contained a waiver of equitable distribution. Wife admits she signed the agreement but shows that the parties reconciled and lived together for a year after the agreement was executed. Father argues that property settlements are not affected by reconciliation.

How do you rule?

Which Type of Contract is it?

- ▶ Postnuptial agreement
 - Frequently called a Property Settlement Agreement
 - Not affected by reconciliation

- ▶ Separation agreement
 - All unexecuted provisions are terminated by reconciliation

Integrated????

- ▶ If the separation was the consideration for the property settlement, the agreement is a separation agreement

- ▶ If the separation was not the consideration for the property settlement, there are two agreements – one a separation agreement and the other a postnuptial contract

- ▶ There is a presumption that these contracts are NOT integrated

How do you tell?

- ▶ An unambiguous integration clause is controlling
 - *But see Underwood*, 365 N.C. 235 (2011)
- ▶ If no clause, look for intent in the language of the document
- ▶ If still unclear, hold evidentiary hearing to determine intent of parties

Mother and father have a valid separation agreement providing for custody, child support and property distribution. It also provides that if the parties engage in litigation regarding the agreement, the losing party will pay attorney fees to the other.

The agreement is not incorporated. Father files an action pursuant to G.S. 50-13.4 seeking guideline child support. Mom files a motion to dismiss, arguing the contract establishes the support obligations of both parents. She also asks for an award of attorney fees based on the provision in the contract.

How do you rule?

Custody and Child Support

- ▶ Agreements between parties are valid and enforceable but the parties cannot contract away right to seek a court order for custody or child support
- ▶ For child support, court must order support as provided in the contract unless the court finds that amount does not meet the reasonable needs of the child
- ▶ Right to attorney fees is governed by G.S 50-13.6 rather than the contract

The agreement was incorporated into the divorce judgment entered two weeks ago. Dad files a motion to modify the child support provisions, stating that he lost his job several months ago, resulting in a substantial involuntary decrease in his income.

Can you modify support?



Effect of Incorporation

- ▶ An incorporated agreement becomes a court order for all purposes
- ▶ Orders for child custody, child support and alimony can be modified
- ▶ Orders regarding property settlements cannot be modified
- ▶ Changed circumstances must be since entry of order – not since execution of contract

The agreement incorporated into the divorce judgment also contains provisions dealing with the distribution of property and alimony. A year following incorporation, mom files a motion to modify the property provisions and the alimony based on significant changes in her financial circumstances which all occurred after the incorporation of the agreement into the divorce judgment.

Can you modify the order if you are convinced there has been a substantial change in circumstances?

Is it really alimony?

- ▶ Only 'true' alimony can be modified
- ▶ 'Alimony' is not 'true' alimony if it really is property settlement
- ▶ If property provisions and payment provisions are integrated, the order is a property settlement

How do you tell?

- ▶ An unambiguous integration clause is controlling
 - *But see Underwood*, 365 N.C. 235 (2011)
- ▶ If no clause, look for intent in the language of the document
- ▶ If still unclear, hold evidentiary hearing to determine intent of parties