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Separation Agreements

Discussion Questions

(With Notes and Citation to 2014 Bench Book Chapter on Spousal Contracts)

1. 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?

   Notes: The mother will be entitled to a money judgment for damages if you are convinced based on her evidence that the child "diligently applied herself".

   See Barker v. Barker, 745 S.E.2d 910 (N.C. App. 2013) and discussion in Spousal Contracts chapter of Family Law volume (2014) of District Court Bench Book, pgs. 1-30 through 1-33. (all references hereinafter to the Bench Book are to this Spousal Contracts Chapter).

   To recover, mother must prove a contract, a breach of that contract and damages. To prove the breach, mother has to prove the terms of the contract and prove that father failed to perform in accordance with the terms. When language in the contract is unambiguous, the trial court interprets the meaning of the terms of the contract as a matter of law. The contract must be interpreted to effectuate the intent of the parties at the time of drafting. A trial court cannot consider evidence other than the language of the contract to determine the intent of the parties unless the court first concludes that the contract is ambiguous. When the contract is not ambiguous, terms must be given their ordinary meaning.

In the *Barker* case, the court of appeals held that the contract was not ambiguous and looked to the dictionary to define the term "diligent." Because mother's evidence was sufficient to support the trial court's findings that the daughter had acted diligently despite her poor academic performance, the court of appeals affirmed the trial court's conclusion that father had failed to comply with the terms of the agreement.

2. 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?

   Notes: Postseparation support and alimony can be waived only by an *express* provision in a valid separation agreement. N.C. Gen. Stat. 50-16.6. Alimony cannot be waived in a postnuptial contract that is not a separation agreement. A waiver of "all" claims – such as the waiver in this case – in a separation agreement is not specific enough to constitute an *express* provision. To constitute an express waiver, the language must specifically "refer to the waiver, release, or settlement of "alimony" or use some other similar language having specific reference to the waiver, release, or settlement of a spouse's support rights." *Napier v. Napier*, 135 N.C. App. 364, 520 S.E.2d 312 (1999). *Cf. Stewart v. Stewart*, 141 N.C. App. 236, 541 S.E.2d 209 (2000)(general waiver of all claims "pursuant to the provisions of General Statutes Chapter 50" was sufficiently express to constitute a waiver of alimony in a premarital agreement). *See also* Bench Book, pgs. 1-34 and 1-35.

3. 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?

Notes: *See Praver v. Raus*, 725 S.E.2d 379 (N.C. App. 2012); *Reeder v. Carter*, 740 S.E.2d 913 (2013). *See also* Bench Book, pgs. 1-60 through 1-71.

Specific performance is a remedy for a breach of contract claim; it is not a cause of action. So, husband first must prove there was a valid agreement, that mother breached the agreement and that he has incurred damages. If he proves those three things, he will be entitled to a money judgment for amounts due and owing under the agreement at the time of trial. In order to be entitled to the equitable remedy of specific performance, he also needs to prove that the remedy at law is inadequate (meaning a money judgment is inadequate), that he has complied with the material terms of the agreement, and that mother has the ability to comply with all or part of the agreement. In *Reeder v. Carter*, the court of appeals held that a provision in a separation agreement providing for the remedy of specific performance does not relieve a party of the burden of proving the required elements for an order of specific performance. When an agreement provides for periodic payments that will continue after the present case is resolved, the remedy at law is presumed to be inadequate and a party is entitled to the remedy of specific performance if that party has performed all material obligations under the agreement and shows that the defendant has the ability to comply with the order of specific performance. However, there is no presumption that the remedy at law is inadequate for past due arrears. In order to support an order of specific performance for past-due payments, a moving party has the burden of proving the inadequacy of the remedy at law, for example, by showing "a pattern of defaults, of unsatisfied money judgments, and of conduct to keep assets from execution on a judgment." If there is no such evidence in this case, the husband would be entitled to a money judgment in the amount of $15,000 and an order of specific performance for the prospective payments required by the agreement, assuming he can show mother has the ability to comply in whole or in part with the terms of the agreement. The court may order specific performance only to the extent evidence shows mother has the ability to pay.

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

Notes: A breach of an agreement by one party does not necessarily excuse the other party's performance under a separation agreement. Breach by one party will excuse performance by the other only if the promises to perform are interdependent rather than independent and the breach was substantial in nature, not caused by the breach of

the other party, and was committed in bad faith. *Smith v. Smith*, 225 N.C. 189 (1945). *See also Reeder v. Carter*, 740 S.E.2d 913 (2013) for discussion of impact of breach by party seeking order of specific performance.

For discussion of mutual breach as a defense to enforcement, see Bench Book, pgs. 1-86 through 1-88.

If the agreement itself provides that the provisions are interdependent, the language controls. *See Wheeler v. Wheeler*, 299 N.C. 189 (1980). If there is no specific provision, there is a presumption that the agreement is *not* integrated. The court must look to the language of the agreement to determine whether the intent of the parties was that the provisions are integrated. The court may take evidence of intent of the parties only if the court determines that the agreement is ambiguous. *See Nisbet v. Nisbet,* 102 N.C. App. 232 (1991)(trial court should not have granted summary judgment when there was no specific language in agreement indicating whether support and custody provisions were interdependent or independent); and *Martin v. Martin, unpublished*, 204 N.C. App. 595 (2010)(clear that parties' intent was that all provisions were independent, so breach by mother of visitation provisions did not excuse father's obligation to pay college expenses).

In *Nesbit*, the court of appeals held that a breach of visitation or custody provisions will never excuse a parent's obligation to pay child support.

A breach also must be substantial to relieve the other party of contractual obligations. An immaterial breach will not excuse performance. To be substantial and material, the breach must "substantially defeat the purpose of the contract or be characterized as a substantial failure to perform." *See Long v. Long*, 160 N.C. App. 664 (2003)(fact that party mailed alimony checks rather than directly depositing them as specified by the agreement was not a substantial breach); *Cator v. Cator*, 70 N.C. App. 719 (1984)(husband's failure to pay alimony when parties were litigating enforceability of agreement was not a substantial breach). *See also Fletcher v. Fletcher*, 123 N.C. App. 744 (1996)(to relieve performance, breach must "go to the very heart of the agreement"; father's breaches were not substantial where father failed to inform mother of dental surgery of one son, failed to cancel joint credit card accounts, and failed to pay mother the full amount of her interest on defendant's pension payments).

Note however, the court of appeals also has held that a breach that might otherwise excuse performance will not do so if the breach has been waived by the other party. See *Wheeler v. Wheeler*, 299 N.C. 633 (1980)(wife only partially complied with visitation

provisions but husband continued to pay all alimony over a long period of time, husband could not assert later that wife's breach relieved him of his obligation to pay support).

5. 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?

   Notes: See discussion in Bench Book, pgs. 1-79 through 1-82.

   Where a fiduciary duty exists between spouses, each spouse has a duty to disclose all material facts to the other. The breach of the duty to disclose can be the basis for rescission if the information not disclosed was material to the contract. However, the duty to disclose exists only while the spouses remain in a fiduciary relationship. The fiduciary relationship ends when the parties separate and become adversaries negotiating over the terms of the agreement. Whether parties remain in such a relationship depends on the facts and circumstances of the case. *See e.g. Daughtry v. Daughtry*, 128 N.C. App. 737 (1998)(when both parties had attorneys during the negotiation, parties were not in fiduciary relationship); *Lancaster v. Lancaster*, 139 N.C. App. 459 (2000)(when wife had moved out of house and husband hired an attorney, parties were not in fiduciary relationship). *Cf Searcy v. Searcy*, 215 N.C. App. 568 (2011)(where parties exchanged financial affidavits to prepare for mediation before they separated and before they hired attorneys, both parties had fiduciary duty to disclose all assets in the financial affidavits); *Sidden v. Mailman*, 137 N.C. App. 669 (2000)(hiring attorney did not end fiduciary relationship when attorney was hired just to act as a 'scrivener' to record agreement negotiated by the parties).

   Note that even if father breached the duty to disclose, mom will not be allowed to set aside the agreement if she has ratified the agreement by accepting any benefits from the contract knowing the benefits come from the contract. *Green v. Webb,* 357 N.C. 40, adopting dissent by Green, 152 N.C. app. 650 (2003); *Honeycutt v. Honeycutt*, 208 N.C. App. 70 (2010).

6. 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.

Notes: The court has no authority to modify the terms of an unincorporated separation agreement. *Walters v. Walters*, 307 N.C. 381 (1983); *Rose v. Rose*, 108 N.C. App. 90 (1992). See discussion in Bench Book, pgs. 1-42 through 1-54.

The court can set aside an agreement if the court determines that it is unconscionable. However, a conclusion that an agreement is unconscionable requires the court to find both procedural unconscionability and substantive unconscionability. *Sidden v. Mailman*, 137 N.C. App. 669 (2000); *Daughtry v. Daughtry*, 128 N.C. App. 737 (1998). Procedural unconscionability consists of fraud, coercion, undue influence, misrepresentation, inadequate disclosure, duress or overreaching by the other party at the time the agreement was executed. Substantive unconscionability means the terms of the contract are harsh, oppressive, and one-sided. *King v. King*, 114 N.C. App. 454 (1994)(inequality of the bargain must be "so manifest as to shock the judgment of a person of common sense, and the terms so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other." *See also Dawbarn v. Dawbarn*, 175 N.C. App. 712 (2006)(agreement executed during the marriage that gave wife all real and personal property owned by the parties was enforceable. Even though agreement appeared to be substantively unconscionable, husband's claims of duress at the time of execution were barred by three-year statute of limitations so trial court could not find procedural misconduct). Regarding unconscionability, see discussion in Bench Book, pgs. 1-82 through 1-84.

7. 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?

   Notes: See Bench Book discussion, pgs. 1-54 through 1-60.

   The general rule is that executory provisions of a separation agreement are terminated upon the reconciliation of the parties, *see In re Estate of Adamee*, 291 N.C. 386 (1976), but property settlements are not affected by reconciliation because G.S. 50-20 states that agreements regarding property can be executed any time before, during or after marriage of the parties. *Porter v. Porter,* 720 S.E.2d 778 (2011).

However, if the property settlement was negotiated as 'reciprocal consideration' for the agreement to live separate and apart, the provisions are deemed integrated and the resumption of marital relations will terminate all of the executory provisions of the contract, including the provisions relating to property. *Morrison v. Morrison,* 102 N.C. App. 514 (1991). To determine if an agreement is integrated, the court must determine the intent of the parties at the time the agreement was executed. There is a presumption that agreements are not integrated. See discussion in Bench Book, pgs. 1-49 through 1-53. A clear integration clause may indicate intent of the parties and rebut the presumption. *But see Underwood v. Underwood*, 365 N.C. 235 (2011)(even with integration clause, agreement was not integrated where rest of agreement clearly showed intent of the parties that alimony and property settlement were separate provisions). If the agreement does not show the intent of the parties, the trial court must hold an evidentiary hearing to determine the intent of the parties at the time of execution. *Lemons v. Lemons*, 103 N.C. App. 492 (1991).

In this case, if the agreement is integrated (meaning property provisions were agreed to in consideration for the agreement to live separate and apart), the entire agreement is invalidated by the reconciliation except to the extent the provisions were executed before reconciliation and wife can proceed with her claim for equitable distribution. *See Stegall v. Stegall*, 100 N.C. App. 398 (1990). Property conveyed to one party or the other before reconciliation will be the separate property of the spouse who received title to the property as a result of the executed provisions of the agreement. *Morrison*. However, the court in *Stegall* also noted that even the executed provisions of the integrated may be voided by reconciliation if evidence shows that was the intent of the parties.

If the agreement is not integrated, the waiver of equitable distribution will not be affected by reconciliation and wife's claim should be dismissed.

8. 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.

   Notes: See Bench Book, pgs. 1-35 through 1- 39.

A contract between the parties does not deprive the court of jurisdiction to set child support. Either party may seek a court order for support by filing an action pursuant to G.S. 50-13.4, even if there is a valid contract addressing support. *Bottomley v. Bottomley*, 82 N.C. App. 231 (1986). However, the trial court must set support in the amount provided in the contract unless the party seeking court-ordered support can show that the support provided in the agreement does not meet the reasonable needs of the child. If the trial court finds that the contract provision for support does not meet the reasonable needs of the child, the trial court then uses the child support guidelines or deviation to determine support. *Pataky v. Pataky*, 160 N.C. App. 289 (2003).

When attorney fees are sought in an action seeking child support pursuant to G.S. 50-13.4, G.S. 50-13.6 controls the award of fees and not the attorney fee provisions in the contract between the parties. *See Hennessey v. Duckworth*, 752 S.E.2d 194 (N.C. App., 2013). This means the court must make all findings required by G.S. 50-13.6 before awarding attorney fees.

9. 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?

   Notes: See Bench Book, pgs. 1-42 through 1-44.

   Once an agreement is incorporated into a court order, it is treated as a court order for all purposes. *Walters v. Walters*, 307 N.C. 381 (1983). Because G.S. 50-13.7 provides that a court order for child support can be modified, a trial court can modify child support provisions in an incorporated agreement upon a showing of a substantial change in circumstances. *Beamer v. Beamer*, 169 N.C. App. 594 (2005). However, the change in circumstances must have occurred *after* the entry of judgment – meaning after the date of incorporation. In this case, father's reduction in income happened before incorporation and therefore cannot support a modification. *See Smart v. State ex. Rel*. Smart, 198 N.C. App. 161 (2009).

10. 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?

Notes: See Bench Book discussion pgs. 1-45 through 1-54.

As with child support and child custody, alimony provisions in a court order can be modified based on a substantial change in circumstances pursuant to G.S. 50-16.9. However, property settlement provisions in a court order cannot be modified. *See White v. White*, 296 N.C. 661 (1979). Only 'true' alimony is subject to modification. If periodic payments actually are property settlement rather than alimony, the payments cannot be modified. *Underwood v. Underwood*, 365 N.C. 235 (2011). The fact that payments are designated as 'alimony' in the agreement is not controlling. If the property provisions and payments are integrated – meaning the property provisions were made in consideration for the monetary payments and visa versa – then the payments are property settlement and not 'true' alimony. There is a presumption that the provisions are *not* integrated. The trial court looks to the agreement as a whole to determine intent of the parties. A clear integration clause is some evidence but is not controlling. *Underwood*. If the agreement is not clear about integration, the trial court must hold an evidentiary hearing to determine the intent of the parties at the time the agreement was executed.