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**Reasonable Separation Agreement Executed on
Understanding That Wife Would Obtain
Foreign Divorce Is Invalid—
*Viles v. Viles****

In July 1951, plaintiff and her husband, both New York residents, separated under a temporary agreement entitling the wife to 400 dollars a month for support. Soon thereafter, the husband urged his wife to divorce him, but she would not assent unless he raised her support payments to 459 dollars per month. This increase was embodied in a permanent separation agreement, executed in Octo-

* 251 N.Y.S.2d 672, 200 N.E.2d 567 (Ct. App. 1964).

ber 1951, which the husband signed on the oral understanding¹ that the wife would obtain a divorce in the Virgin Islands. The wife journeyed to the Virgin Islands and, in December 1951, obtained a valid divorce decree.² Ten years later the husband defaulted on the monthly support payments due under the permanent separation agreement. The wife's suit to recover these sums was dismissed on the ground that the support agreement was illegal.³ On appeal to the New York Court of Appeals, *held*, affirmed, three judges dissenting.⁴ The oral understanding had a direct tendency to dissolve the marriage in contravention of New York law; therefore the affiliated written separation agreement was invalid.

Both civil and common-law systems accord domestic relations an elevated status among their protected interests.⁵ Thus, antenuptial contracts signed in anticipation of divorce⁶ and agreements to separate in the future⁷ are void because they have a tendency to promote divorce and to disparage the public policy favoring the preservation of the marriage. This policy is reflected in section 51 of the New York Domestic Relations Law which provides: "A husband and wife cannot contract to alter⁸ or dissolve the marriage. . . ."⁹ While the statute would appear to nullify only those agreements that expressly dissolve the marriage, the New York courts, reasoning that the legislature wished to follow a broader policy, have extended the statute's coverage to include all agreements that have a "direct

1. The husband's attorney testified that he was "submitting this agreement for signature to Mr. Viles, predicated upon the understanding arrived at that Mrs. Viles was going to the Virgin Islands for the purpose of obtaining a divorce, and that this was a condition of the execution of this agreement." Principal case at 673, 200 N.E.2d at 568. It is not clear whether the payments were to begin upon divorce or whether divorce was a prerequisite to their continuation. This distinction is not material, however, as either arrangement would contemplate divorce, and, in either situation, the wife views divorce as a vehicle to financial security.

2. The residence requirement is six weeks in the Virgin Islands. V.I. CODE ANN. tit. 16, § 106 (1964).

3. *Viles v. Viles*, 36 Misc. 2d 731, 233 N.Y.S.2d 112 (Sup. Ct. 1962).

4. *Van Voorhis, Fuld, and Bergan*, JJ. dissented.

5. See generally Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177 (1916).

6. *Oliphant v. Oliphant*, 177 Ark. 613, 7 S.W.2d 733 (1928). See Comment, 41 MICH. L. REV. 1133, 1135-36 (1943).

7. *E.g.*, *Hungerford v. Hungerford*, 16 App. Div. 612, 44 N.Y.S. 973 (1897); *Pugliese v. Pugliese*, 220 N.Y.S.2d 67 (Sup. Ct. 1961); *Censor v. Censor*, 28 Misc. 2d 702, 208 N.Y.S.2d 95 (Sup. Ct. 1960) (*per curiam*).

8. The New York courts have overlooked the word "alter." See Feld, *An Appraisal of the Separation Agreement in New York*, 15 BROOKLYN L. REV. 210, 211 (1949); Roberts, *The Validity and Utility of Separation Agreements in New York Law*, 16 ST. JOHN'S L. REV. 185, 188 (1942).

9. N.Y. DOM. REL. LAW § 51 (now N.Y. GENERAL OBLIGATIONS LAW § 5-311). Several states have similar statutes, although the terminology varies. Compare CAL. CIV. CODE § 159. In other jurisdictions, courts void contracts which promote divorce, although the applicable statute seemingly entitles women to full contractual freedom in this regard. Compare ILL. REV. STAT. ch. 68, § 6 (1959), with *Morrissey v. Morrissey*, 299 Ill. App. 173, 19 N.E.2d 835 (1939).

tendency" to promote divorce.¹⁰ As an example, the "direct tendency" test condemns separation agreements that pay the wife substantially more than she would have received under an alimony award because the higher amount provides an incentive to sue for divorce.¹¹ In the principal case, where payments were conditioned on the wife's obtaining a divorce, the "direct tendency" test seems misapplied since the arrangement merely dealt with the financial obligations which would have been required of the husband after the divorce, and it simply mirrored the prior collapse of the marriage, at most hastening the legal demise of a marriage which was already dissolved in fact.¹² Public policy would not seem offended once "the legitimate objects of matrimony have been utterly destroyed."¹³

The inefficacy of the result in the principal case is apparent from the fact that substitute techniques were available to attain the objective sought by the support agreement in the principal case without endangering its validity. The wife could have established

10. In the Matter of Rhinelander, 290 N.Y. 31, 38, 47 N.E.2d 681, 684 (1943). See *Winter v. Winter*, 191 N.Y. 462, 474, 84 N.E. 382, 386 (1908), in which the court of appeals indicates that the legislature sought to preserve the common-law policy. Compare 6 WILLISTON, CONTRACTS § 1743 (rev. ed. 1938): "All bargains which have for their object or tendency the divorce of married persons are opposed to public policy." See also RESTATEMENT, CONTRACTS § 586 (1932).

11. *Schley v. Andrews*, 225 N.Y. 110, 121 N.E. 812 (1919); *Niman v. Niman*, 15 Misc. 2d 1095, 181 N.Y.S.2d 260 (Sup. Ct. 1958), *aff'd mem.* 8 App. Div. 2d 793, 188 N.Y.S.2d 948 (1959); *Kroll v. Kroll*, 4 Misc. 2d 520, 153 N.Y.S.2d 930 (Sup. Ct. 1956). The support payments in the principal case, although increased at the wife's insistence, stayed within permissible financial limits, thus negating any notion of inducement. See principal case at 674, 200 N.E.2d at 569 (Van Voorhis, J., dissenting). See also *Yates v. Yates*, 183 Misc. 934, 940, 51 N.Y.S.2d 135, 141 (Sup. Ct. 1944) (Van Voorhis, J.), in which the court said: "It would be unrealistic to require that in order to satisfy public policy separation agreements must make provision for the wife in the same form as that in which the divorce court is allowed to do by statute." When the husband desires the divorce, the wife can often obtain a larger allowance than a court would award in alimony. See Pilpel & Zavin, *Separation Agreements: Their Function and Future*, 18 LAW & CONTEMP. PROB. 33, 35 (1953), in which the authors state: "The amount of support is frequently determined, not by the evaluation of relevant social and economic factors alone, but by the comparative eagerness of the spouses to dissolve the marriage. Where the husband is the one who badly wants the divorce, the amount of alimony fixed by the separation agreement is apt to be more than a court would allow the wife if the question were left for judicial determination. The increased support is the price the husband pays for his wife's cooperation in securing the decree. Conversely, where the wife is more eager for the divorce, the amount given her by the separation agreement is often just as little as the husband's attorney feels she can be given without having the court question the validity of the [separation] agreement."

12. Physical separation normally admits marital failure; most separations end in divorce. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS § 31-1 (1961).

13. *Hill v. Hill*, 23 Cal. 2d 82, 93, 142 P.2d 417, 422 (1943). In contrast to New York, some courts hold that, since both parties already have resolved upon divorce, conditioned separation agreements are valid. *E.g.*, *Frothingham v. Anthony*, 69 F.2d 506 (1st Cir. 1934); *Hill v. Hill*, *supra*; *Dora v. Dora*, 392 Pa. 433, 141 A.2d 587 (1958). See generally 31 CALIF. L. REV. 596 (1943).

residence in the foreign jurisdiction and instituted suit. Thereafter the parties could have signed the prearranged separation agreement, conditioning its commencement upon the entry of a divorce decree.¹⁴ The suit's pendency would preclude the argument that the separation agreement promoted divorce. By an alternative method, the separation agreement could have been incorporated into a foreign divorce decree, issued after both parties had appeared.¹⁵ New York decisions hold that incorporation adjudicates the agreement's legality and that this determination is entitled to full faith and credit in a subsequent action between the parties.¹⁶ Thus the Viles' separation agreement, if incorporated, could not have been assailed on the ground that the condition promoted divorce. Finally,

14. There is reason to believe that a conditioned separation agreement is valid provided it is executed after the institution of the foreign divorce suit. *In re Nichol's Estate*, 201 Misc. 922, 928, 107 N.Y.S.2d 311, 316 (Surr. Ct. 1951). See *Werner v. Werner*, 153 App. Div. 719, 722, 138 N.Y.S. 633, 635 (1912); *Hammerstein v. Equitable Trust Co.*, 209 N.Y. 429, 103 N.E. 706 (1913), *affirming* 156 App. Div. 644, 141 N.Y.S. 1065, in which that Appellate Division stated: "In matrimonial actions, brought in good faith, the parties may relieve the court by agreement, contingent upon the result, of the duty of fixing an amount of alimony. Such an agreement, openly made and submitted to the court, is not against the policy of the law, but is in conformity with the general rule which favors ending litigation by agreement when possible. Of course, an agreement based upon promise or understanding to institute an action to dissolve the marriage would be against public policy But after the fact, simply as a short cut to settling one of the subsidiary issues, there can be no objection to an agreement as to alimony, so submitted." *Id.* at 649, 141 N.Y.S. at 1070.

15. The majority view holds that the agreement survives the decree if incorporated therein; the minority view holds that the agreement merges with the decree. *LINDEY, op. cit. supra* note 12, § 31-45. The majority view is followed in New York. *Meyer v. Meyer*, 5 App. Div. 2d 655, 174 N.Y.S.2d 701 (1953). Furthermore, a separation agreement may contain a clause which states that its terms will be incorporated in the divorce decree in the event of divorce. *O'Rourke v. Weston*, 37 Misc. 2d 733, 234 N.Y.S.2d 871 (N.Y. County Civ. Ct. 1962). *Accord*, *Kepner v. Kepner*, 12 App. Div. 2d 204, 209 N.Y.S.2d 681 (1961). It is best to include a clause that states that it is not the intent of the parties to merge the agreement in the decree. Thus the wife can maintain an action either on the separation agreement or on the foreign divorce judgment to recover arrears in support payments. The wife risks modification of the incorporated separation agreement upon the husband's application in the foreign forum. Nonetheless, New York will not modify the support provisions in an incorporated separation agreement when the divorce forum has retained personal jurisdiction over the parties. *Marshall v. Marshall*, 280 App. Div. 814, 113 N.Y.S.2d 602 (1952) (memorandum decision), *aff'd mem.* 304 N.Y. 956, 110 N.E.2d 889 (1953). When the separation agreement is unincorporated, the validity of the agreement remains open to question, as in the principal case. Incorporation therefore has its advantages and disadvantages, which must be measured against each other in each particular situation. See generally Comment, 20 U. CHI. L. REV. 138 (1952); Note, 63 HARV. L. REV. 337 (1949).

16. *E.g.*, *Rehil v. Rehil*, 306 N.Y. 126, 116 N.E.2d 281 (1953); *Snelwar v. Snelwar*, 26 Misc. 2d 967, 208 N.Y.S.2d 555 (Sup. Ct. 1960); *Graham v. Hunter*, 266 App. Div. 576, 42 N.Y.S.2d 717 (1943). In the principal case, the Virgin Islands decree ordered payments equivalent to those under the unincorporated separation agreement. In 1961, Mr. Viles brought suit in the Virgin Islands to modify the alimony award. His success provoked Mrs. Viles' suit in New York on the separation agreement. Although she lost in New York, she secured reversal of the Virgin Islands decision modifying the alimony award. *Viles v. Viles*, 316 F.2d 31 (3d Cir. 1963).

an *unconditioned* separation agreement might have been executed had the husband been willing to rely on the wife to secure the divorce,¹⁷ although such reliance seems unrealistic in an acrimonious and suspicious atmosphere. Paradoxically, the condition which the husband required in order to compel his wife to obtain a divorce¹⁸ also served as the vehicle by which he was able to avoid the support payments due under the agreement.¹⁹

Litigation over separation agreements should be discouraged²⁰ because the agreement has often governed the parties for several years, and they have become accustomed to its terms. Furthermore, invalidation of the agreement after divorce leaves the wife without further recourse against the husband²¹ unless she either received alimony under the foreign decree or can reopen the foreign decree to obtain an alimony award.²² In short, the result achieved in the principal case is unfair to the wife. In addition, the decision in the principal case is inconsonant with judicial favoritism toward separation agreements composed by counsel.²³ In most divorce actions courts adopt submitted separation agreements.²⁴ "Even a superficial inspection of the results of matrimonial lawsuits," wrote a New York judge, "would suggest that parties disposed to solve the economic consequences of marital failure can reach better solution for themselves than the court can possibly do for them"²⁵ It is inconsistent judicial policy to encourage the private negotiation of separation agreements on the one hand and to limit the techniques of achieving such agreements on the other.²⁶

17. Indeed, Mrs. Viles denied that the separation agreement was conditional. However, her attorney had died, and the trial court believed the testimony of her husband's attorney. On appeal, this finding was not disturbed. Principal case at 673, 200 N.E.2d at 568.

18. It might be remarked that an unscrupulous husband can employ dilatory tactics to coerce the unwilling wife to obtain a divorce. See N.Y. LEG. DOC. NO. 26, N.Y.S. JOINT LEG. COMM. ON MATRIMONIAL AND FAMILY LAWS 36 (1958).

19. The common-law rule terminates the husband's liability for support upon divorce. *E.g.*, *Marshall v. Marshall*, 304 N.Y. 956, 110 N.E.2d 889 (1953); *People v. Schenkel*, 258 N.Y. 224, 179 N.E. 383 (1932) (Lehman, J.).

20. See generally Alexander, *Let's Get the Embattled Spouses Out of the Trenches*, 18 LAW & CONTEMP. PROB. 98 (1953).

21. See *Duvall v. Duvall*, 215 Iowa 24, 244 N.W. 718 (1932) (divorce decree silent as to alimony cannot be modified).

22. See *Bart v. Bart*, 182 Md. 477, 35 A.2d 125 (1943).

23. *Le Bert-Francis v. Le Bert-Francis*, 194 A.2d 662, 663-64 (D.C. Ct. App. 1963). See *In re Webb*, 160 F. Supp. 544, 550-51 (S.D. Ind. 1958); *Collins v. Collins*, 48 Cal. 2d 325, 331, 309 P.2d 420, 422 (1957); *Shapiro v. Shapiro*, 8 App. Div. 2d 341, 188 N.Y.S.2d 455 (1959); *Ryan v. Griffin*, 199 Va. 891, 895, 103 S.E.2d 240, 244 (1958).

24. N.Y. LEG. DOC. NO. 26, N.Y.S. JOINT LEG. COMM. ON MATRIMONIAL AND FAMILY LAWS 41 (1958); Pilpel & Zavin, *supra* note 11, at 34. Separation agreements are present in most matrimonial litigation brought in this country. N.Y. LEG. DOC. NO. 32, N.Y.S. JOINT LEG. COMM. ON MATRIMONIAL AND FAMILY LAWS 28 (1957).

25. *Shapiro v. Shapiro*, 8 App. Div. 2d 341, 342, 188 N.Y.S.2d 455, 457 (1959) (Bergan, J.).

26. Compare the opinion in the principal case with the findings of the Joint

Heretofore, it had appeared that the conditioned separation agreement was valid in New York since the "direct tendency" test had been held not to invalidate separation agreements that terminated support payments within an appointed time unless one party had by then acquired a divorce.²⁷ However, as it seems untenable to distinguish between a separation agreement that commences upon divorce and one that terminates unless a divorce is obtained,²⁸ the court of appeals has now seemingly determined that the "direct tendency" test will nullify both types of separation agreements conditioned upon divorce.²⁹

Contractual latitude is particularly necessary in New York where adultery is still the sole ground for divorce³⁰ and, consequently, migratory divorces are common.³¹ In all such divorces,

Legislative Committee on Matrimonial and Family Laws which were recommended to the New York legislature. The findings state: "It has been our law and it was the considered opinion of the Committee's witnesses and conferees that a separation agreement between spouses which does not concern the rights of children of the marriage need not be approved. Here, in the vast majority of cases, we have two adults, each probably represented by counsel, and *it is for them to make their bargain.*" (Emphasis added.) N.Y. LEG. DOC. NO. 26, N.Y.S. JOINT LEG. COMM. ON MATRIMONIAL AND FAMILY LAWS 44 (1958).

27. *Butler v. Marcus*, 264 N.Y. 519, 191 N.E. 544 (1934) (memorandum decision); *Abeles v. Abeles*, 197 Misc. 913, 96 N.Y.S.2d 423 (Sup. Ct. 1950). See *Graham v. Hunter*, 266 App. Div. 576, 42 N.Y.S.2d 717 (1943); *Yates v. Yates*, 183 Misc. 934, 51 N.Y.S.2d 135 (Sup. Ct. 1944) (*Van Voorhis, J.*). Compare *Lake v. Lake*, 136 App. Div. 47, 119 N.Y.S. 686 (1909); *In re Hellwig's Estate*, 178 Misc. 510, 34 N.Y.S.2d 876 (Surr. Ct. 1942), *aff'd mem.* 265 App. Div. 998, 39 N.Y.S.2d 995, *motion dismissed*, 290 N.Y. 743, 49 N.E.2d 1008 (1943).

28. This analysis presupposes that the agreement in the principal case would not commence until the wife obtained a divorce. The ambiguity in this agreement is documented in note 1 *supra*. Of course, if the agreement terminated unless the wife obtained a divorce, the holding in the principal case perforce overrules *Butler v. Marcus*, *supra* note 27, and similar cases.

29. See *In the Matter of Rhineland*, 290 N.Y. 31, 38, 47 N.E.2d 681, 684 (1943), in which the court states that the "direct tendency" test does not cover *Butler v. Marcus*, 264 N.Y. 519, 191 N.E. 548 (1934). The cases cited by the majority opinion in the principal case are distinguishable. In *Reed v. Robertson*, 195 Misc. 885, 91 N.Y.S.2d 583 (Sup. Ct. 1949), *rev'd mem.* 276 App. Div. 902, 94 N.Y.S.2d 905 (1950), *aff'd mem.* 302 N.Y. 596, 96 N.E.2d 894 (1951), the wife renounced her right to support in the separation agreement in contravention of N.Y. DOM. REL. LAW § 51; In the *Matter of Rhineland*, *supra*, upheld a separation agreement executed after the entry of a foreign divorce decree; *Murthey v. Murthey*, 261 App. Div. 991, 26 N.Y.S.2d 363 (1941) (memorandum decision), *aff'd mem.* 287 N.Y. 740, 39 N.E.2d 941 (1942), and *Niman v. Niman*, 15 Misc. 2d 1095, 181 N.Y.S.2d 260 (Sup. Ct. 1958), *aff'd mem.* 8 App. Div. 2d 793, 188 N.Y.S.2d 948 (1959), involved separation agreements that contained substantial monetary inducements, void under the rule of *Schley v. Andrews*, 225 N.Y. 110, 121 N.E. 812 (1919), in order to obtain a divorce.

30. N.Y. DOM. REL. LAW § 170 (Supp. 1964). See generally *BLAKE, THE ROAD TO RENO* 65-79, 189-225 (1962), in which the author entertainingly discusses the history and politics behind New York's severe divorce law.

31. *JACOBSON, AMERICAN MARRIAGE AND DIVORCE* 116 (1959). The author speculates that almost as many New Yorkers obtain out-of-state divorces as obtain in-state divorces. Unfortunately, precise statistics are unavailable. For a provocative sociological evaluation of divorce trends, see *Llewellyn, Behind the Law of Divorce* (pt. 2), 33 *COLUM. L. REV.* 249 (1933).

special cooperation between the parties is essential. The wife normally brings the action, even when the husband desires the divorce.³² Accordingly, she must agree to obtain the divorce and he must agree to enter a general appearance.³³ In the event that the husband seeks the divorce, as in the principal case, the well-advised wife will withhold her cooperation until the settlement contains terms satisfactory to her. Hence, she will insist that they adjust their affairs before she will establish residence in the foreign jurisdiction. In this situation, counsel need to be able to negotiate a conditioned separation agreement in order to protect the rights of both parties: the wife desires a guarantee that her support payments are forthcoming; the husband seeks assurance that his wife will obtain a divorce. Thus, the conditioning of a financial arrangement upon obtaining a valid divorce seems important to reconcile both parties to the separation agreement. Logically, courts that prefer private resolution of economic affairs in divorce actions should sustain these agreements as their very negotiation indicates the impending dissolution of the marriage, even before the existence of the conditional separation agreement.

32. JACOBSON, *op. cit. supra* note 31, at 119-22. Wives prosecute nearly 75% of all divorce proceedings. Three reasons are important: First, the wife is more successful than the husband statistically; second, more legal grounds are available to the wife than to the husband; third, less social opprobrium attaches when the wife brings the action.

33. Naturally, parties wish to avoid collateral attack on the foreign divorce decree. As long as defendant appears and admits plaintiff's residence, neither party can mount a collateral attack. *Cook v. Cook*, 342 U.S. 126 (1951); *Coe v. Coe*, 334 U.S. 378 (1948). For discussion, see Lindey, *op. cit. supra* note 12, §§ 31-68. See also Note, 77 HARV. L. REV. 1531 (1964).