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EQUITY-DIVORCE AND SEPARATION-WIFE'S AGREEMENT NOT TO CLAIM ALIMONY AS DEFENSE TO LATER ACTION FOR ARREARS

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EQUITY—DIVORCE AND SEPARATION—WIFE'S AGREEMENT NOT TO CLAIM ALIMONY AS DEFENSE TO LATER ACTION FOR ARREARS—In a prior action against *H* for separate maintenance, *W* was awarded custody of their children and monthly maintenance of $50. She later lived openly with *X*, adopted his name, and had a child by him. Some of the children left *W* during their minority and lived with *H*. The maintenance payments were discontinued when *W* told *H* that she would no longer receive them. Four years after payments ceased, *W* unsuccessfully moved the federal district court to adjudge *H* guilty of contempt and to award her a money judgment for the past-due installments. *Held*, judgment for *H* affirmed. *Franklin v. Franklin*, (App. D.C. 1948) 171 F. (2d) 12.

Pursuant to statutory authority,[1] to an express provision in the decree,[2] or to their inherent remedial authority,[3] equity courts almost universally modify alimony or separate maintenance orders upon a proper showing by either party. An order may be modified or vacated in a proper proceeding, or it may terminate automatically upon death of either party, divorce with an alimony award, or, in some

[1] 2 VERNIER, AMERICAN FAMILY LAWS §§106, 132 (divorce), §§139, 145 (separate maintenance) (Supp. 1938).

[2] 17 AM. JUR., Divorce & Separation, §644.

[3] 42 C.J.S., Husband and Wife, §626; 17 AM. JUR., Divorce & Separation, §644; 27 AM. JUR., Husband and Wife, §§402, 428 (separate maintenance); 127 A.L.R. 741 (1940). Authorities conflict as to the power to modify an alimony decree in an absolute divorce; 71 A.L.R. 723, 726 (1931). But see Golderos v. Golderos, 169 Va. 496, 194 S.E. 706 (1938), holding that the absence of an express reservation prevented later modification of the divorce decree.

jurisdictions, resumption of cohabitation.[4] Absent one of these circumstances, failure to comply with the order is hazardous even though changed conditions may justify modification or vacation by the court, because the majority of courts hold that the installments become vested property rights as they accrue and the court has no power to modify its decree as to these past-due installments.[5] Even these courts, however, may enforce a contract between the parties to change the amount of the maintenance award, although this results in a retroactive modification of the original order. Such agreements do not bind the court, and are approved only if they are fair and free from fraud, make reasonable provision for the wife, and have valuable consideration.[6] On this basis the court in the principal case could not find the elements of contract because of the absence of promissory undertakings and mutual assent; *H*'s expenditures in support of the children who were living with him were not the agreed exchange for *W*'s waiver of maintenance payments. Nor could the court deny relief on the ground of laches, as a much longer lapse of time than four years, with other prejudicial circumstances, is generally necessary in alimony cases.[7] Instead, the court overruled its prior decisions that it lacked power to remit accrued installments.[8] The merits of this assertion by the court of unrestricted power to control maintenance payments must, however, be balanced against the need to protect the remedial weapons of the wife. Where the equity court retains this measure of control, the decree will not be considered final; hence it is not required to be enforced by a foreign court under the full

[4] 42 C.J.S., Husband and Wife, §626(2); 27 AM. JUR., Husband and Wife, §428; 40 A.L.R. 1227, 1239 (1926). Contra, Washburn v. Washburn, 137 Misc. 658, 244 N.Y.S. 34 (1930); McIlroy v. McIlroy, 208 Mass. 458, 94 N.E. 696 (1911) (resumption of cohabitation). Cf. ANN. CAS. (1912A) 937.

[5] Greer v. Greer, 110 Colo. 92, 130 P. (2d) 1050 (1942); Bennett v. Tomlinson, 206 Ia. 1075, 221 N.W. 837 (1928); 94 A.L.R. 331 (1935); 27 AM. JUR., Husband and Wife, §428; Sistare v. Sistare, 218 U.S. 1, 16-17, 30 S.Ct. 682 (1910). Apparently most jurisdictions draw no substantial distinction between alimony decrees in limited divorce cases and separate maintenance orders in this respect. See Knight v. Knight, 211 S.C. 25, 43 S.E. (2d) 610 (1947). But cf. Rochelle v. Rochelle, 235 Ala. 526, 179 S. 825 (1938); Ostrin v. Posner, 127 Misc. 313, 215 N.Y.S. 259 (1925). Statutes may expressly provide for retroactive modification, e.g. N.Y. Civil Practice Act (Cahill-Parsons, 1946) §1170, amended by N.Y. Amendment Laws (1948), c. 212; or prohibit retroactive modification, e.g., 5 Ore. Comp. Laws Ann. (Supp. 1943) 63-215 (f); or may be sufficiently broad that the court may construe them to permit retroactive modification, as in Woehler v. Woehler, 107 Mont. 69, 81 P. (2d) 344 (1938); and Duffy v. Duffy, 19 N.J. Misc. 332, 19 A. (2d) 236 (1941). Most statutory language is so general as to permit either construction.

[6] Gray v. Gray, 149 Misc. 273, 267 N.Y.S. 95 (1932); Meyers v. Meyers, (Mo. App. 1929) 22 S.W. (2d) 853; 27 C.J.S., Divorce, §238(c) and cases cited. See also 166 A.L.R. 372 (1947). The agreement may not be specifically enforceable, however, Apfelbaum v. Apfelbaum, 111 N.J. Eq. 529, 162 A. 543 (1932).

[7] 137 A.L.R. 884, 894 (1942). Again, courts do not distinguish between divorce and separation decrees.

[8] Principal case at 13, overruling three previous decisions of the court. Either result is possible under the District of Columbia statute, which provides that ". . . the case shall still be considered open for any future orders. . . ." 16 D.C. Code (1940) §413. See 16 D.C. Code (1940) §415. A few other courts have reached this result, usually on the basis of estoppel or acquiescence. De Blaquiere v. De Blaquiere, 3 Hagg. Ecc. 322, 162 Eng. Rep. 1173 (1830); Kumlin v. Kumlin, 200 Minn. 26, 273 N.W. 253 (1937); 137 A.L.R. 884, 897 (1942). Cf. Atkinson v. Atkinson, 233 Ala. 125, 170 S. 198 (1936).

faith and credit clause of the Constitution.[9] If the wife cannot sue the husband on the decree wherever she finds him, she may be unable to enforce her right to support in any way. Moreover, as in the principal case, the husband can generally get prospective relief from the court which granted the decree if sufficient grounds exist for ceasing payment.[10] It is easy to understand the motives for the decision in the principal case, but the probable effect in forfeiting the extraterritorial sanction of the full faith and credit clause for alimony or separate maintenance decrees makes it at least questionable.[11]

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[9] Sistare v. Sistare, 218 U.S. 1, 30 S.Ct. 682 (1910); Nelson v. Nelson, 282 Mo. 412, 221 S.W. 1066 (1920). Courts disagree as to whether they will enforce such a decree on considerations of comity, 41 A.L.R. 1419, 1421 (1926).

[10] Adultery is a sufficient ground for termination of the separate maintenance decree in some jurisdictions. 42 C.J.S. 272 (1944); 27 AM. JUR., Husband and Wife, §408; 26 AM. JUR., Husband and Wife, §340.

[11] In alimony cases Missouri also adopted the view of the principal case in Francis v. Francis, 192 Mo. App. 710, 179 S.W. 975 (1915), but returned to the majority rule in Nelson v. Nelson, 282 Mo. 412, 221 S.W. 1066 (1920), on this public policy ground.