November 2011

Public Policy Considerations in Drafting Separation Agreements

Part Two of a Two-Part Article

By Bari Brandes Corbin and Evan B. Brandes

We continue herein our discussion of New York's public policy and its effects on the validity of separation agreements.

No Exceptions

While it appears that the language in General Obligations Law § 5-311 exempts from its reach separation agreements that comply with Domestic Relations Law § 236 (B) when it says, "Except as provided in New York Domestic Relations Law § 236," the exception is illusory.

Domestic Relations Law § 236 (B)(3), which became law on July 19, 1980, provides, among other things, that an agreement by the parties, made before or during the marriage, may include: 1) a contract to make a testamentary provision of any kind, or a waiver of any right to elect against the provisions of a will; 2) provision for the ownership, division or distribution of separate and marital property; 3) provision for the amount and duration of maintenance or other terms and conditions of the marriage relationship, subject to the provisions of § 5-311 of the general obligations law, provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment; and 4) provision for the custody, care, education and maintenance of any child of the parties, subject to the provisions of § 240. DRL § 236 (B)(3).

So Domestic Relations Law § 236 (B)(3) still requires that the "provision for the amount and duration of maintenance or other terms and conditions of the marriage relationship" remain "subject to the provisions of section 5-311 of the general obligations law." A husband and wife therefore remain unable to contract to "alter" the marriage, "dissolve" the marriage or relieve one another of responsibility to support each other in the "public charge" situation. General Obligations Law § 5-311 has never been construed to prohibit husbands and wives from making a contract to make a testamentary provision of any kind, or a waiver of any right to elect against the provisions of a will. Nor has it been construed to prohibit them from making provisions for the ownership, division or distribution of separate and marital property, or from providing for the custody, care, education and maintenance of any child of the parties.

Agreement Void if No Separation Occurs

In New York today, a separation agreement is void, as against public policy, if the parties are living together at the time of making the agreement and never subsequently separate. One example of the application of this policy can be found in Garlock v. Garlock, 279 N.Y. 337 (1939). There, the husband and wife entered into an agreement, which recited that they resided together and that the husband would thenceforth pay the wife $15,000 per year during her lifetime, in equal monthly installments of $1,250. The agreement stated that the wife was to use these funds for her support and maintenance, and that these payments were in lieu of and in release of any and all obligations the husband had to support the wife. When the husband failed to pay a monthly installment of $1,250, the wife brought an action to recover the sum. The wife's attorney's reply affidavit stated that the agreement was drawn up after a conversation with the husband, who stated that, while the parties were happily married, they wanted to reduce to a stated sum the amount the husband should provide his wife each year for her support and maintenance. Special Term dismissed the complaint on the ground that the contract was void, and the Court of Appeals agreed. It pointed out that marriage is a relationship established according to law, and that under that law the husband has the duty to support and maintain his wife in conformity with his condition and station in

life. Allowing him to contract his duties away would be contrary to public policy. Conversely, where the parties have separated, contracts similar to that in Garlock are legal. See, e.g., Winter v. Winter, 191 NY 462 (1939).

The rule, however, is not ironclad, and the validity of a separation agreement may be sustained, even though executed at a time when the parties were living in the same household, where it appears that an immediate separation was contemplated and in fact occurred. Thus, an agreement to separate executed while the parties are living together is only contrary to public policy and void if the separation does not take place within a reasonable time. Markowitz v. Markowitz, 52 AD 521 (1st Dept. 1976). Additionally, a separation agreement will sometimes be found valid even if the husband and wife continue to reside in the same home. In Sepenoski v. Sepenoski,188 AD2d 457 (2d Dept. 1992), the Second Department held that the fact that the husband and wife lived in the same house for four years after their separation agreement was executed was not sufficient to vitiate it where they were not living together as husband and wife, did not engage in sexual relations, and the wife received a salary for working on the family farm.

Abandoning the Agreement

A reconciliation after the separation agreement has been made will vitiate it, but the definition of "reconciliation" in this context is one that the courts have often had to grapple with. If a reconciliation is accomplished, the paying spouse's duty under the agreement to make payments for the support of the other spouse and their children terminates; it is replaced by his or her general obligation, in accordance with New York public policy, to provide the support that the marriage contract imposes. Blumenthal v. Blumenthal, 194 Misc 322 (1944).

Cohabitation in and of itself does not abrogate or make a separation agreement invalid; there must be an intent to reconcile. Markowitz v. Markowitz, 52 AD 2d 521 (1st Dept. 1976); Stim v. Stim, 65 AD 2d 790 (2d Dept. 1978). In Farkas v. Farkas, 26 AD 2d 919 (1st Dept. 1966), the parties separated, but continued to engage in sexual relations. By a separation agreement dated Nov. 17, 1962, the defendant husband agreed to pay the wife $1,250 per month for her support and maintenance. She later contended that thereafter, the parties resumed their marital relationship. However, the court held that mere cohabitation and sexual intercourse between the parties, following the execution of the separation agreement, did not render the agreement invalid absent proof of an intention to abandon the separation agreement. No such intention was shown by the facts, which included that: 1) following the separation and prior to the execution of a reconciliation agreement the wife moved into a hotel; 2) she thereafter continued to live at the hotel and paid her bill there with part of the $1,250 per month she received under the terms of the separation agreement; 3) the husband maintained an apartment elsewhere; 4) the wife later moved into an apartment on a three-month sublease signed by the husband and each paid half of the rent, but the husband continued to maintain a separate apartment; and 5) during the entire interval the plaintiff continued to receive the sum of $1,250 per month. There also was credible testimony that the wife, as a condition to resumption of a full marital relationship, had demanded a revision of the parties' prenuptial agreement and that the husband had refused to consent to this. The Appellate Division held that the evidence failed to support the wife's contention that the parties had reconciled.

Parties have found ways to make their intentions concerning reconciliation after separation even more clear, though some may be unhappy with the results. In Lotz v. Lotz, 135 A.D.2d 1007 (3d Dept 1987), a relevant provision of the separation agreement provided that it could not be modified except by a written agreement "duly subscribed and acknowledged with the same formality as this Agreement." Later, the parties signed an "addendum agreement," drafted by the wife's attorney, in which they expressed their intent to be bound by the original agreement despite the fact that they were going to try to reconcile. The record indicated that the attempt at reconciliation was short-lived. The wife then alleged that the separation agreement was invalidated by the defendant's cohabitation with her following execution of the agreement. The Appellate Division held that mere sporadic cohabitation and sexual relations are not enough to invalidate a separation agreement. There must be an intent to reconcile and to abandon the agreement; here, a contrary intent was made clear by the fact of the addendum agreement, which the wife's attorney had drafted, and which specifically provided that the parties' cohabitation was not to be considered as evidence of an intent to abandon the separation agreement.

Where a separation agreement is nullified by a reconciliation of the parties, it is not revived by the parties' subsequent separation. Re Landon's Estate, 149 Misc. 832 (1933). And where the husband and wife are divorced after executing a separation agreement, and then remarry each other, the agreement is abrogated. Re Carroll's Will, 202 Misc. 508 (1952).

Conclusion

The public policy of the State of New York constrains a husband and wife from making some of the agreements that they might otherwise choose to make. As we have seen, they cannot contract to "alter or dissolve" the marriage relationship, or to relieve one another of their support obligations, and they cannot generally keep their separation agreements in force if they reconcile and resume their marital status. Counsel must take care when drafting a separation agreement — or for that matter, any other marital contract — to avoid running afoul
of GOL § 5 311, or of any other aspect of New York public policy, whether codified or expressed in court decisions.

Bari Brandes Corbin maintains her offices for the practice of law in Laurel Hollow, NY. She is co-author of Law and the Family New York, Second Edition, Revised, Volumes 5 & 6 (Thomson-West). Evan B. Brandes is an associate with Baker & McKenzie, in Sydney, Australia. They co-author, with Joel R. Brandes, President of Joel R. Brandes Consulting Services Inc. (www.brandeslaw.com), the annual supplements to Law and the Family New York, Second Edition, Revised (Thomson-West).

Go To Top of Page