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COMMENTS

SELECTED ASPECTS OF DOMESTIC RELATIONS
IN PENNSYLVANIASEPARATION AGREEMENTS UNDER PENNSYLVANIA
LAW: THE IMPACT OF DOMESTIC POLICY
ON PRIVATE CONTRACTS

I. INTRODUCTION

In an attempt to resolve marital difficulties, spouses often arrange a separation and execute contracts defining the rights and duties of each party during the separation. Separation agreements are generally well received by the courts for they relieve the judiciary of the burden of entering marital disputes. Several problems have arisen, however, in regard to the binding nature of these unique agreements. The core of the difficulty with regard to separation agreements is that they are subject to interpretation from two often conflicting viewpoints. On one side, stand basic principles of contract which provide an element of certainty to the relations of the parties. On the other, stand the interests of the state in preventing enforcement of individual contracts contrary to basic domestic policy considerations. The purpose of this Comment is to explore the approach taken by Pennsylvania courts to this problem. An attempt will be made to establish the hypothesis that separation agreements are *sui generis* in nature, and should not be subject to rigid contractual interpretation in all instances.

II. GENERAL REQUIREMENTS FOR VALIDITY

Postnuptial agreements may be classified into two general categories: family settlements, through which a husband and wife agree as to the ownership of property within their joint possession; and separation agreements, where spouses enter into a binding contract with respect to the wife's support. These postnuptial arrangements are distinguished by the fact that the latter is made after the spouses have separated, or where a separation is imminent, while in the former, the parties do not necessarily contemplate separation. It is settled law today in Pennsylvania that separation agreements between husband and wife,¹ wherein

1. At common law, a married woman's contracts including those with her husband, were void. Although unenforceable under the common law, separation agreements will be enforced in equity. *Rice v. Shank*, 382 Pa. 396, 115 A.2d 210 (1955). For an analysis of age as a limitation on a wife's right to contract, see Note, 15 U. Prrt. L. Rev. 643 (1954).

property is divided, separate maintenance is provided for the wife, and the husband's estate is released, are valid and will be enforced if fair in their terms and fairly obtained.² The courts apparently take the view that disputes between husband and wife are best settled by the parties themselves, and for this reason prefer and commend private settlements.³

A. As Related to Divorce

While valid public policy considerations support upholding separation agreements, the courts have been careful not to allow the use of such agreements as an inducement for obtaining divorce. In *Commonwealth v. Miller*,⁴ a wife filed an action for support against her husband. The husband, in defense, claimed that a separation agreement previously executed by the parties barred the action. Under the terms of the agreement, the husband was to place funds in escrow for the support of his wife. The agreement also required the wife, immediately after signing the contract, to institute divorce proceedings, and provided further that the balance remaining in the escrow account was to be returned to the husband if the divorce was not granted. In striking down the agreement as one conducive to the procurement of a divorce, the court distinguished a line of earlier cases⁵ holding separation agreements valid although divorce may have been contemplated by the parties. In distinguishing the earlier cases the court noted two points. First, it did not appear in any of the previous cases that the separation agreements had as their purpose the acquisition of a divorce. Second, in all of the cases grounds for divorce existed prior to the execution of an agreement.⁶ Apparently, the court felt that the absence of pre-existing grounds for divorce in *Miller* raised a strong presumption that the agreement between the parties was not intended primarily as a property settlement. In *Commonwealth ex rel. Smylie v. Smylie*,⁷ decided three years after *Miller*, a separation agreement, under which a wife was required to secure a divorce under penalty of forfeiting her right to institute an action for support, was held invalid as directly conducive to the procurement of a divorce. However, the court qualified its decision to a large extent by stating that separation agreements in which the granting of a divorce is a condition precedent to performance by either party are

2. See *Commonwealth ex rel. Miller v. Miller*, 176 Pa. Super. 64, 106 A.2d 627 (1954); *Commonwealth ex rel. Schaffhauser v. Schaffhauser*, 164 Pa. Super. 54, 63 A.2d 410 (1949); *Commonwealth ex rel. Mosey v. Mosey*, 147 Pa. Super. 466, 24 A.2d 59 (1942).

3. See, e.g., *Miller v. Miller*, 284 Pa. 414, 131 A. 236 (1925).

4. 176 Pa. Super. 64, 106 A.2d 627 (1954).

5. *Schmoker v. Schmoker*, 359 Pa. 272, 59 A.2d 55 (1948); *Commonwealth ex rel. Schaffhauser v. Schaffhauser*, 164 Pa. Super. 54, 63 A.2d 410 (1949); *Commonwealth ex rel. Rossi v. Rossi*, 161 Pa. Super. 86, 53 A.2d 887 (1947); *Forbes v. Forbes*, 159 Pa. Super. 243, 48 A.2d 153 (1946).

6. *Commonwealth ex rel. Miller v. Miller*, 176 Pa. Super. 64, 106 A.2d 627, 629 (1954).

7. 184 Pa. Super. 276, 132 A.2d 386 (1957).

not per se illegal or contrary to public policy.⁸ Other cases have upheld separation agreements in which payments to the wife were conditioned on procurement of an absolute divorce,⁹ and where the parties agreed to limit the grounds upon which a future divorce would be sought.¹⁰ From a review of the cases, it appears that the distinction between agreements which are directly conducive to divorce, and thus illegal, and those which are made only in contemplation of divorce, and thus legal, is by no means a clear one.¹¹ At best, the rule provides a convenient tool through which the courts of Pennsylvania can hold invalid those agreements not to their liking.

B. Physical Separation of the Parties

Other general requirements for the validity of separation agreements under Pennsylvania law concern the separation of the parties themselves. It is well settled that the separation must have already occurred or be imminent, and thus agreements to effectuate a future separation are invalid.¹² Further, both parties to the contract must consent to the separation. Silent acquiescence to a separation does not constitute consent,¹³ and it has been held that even a signed separation agreement is not conclusive evidence that the separation of the parties was consensual.¹⁴ If the parties affect a reconciliation, it is the general rule that the separation agreement is abrogated, for living apart is the essential consideration for the agreement.¹⁵ What conduct on the part of the parties constitutes a sufficient reconciliation to display an intention to abandon a separation agreement is a question of fact to be determined from all the surrounding circumstances and may vary considerably.¹⁶ Although co-

8. *Id.* at 279, 132 A.2d at 386.

9. *Commonwealth ex rel. Dora v. Dora*, 392 Pa. 433, 141 A.2d 587 (1958).

10. *Forbes v. Forbes*, 159 Pa. Super. 243, 48 A.2d 153 (1946). However, where the sole reason for consummation of the agreement is the wife's threat to contest impending divorce proceedings, the agreement is directly conducive to divorce and thus void. *Gershman v. Metropolitan Life Insurance Co.*, 405 Pa. 485, 176 A.2d 435 (1961).

11. Other jurisdictions also appear to have difficulty in drawing the line between legal and illegal separation agreements where the divorce issue is involved. In *Viles v. Viles*, 14 N.Y.2d 365, 200 N.E.2d 567, 251 N.Y.S.2d 672 (1964), the New York Court of Appeals ruled that the trial court was correct in holding a separation agreement invalid where evidence was presented as to a collateral oral understanding between the parties and their attorneys that a divorce would follow. The *Viles* decision precipitated much comment as to whether attorneys, representing spouses in matrimonial matters, could even talk about a subsequent divorce. See 2 A. LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 31, at 8-10 (Supp. 1969). The scope of the *Viles* ruling, however, was considerably narrowed by a subsequent amendment to section 5-311 of the General Obligations Law providing that separation agreements would not be declared invalid as inducive to divorce unless they contained an express provision requiring the dissolution of the marriage. See also *Rosen v. Goldberg*, 28 App. Div. 2d 1051, 283 N.Y.S.2d 804 (1967).

12. See *Kaiser's Estate*, 14 Pa. Super. 155 (1900).

13. *Sacks v. Sacks*, 172 Pa. Super. 543, 94 A.2d 147 (1953).

14. *Commonwealth ex rel. Pitucci v. Pitucci*, 200 Pa. Super. 591, 189 A.2d 912 (1963). As to effect of an offer to resume marital relations on the consent issue, see *Commonwealth ex rel. Doering v. Doering*, 157 Pa. Super. 9, 41 A.2d 358 (1945).

15. See *Commonwealth v. Doughty*, 187 Pa. Super. 499, 144 A.2d 521 (1958); *Commonwealth ex rel. Makowski v. Makowski*, 163 Pa. Super. 441, 62 A.2d 71 (1948).

16. *Id.*

habitation by the parties subsequent to the execution of an agreement of separation will generally be construed as intent to renunciate the agreement,¹⁷ such activity under Pennsylvania law is by no means conclusive proof that a reconciliation sufficient to abrogate the agreement has occurred.¹⁸ Finally, it is important to note that a reconciliation annuls only executory provisions of a separation agreement;¹⁹ the executed provisions are considered valid.

C. Absence of Fraud and Duress

Since separation agreements are grounded in contract, basic principles of contract law, with few exceptions, dictate the majority of other requirements for their validity.²⁰ In the area of fraud and duress, however, Pennsylvania courts have, in some instances, declined to apply general principles of contract, opting instead for equitable considerations as a basis for their decisions. This inconsistent approach by the courts has led to confusion and contradiction in the case law. In *Schoble v. Schoble*,²¹ a husband brought a bill in equity to revoke a separation agreement averring that his wife, through her attorney, had persuaded him to sign an unconscionable agreement.²² The lower court declared the agreement void holding:

The extreme unfairness of the agreement, the circumstances under which it, and the confirmatory agreement were signed, the apparent domination by the plaintiff and her advisors, amounts, in our opinion, to constructive fraud and should be relieved against.²³

On appeal, the Supreme Court of Pennsylvania reversed, holding that the husband had failed to prove the existence of fraud in the execution of the agreement.²⁴ The basis of the Supreme Court's decision

17. *Commonwealth v. Doughty*, 187 Pa. Super. 499, 144 A.2d 521 (1958).

18. *See In re Ray's Estate*, 304 Pa. 421, 156 A. 64 (1931), where the court held that the determinative issue was not the subsequent cohabitation of the parties itself, but rather whether the resumption of marital relations evidenced an intent to renunciate the agreement.

19. *Id.* It should be noted that a reconciliation of the parties does not abrogate a post-nuptial property settlement. Whether the agreement entered into by the parties constitutes a post-nuptial settlement or merely a separation agreement depends upon the intent of the parties as gathered from all the facts. *See Commonwealth v. Doughty*, 187 Pa. Super. 499, 144 A.2d 521 (1958); *Commonwealth ex rel. Di Valerio v. Di Valerio*, 169 Pa. Super. 477, 82 A.2d 687 (1951); *Commonwealth ex rel. Makowski v. Makowski*, 163 Pa. Super. 441, 62 A.2d 71 (1948).

20. The general rules pertaining to construction of terms of contracts also apply to separation agreements. Thus, where the agreement is susceptible of conflicting interpretations, the one that ascribes natural conduct to the parties will govern. *Wiegand v. Wiegand*, 349 Pa. 517, 37 A.2d 492 (1944). Also, where one of two possible interpretations imputes bad faith, and the other does not, the latter will prevail. *Wells v. Wells*, 166 Pa. Super. 635, 74 A.2d 702 (1950). *See also* 2 A. LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 32 (1964).

21. 349 Pa. 408, 37 A.2d 604 (1944).

22. The evidence presented at trial, however, did not support the husband's claim. It appeared that the wife's attorney was a personal friend of the husband and that previously the attorney had informed the husband that he intended to obtain the best possible arrangement for the wife. *Id.* at 410, 37 A.2d at 605.

23. *Id.* at 410, 37 A.2d at 605.

24. *Schoble v. Schoble*, 349 Pa. 408, 37 A.2d 604, 605 (1944).

was made clear by its reliance on an earlier case, *Berardini v. Kay*,²⁵ where it was held that a "written contractual obligation may not be nullified because a party who signs it recklessly, and in complete disregard of his own interests and the rights of others, refuses to take the common precaution of reading what is plainly written on the instrument before him."

The trend reflected in the *Schoble* decision of strict enforcement of separation agreements has been repudiated to a large extent by later decisions of Pennsylvania courts. In *Commonwealth v. Doughty*,²⁶ a husband appealed from an order requiring him to pay fixed amounts for support of his wife and son on the basis that the parties had previously entered into a separation agreement. The husband, in the presence of his attorney, induced his wife to sign the agreement by informing her that he had had an affair with another woman resulting in her pregnancy, and that the brothers of this woman were "gunning" for him. The husband also falsely promised to remarry the wife, claiming that his only purpose in marrying the other woman was to give the expected child a name. In holding the agreement void for fraud, duress, and coercion,²⁷ and thus no defense to an action for support, the court labelled the agreement an integral part of a plan to rid the husband of his marriage obligation "more devious and complicated than has ever come to our attention."²⁸

It is not easy to reconcile the *Schoble* and *Doughty* decisions. In both cases, the terms of the agreement were unreasonable and the conditions under which the agreement was signed were highly unfavorable to the complaining party. Also, in both instances, the complaining party had no legal representation at the time the agreement was executed. One distinguishing factor is that in *Schoble*, the husband was seeking to avoid the terms of the agreement while in *Doughty* the wife was the complaining party. Whether, under Pennsylvania law, the quantum of proof necessary to establish fraud sufficient to void a separation agreement varies with which marital partner is the complaining party is not clear.²⁹ The decision in *Doughty* would appear, however, to indicate that Pennsylvania courts will no longer blindly hold parties, particularly the wife, to a separation agreement without careful scrutiny of its terms, and the circumstances under which it was executed.³⁰

25. 326 Pa. 481, 486, 192 A. 882, 884 (1934).

26. 187 Pa. Super. 499, 144 A.2d 521 (1958).

27. The fact that the parties had effected a reconciliation subsequent to the agreement provided an additional basis for voiding the agreement. *Id.*

28. *Commonwealth v. Doughty*, 187 Pa. Super. 499, 502, 144 A.2d 521, 523 (1958).

29. It is the policy in many jurisdictions to construe separation agreements in favor of the wife for she is usually in the weaker bargaining position. This perhaps justifies differentiating on the basis of sex as to the presumption of validity. See 1 A. LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 3, at 18-23 (1964).

30. For other cases dealing with the problem of fraud and duress in separation agreements, see *Tracy v. Tracy*, 377 Pa. 420, 105 A.2d 122 (1954); *Brunner v. Brunner*, 104 Pa. Super. 539, 158 A. 615 (1932); *Clayden v. Clayden*, 9 Pa. D. & C. 681 (C.P. Phila. 1927).

III. SPECIFIC PROVISIONS WITHIN SEPARATION AGREEMENTS

Assuming a separation agreement meets the general requirements for validity, close judicial scrutiny of particular clauses within the agreement will generally occur. The two clauses in separation agreements most productive of controversy are the support clause and the custody clause.³¹

A. Wife's Support

Common law imposed upon the husband a duty to support his wife and children in accordance with his financial condition and general situation in life.³² Most jurisdictions, including Pennsylvania, have codified this duty in support statutes.³³ Under Pennsylvania law, a husband's duty to support his wife terminates upon divorce,³⁴ the wife's misconduct³⁵ or death, and the husband's death³⁶ unless there is an agreement to the contrary. The execution of a valid separation agreement within which fair and adequate provision is made for the wife's support will bar any subsequent action for support by the wife as long as the husband continues or completes his performance under the agreement.³⁷ There appears to be no set formula for determining what constitutes a fair and adequate support allowance. Rather, it is a question of fact to be determined from several factors including the wife's previous standard of living, her present needs, and the husband's economic situation.³⁸

31. See generally 1 A. LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 14, at 1-6 (1964).

32. See *Gessler v. Gessler*, 181 Pa. Super. 357, 124 A.2d 502 (1956).

33. See, e.g., PA. STAT. tit. 48, § 131 (1965).

34. In Pennsylvania, absolute divorce completely terminates the marriage relation and all duties, including support, arising from it. See *Commonwealth ex rel. Bortin v. Bortin*, 210 Pa. Super. 355, 234 A.2d 55 (1967); *Lorusso v. Lorusso*, 189 Pa. Super. 403, 150 A.2d 370 (1959); *Harrison v. Harrison*, 183 Pa. Super. 562, 133 A.2d 870 (1957).

35. Pennsylvania courts have taken the rather extreme view that the wife's misconduct must be sufficient to constitute grounds for divorce to justify relieving the husband of his duty to support. See *Commonwealth v. Cooper*, 183 Pa. Super. 36, 128 A.2d 181 (1956); *Commonwealth v. Williams*, 178 Pa. Super. 313, 116 A.2d 297 (1955). A wife does not lose her right to support if she leaves for just cause, and even where she leaves without just cause, her right to support continues if the husband acquiesces in the separation. See *Commonwealth v. Cooper*, 183 Pa. Super. 36, 128 A.2d 181 (1956). However, if the husband in good faith, withdraws his consent and asks the wife to return, her refusal would terminate the support obligation. See *Commonwealth ex rel. Davidoff v. Davidoff*, 178 Pa. Super. 549, 115 A.2d 892 (1955).

36. Even though the husband's obligation to furnish support terminates upon his death, he may voluntarily undertake to bind his estate to continue the payments to his wife after he dies. See *Elmendorf v. Whitney*, 153 Pa. 460, 25 A. 607 (1893). Where the husband agrees to maintain his wife "as long as she lives," his estate will be bound, though not explicitly so stated. See *In re Pierce's Estate*, 123 Pa. Super. 171, 187 A. 58 (1937). See also *Wolfsohn v. Solms*, 392 Pa. 129, 139 A.2d 523 (1958).

37. See, e.g., *Commonwealth ex rel. Schaffhauser v. Schaffhauser*, 164 Pa. Super. 54, 63 A.2d 410 (1949).

38. For an exhaustive analysis of the factors to be considered in determining the amount of a support allowance under a separation agreement, see 1 A. LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 15, at 78-94 (1964).

The fact that the wife has a means of income of her own does not wholly relieve the husband of his support obligation under Pennsylvania law.³⁹

Surprisingly, it is the form that support payments take, rather than their amount in particular cases, which has occasioned the most controversy. Although a multitude of arrangements are possible,⁴⁰ it is convenient from an analytical viewpoint to classify the form of payment as either *periodic* or *lump-sum*. Under the lump-sum⁴¹ arrangement, the wife agrees to accept a single sum, *to be paid in one or more installments*, in exchange for her right to future support from her husband. A valid lump-sum agreement constitutes a waiver on the part of the wife of her right to support and bars any subsequent action at law by the wife for support. The periodic payment arrangement is distinguished by the fact that the husband's *support duty is not reduced to a single definite sum*, but rather is considered as a continuing one. Under the periodic arrangement, payments may be fixed or flexible and the wife is not deemed to have waived all rights to future support. Thus, she may institute an action for an increase in the support payments if a change in circumstances warrants such an increase.

It is settled law in Pennsylvania that agreements for the release of future support by the wife are valid and will be upheld if fair and reasonable.⁴² However, noting that such agreements are of great importance, the courts have scrutinized them closely, requiring that they be established by evidence which is "clear, positive, and convincing."⁴³ The use of the lump-sum arrangement has several advantages which tend to support the Pennsylvania position as to their validity. First, they reduce the necessity of personal contact between the parties inherent

39. See *Commonwealth v. Litz*, 190 Pa. Super. 310, 154 A.2d 420 (1959); *Commonwealth ex rel. Lagazu v. Lagazu*, 180 Pa. Super. 342, 119 A.2d 605 (1956).

40. Lindey lists the following types of provisions for the wife's support commonly found in separation agreements:

- (a) Periodic payments, fixed or flexible;
- (b) A trust or an escrow, with income to the wife;
- (c) An annuity;
- (d) Payment of a gross amount in a single sum;
- (e) Payment of a gross amount in installments;
- (f) Transfer of real or personal property, or both in final settlement of the husband's obligation for support; or
- (g) A combination of any two or more of the above.

1 A. LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 15, at 102-04 (1964).

41. A lump sum settlement is sometimes mistakenly labeled "alimony in gross." Alimony may be distinguished from support provisions of a separation agreement by the fact that the former arises from a judicial decree while the latter is the result of a contract between the parties. *Id.*

42. See *Commonwealth ex rel. Jablonski v. Jablonski*, 179 Pa. Super. 498, 118 A.2d 222 (1955); *Commonwealth ex rel. Schaffhauser v. Schaffhauser*, 164 Pa. Super. 54, 63 A.2d 410 (1949). The jurisdictions permitting lump sum settlements include Connecticut, Ohio, and Maryland. See *Liber v. Liber*, 14 Conn. Supp. 64 (1946); *Meyer v. Meyer*, 153 Ohio St. 408, 91 N.E.2d 892 (1950); *Frank v. Frank*, 207 Md. 124, 113 A.2d 411 (1955).

43. *Commonwealth ex rel. Schaffhauser v. Schaffhauser*, 164 Pa. Super. 54, 63 A.2d 410, 412 (1949).

in the periodic arrangement.⁴⁴ Secondly, the payment of a definite sum lends an element of certainty to the financial situations of both parties.⁴⁵ Finally, since the wife has waived her right to support, the courts are not burdened with continuing disputes over the amount and duration of payments under the agreement.

A few jurisdictions have refused to recognize separation agreements within which the wife has waived her right to support, declaring such provisions void as contrary to public policy.⁴⁶ In New York, lump-sum arrangements have been construed as violative of a specific legislative mandate. Section 5-311 of the General Obligations Law states in pertinent part:

A husband and wife can not contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife or to relieve the wife of liability to support her husband provided that she is possessed of sufficient means and he is incapable of supporting himself and is or is likely to become a public charge.⁴⁷

Lump-sum arrangements have been interpreted in New York as an attempt by the husband to purchase exemption from his support duty and are thus considered in direct contravention of the statute.⁴⁸ Two major policy considerations form the basis of the New York view. First, it is apparent that the legislature of New York favors strict judicial control over the legal consequences of the marriage contract.⁴⁹ Second, from a practical viewpoint, it is clear that the legislature feared the possibility that a wife might squander whatever settlement she received, and thus become a public charge, her husband having been relieved of his support duty by the agreement. This would appear to be a particularly relevant consideration where children are involved.

Despite the obvious advantages of lump-sum agreements mentioned previously, it is suggested that the New York position is the better view. It is important to note that New York courts have taken the view that lump-sum agreements are not per se illegal or void.⁵⁰ Rather, the courts consider them voidable. Thus where the husband and wife enter into a separation agreement under which the wife accepts a lump-

44. See 1 A. LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 15, at 2-3 (1964).

45. *Id.*

46. See *Laleman v. Crombez*, 6 Ill. 2d 194, 127 N.E.2d 489 (1955), where the court stated:

The rule of law which makes a wife's waiver of her right to support unenforceable is designed in part for her protection, and in part for the protection of the public, upon whom the necessity of supporting her might fall if the husband should fail to discharge his obligation.

Id. at 195-96, 127 N.E.2d at 491.

47. N.Y. GEN. OBLIGATIONS LAW § 5-311 (McKinney 1964).

48. See *Leeds v. Leeds*, 308 N.Y. 991, 127 N.E.2d 845 (1955).

49. See *Haus v. Haus*, 298 N.Y. 69, 71, 80 N.E.2d 337, 339 (1948); *Weiman v. Weiman*, 295 N.Y. 150, 154, 65 N.E.2d 754, 755-56 (1946).

50. See *Jacobson v. Jacobson*, 140 N.Y.S.2d 917 (Sup. Ct. 1955).

sum settlement, the husband takes the risk that the agreement will be set aside if unfair and if the proceeds of the settlement are exhausted by the wife.⁵¹ The risk that the husband may have to pay twice provides an impetus toward making an adequate settlement during the original negotiations. Further, by discouraging lump-sum settlements, the courts effectively help to relieve highly inequitable situations which result when, subsequent to the settlement, either party experiences a noted increase or decrease in earning power. Finally, discouragement of lump-sum settlements promotes the state's interest⁵² for a continuing duty is placed upon the husband to support his wife, thereby preventing her from becoming a public charge.

B. Child Support

It is well established that the primary obligation for child support rests upon the father.⁵³ The obligation to support children does not, as in the case of the wife, terminate upon divorce.⁵⁴ The proper measure of support for a child is dependent on a number of factors including the earning power of the father, his financial resources,⁵⁵ and the needs and ambitions⁵⁶ of the child. The fact that the mother, as custodial parent, may have independent income is a factor to be considered, but will not, in all cases, constitute a bar to compelling contribution from the father.⁵⁷

Under the doctrine of *parens patriae*, the courts of Pennsylvania have been careful to guard the support rights of children. Thus, it is well settled that a mother can not by means of a lump-sum settlement bargain away the right of her minor child to adequate support from the father, regardless of the validity of the agreement as to the parties themselves.⁵⁸ Child support provisions within separation agreements,

51. *Friedman v. Friedman*, 114 N.Y.S.2d 874 (Sup. Ct. 1952).

52. The interests of states in seeing that husbands fulfill their support obligations has led to legislation providing for interstate enforcement of support awards and support obligations under separation agreements. See Comment, *The Uniform Reciprocal Enforcement of Support Act: Procedural Problems and A Technological Solution*, 41 TEMP. L.Q. 325 (1968). Pennsylvania courts have enforced this type of legislation. See *Commonwealth v. Shaffer*, 175 Pa. Super. 100, 103 A.2d 430 (1954).

53. *Commonwealth ex rel. Yeats v. Yeats*, 168 Pa. Super. 550, 79 A.2d 793 (1951).

54. *Id.*

55. For an illuminating discussion of the factors to be considered in determining what constitutes adequate support, see *Hecht v. Hecht*, 189 Pa. Super. 276, 150 A.2d 139 (1959).

56. As to whether a father, in the absence of an agreement, will be required to finance a college education for children in the custody of his wife, see *Commonwealth ex rel. Larsen v. Larsen*, 211 Pa. Super. 30, 234 A.2d 18 (1967); *Commonwealth ex rel. Brown v. Weidner*, 208 Pa. Super. 114, 220 A.2d 382 (1966); *Commonwealth ex rel. Rothrock v. Rothrock*, 205 Pa. Super. 32, 206 A.2d 397 (1965). For a construction of the term "schooling" within a separation agreement, see *Commonwealth ex rel. Grossman v. Grossman*, 188 Pa. Super. 236, 146 A.2d 315 (1958).

57. See generally *Mullinger v. Mullinger*, 197 Pa. Super. 34, 175 A.2d 890 (1961); *Commonwealth ex rel. Heller v. Yellin*, 174 Pa. Super. 292, 101 A.2d 452 (1953).

58. *Commonwealth v. Beavin*, 168 Pa. Super. 73, 76 A.2d 653 (1950); *Commonwealth ex rel. Roy v. Roy*, 159 Pa. Super. 284, 48 A.2d 131 (1946).

when contested, have, at best, only evidentiary value, and the final decision as to whether adequate provisions have been made rests in the courts.⁵⁹ Where, in fact, the child support provisions within a separation agreement are inadequate at law, Pennsylvania provides a statutory remedy for support, available upon petition to the court, and complete with criminal sanctions to be used if the father fails to provide such "reasonable" support as the court may order.⁶⁰

In those cases where the child support provisions within a separation agreement are *more* than adequate, the issue arises as to whether a child, though not a party to the agreement, may enforce those terms of the contract which inure to his benefit. There appear to be three views on the question. Some courts hold that where the contract dictates that all payments be made directly to the mother, the child receives only incidental benefit, and thus, under the third party beneficiary theory,⁶¹ is not a proper party to maintain an action for its enforcement.⁶² Under the New York view, a child may not sue to enforce support provisions paid directly to the mother unless the mother refuses or is incapable of suing through disability.⁶³ Finally, a few jurisdictions hold that the right of a child to enforce separation agreements is unqualified.⁶⁴ Although there appears to be no direct Pennsylvania authority decisive of this issue, one early case indicates that Pennsylvania courts will side with those jurisdictions holding the right of a child to enforce a separation agreement to be unqualified. In *Brill v. Brill*,⁶⁵ an illegitimate child sought to enforce an agreement between his mother and putative father providing for monthly support payments to the mother. Subsequent to the agreement, the mother released the father from his obligations under the contract in return for a lump settlement. The Supreme Court of Pennsylvania held that the child, though not a party to the agreement, had a sufficient beneficial interest to justify allowing the child to sue for its enforcement.⁶⁶ Giving the child an unqualified right to enforce separation agreements is the best reasoned view, for it is often the case that provisions for support within a separation agreement are more generous than those which could be obtained by pursuing statutory

59. *Commonwealth v. Beavin*, 168 Pa. Super. 73, 76 A.2d 653 (1950); *Commonwealth ex rel. Rey v. Rey*, 159 Pa. Super. 284, 48 A.2d 131 (1946).

60. PA. STAT. tit. 18, § 4733 (1963).

61. For an analysis of contracts for the benefit of third parties, see generally L. SIMPSON, CONTRACTS §§ 116-23 (1965).

62. See, e.g., *Percival v. Luce*, 114 F.2d 774 (9th Cir. 1940).

63. See *Forman v. Forman*, 17 N.Y.2d 274, 217 N.E.2d 645, 270 N.Y.S.2d 586 (1966). For a detailed analysis of New York cases on this issue, see Comment, *Enforcement and Attack of Separation Agreements By the Wife and The Separable Rights of Children as Third-Party Beneficiaries*, 33 BROOKLYN L. REV. 290 (1966).

64. See *Walsh v. Walsh*, 28 Cal. App. 2d 723, 108 P.2d 760 (1940); *Smith v. Smith*, 7 Ohio App. 2d 4, 218 N.E.2d 473 (1964). See also Note, *Separation Agreements To Make Mutual Wills for the Benefit of Third Parties*, 18 HASTINGS L. REV. 423 (1967).

65. 282 Pa. 276, 127 A. 840 (1925).

66. *Id.* at 283, 127 A. at 843.

remedies.⁶⁷ Those jurisdictions which hold that the child is only an incidental beneficiary under a support agreement between his parents appear to be placing principles of contract on a higher scale than the interests of the child.

C. Custody

As in the case of child support, agreements between parents relating to custody of their children are not binding on the courts.⁶⁸ Custody of children is not a property right of the parents;⁶⁹ in all instances, it is the welfare of the child, not the interests of prior agreements of the parents, which is the controlling consideration.⁷⁰

Under the typical separation agreement, custody of the children is placed with the mother, and the duty of the father to provide support under the contract is conditioned upon the granting of visitation rights to the father. The question often arises whether a father can be held liable for support for his children where the wife wrongfully denies his visitation privileges. In the case where visitation rights arise out of a support order, rather than from agreement of the parties, the law in Pennsylvania is clear. In *Commonwealth ex rel. Firestone v. Firestone*,⁷¹ it was held that the fact that a divorced wife who was granted custody of her minor child moved permanently to another state did not justify relieving the father from liability for support of the child, notwithstanding that the father was thereby deprived of his right to visitation.⁷² In explaining the underlying policy behind its ruling, the court stated:

But the duty of the father to support a three year old child is well nigh absolute. Here the lower court relieved the father of this duty to support because of some conduct of the mother not affecting her fitness for custody. . . . Custody and support are two different things. If this mother, by depriving the father of the right of visitation *were* guilty of contempt of court (which we do not hold), it could subject her, but never the child to penalties; and it does not relieve the father of the duty to support the child under circumstances such as these.⁷³

The value of the *Firestone* decision lies in its perception of the fact that the controlling consideration is the welfare of the child, not the rights of the parents.

67. Also, by suing on the contract, litigation of the proper measure of support is avoided. See Comment, *supra* note 63, at 300.

68. See *Commonwealth ex rel. Hubbell v. Hubbell*, 176 Pa. Super. 186, 107 A.2d 388 (1954).

69. See *Mullinger v. Mullinger*, 197 Pa. Super. 34, 175 A.2d 890 (1961).

70. See *Commonwealth ex rel. Jacobsen v. Jacobsen*, 181 Pa. Super. 369, 124 A.2d 462 (1956); *Commonwealth ex rel. Hubbell v. Hubbell*, 176 Pa. Super. 186, 107 A.2d 388 (1954). See generally 1 A. LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 14, at 32-33 (1964).

71. 158 Pa. Super. 579, 45 A.2d 923 (1946).

72. *Id.* at 581-82, 45 A.2d at 924.

73. *Id.* See also *Commonwealth ex rel. Crane v. Rosenberger*, 212 Pa. Super. 144, 239 A.2d 810 (1968).

In those cases where visitation rights arise from an agreement between the parties, rather than by judicial order, contract principles emerge and are often controlling. It is the general rule that denial of visitation rights reserved to the husband under a separation agreement will suspend his obligation to make support payments until restoration of his rights occur.⁷⁴ Such a denial of visitation rights, however, relieves the husband only of his *contractual* liability for support, and not his support duty pursuant to statute.⁷⁵ Thus, the wife may apply to the court for a support award. Pennsylvania courts refuse to abide by this general rule. In *Malinge v. Malinge*,⁷⁶ the mother of a child brought an action in assumpsit against the father to recover the amount due her in accordance with the support provisions of a separation agreement. The father admitted his failure to pay, but excused his failure on the grounds that the mother had breached the contract by denying him visitation privileges. In holding that the mother could recover, even in light of her breach of the contract,⁷⁷ the majority relied heavily on the policy enunciated in *Firestone*, stating that "the public policy in the state of Pennsylvania requires the treatment of support of children and visitation rights as distinct problems, both of which may be enforced by proper and adequate legal action."⁷⁸ The dissenting opinion aptly pointed out that the majority's position was divergent from general principles of contract law.

The mother's right to obtain a court order for support for her child in this case seems clear and she can recover reasonable amounts which she has expended for the child's support in quantum meruit. But she is not entitled to recover on the contract which she herself has broken.⁷⁹

Despite the validity of the dissent from a contractual viewpoint, several important considerations buttress the majority position. First, as noted previously, provisions in separation agreements for child support often exceed the standards imposed by law. Further, the interruption of payments by the father until a support order is obtained may work severe hardship on the child, particularly where the mother has no independent means of income. Finally, it is clear that the best interests of the child are not served by allowing him to suffer the consequences of his mother's action. These considerations clearly indicate that the Pennsylvania position as to the independence of the support and visitation covenants is the better reasoned view.⁸⁰

74. See 1 A. LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 14, at 60 (1964).

75. See *Garbarin v. Keller*, 20 Misc. 2d 303, 189 N.Y.S.2d 829 (Sup. Ct. 1959).

76. 197 Pa. Super. 34, 175 A.2d 890 (1961).

77. *Id.* at 36, 175 A.2d at 891.

78. *Id.* at 38, 175 A.2d at 892.

79. *Id.* (dissenting opinion).

80. For the effect of a breach of a no molestation clause on the husband's duty to support, see *Wagner v. Wagner*, 158 Pa. Super. 93, 43 A.2d 912 (1945). See also

IV. CHANGE IN CIRCUMSTANCES — JUDICIAL MODIFICATION OF SEPARATION AGREEMENTS

It is the general rule that separation agreements are not modifiable when not incorporated⁸¹ within a divorce decree.⁸² Thus, in the absence of fraud, a husband will be held to the strict adherence of the support provisions of a separation agreement despite the fact that he has suffered financial reverses, or that children in the custody of the mother have grown up and are self-supporting.⁸³ This rigid view on the part of courts is supported by the fact that the parties had the opportunity to insert within the original agreement a modification clause to cover such unforeseen developments.⁸⁴

An exception to the general rule that courts will not grant relief from the terms of separation agreements on the basis of a change in circumstances exists in regard to child support. In *Hecht v. Hecht*,⁸⁵ the parties executed a separation agreement under which the father agreed to make rather liberal support payments to the mother for the benefit of the children in her custody. Subsequent to the agreement, the father inherited large sums of money from several estates. The mother, commenced an action to increase the support payments under the agreement. In granting the increase, the court stated:

Children of wealthy parents are entitled to the educational advantages of travel, private lessons in music, drama, swimming, horseback riding, and other activities in which they show interest and ability. They are entitled to the best medical care, good clothes and familiarity with good restaurants, good hotels, good shows, and good camps.⁸⁶

Note, *Effect of Wife's Breach of Separation Agreement on Husband's Duty to Support*, 49 COLUM. L. REV. 130 (1949).

81. Whether the incorporation of a separation agreement within a divorce decree provides a sufficient nexus for judicial modification has been a most troublesome issue in many jurisdictions. For an excellent review of the basic effect of incorporation on separation agreements, see H. CLARK, *LAW OF DOMESTIC RELATIONS* 553-66 (1968).

There have been few decisions by Pennsylvania courts on this issue. As to the effect of incorporation and merger on modifiability, see *Silvestri v. Slatkowski*, 423 Pa. 498, 224 A.2d 212 (1966). As to the enforceability of incorporated agreements through contempt proceedings, see *Buswell v. Buswell*, 377 Pa. 487, 105 A.2d 608 (1954).

For a highly critical evaluation of New York law in this area, see Ploscowe & Haber, *Modifiability of Separation Agreements, Followed by Divorce*, *New York Law Journal*, March 6, 1968, at 1, col. 4.

82. H. CLARK, *supra* note 81, § 16.13, at 557.

83. See *Adams v. Adams*, 32 Pa. Super. 353 (1907); *Biery v. Steckel*, 194 Pa. 445, 45 A. 376 (1900). Other jurisdictions appear to follow the same rule. See *Glazer v. Silverman*, 354 Mass. 177, 236 N.E.2d 199 (1968); *Faller v. Faller*, 247 Md. 631, 233 A.2d 807 (1967).

84. As to the advisability of placing an "escalator" clause within a separation agreement in order to relieve hardship in regard to the support provisions, see *McNiece & Thornton, Separation Agreements and Changed Conditions*, 25 ST. JOHN'S L. REV. 1 (1950).

85. 189 Pa. Super. 276, 150 A.2d 139 (1959).

86. *Id.* at 283, 150 A.2d at 143.

It is thus clear that any arrangement between the parties as to child support, even where the provisions are more than enough to cover necessities, are at best temporary in nature, and may be changed by judicial order whenever warranted by a change in circumstances. The *Hecht* decision is indicative of the extent to which the courts attempt to foster the welfare and interests of the child.

V. CONCLUSION

A review of Pennsylvania law on separation agreements indicates that for the most part the courts have been unwilling to allow principles of contract law to overshadow domestic policy considerations promotive of the welfare of the family. The most important exception to this general trend has been recognizing as valid a waiver of future support by the wife. Considering the state's interest in seeing that the wife does not have to rely on public funds for her support,⁸⁷ a change is indicated, and it is suggested that this be a matter of legislative concern.

Several proposals for reform of the law of separation agreements have been made in other jurisdictions. In New York, it has been suggested that all separation agreements containing provisions relating to the welfare of children be submitted to the courts for approval.⁸⁸ This suggestion clearly has merit, particularly where the arrangements are not in the child's interest, and neither parent comes forth to contest the agreement. It has also been proposed that either spouse, after a designated period, should have the right to revoke a separation agreement if a good faith attempt to save the marriage is demonstrated.⁸⁹ Adoption of this proposal might lessen judicial concern on the use of separation agreements as an inducement for divorce. It is submitted that both these proposals are worthy of consideration by the Pennsylvania legislature.

David J. Griffith

87. The conclusion that a wife should not be allowed to waive her rights to future support is further supported if one takes into consideration the circumstances under which most agreements are executed. One commentator has stated that "[t]he desire to settle a vexatious and emotionally charged matrimonial situation too often induces separation agreements to which counsel has devoted inadequate thought." Fischer, *Toward Better Separation Agreements*, 4 J. FAM. L. 63 (1964). This comment appears to apply equally as well to the parties to the agreement.

88. See STATE OF NEW YORK, REPORT OF JOINT LEGISLATIVE COMMITTEE ON MATRIMONIAL AND FAMILY LAWS, Legislative Doc. No. 44, at 69 (1959), cited in H. CLARK, *supra* note 81, § 16.13, at 557-58 n.8.

89. See Payne, *Proposals for Reform of the Law Relating to Separation and Maintenance Agreements — Separation and Maintenance Agreements in England and Canada*, 33 SASK. L. REV. 1 (1968).