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> Public policy is more tolerant towards agreements made while the parties are living apart or in prospect of immediate separation, (which) is conditioned upon a recognition that in such cases public policy is not offended because the contract does not bring about the separation nor promote the marital discord . . . The law encourages the resumption of marital relations and agreements which bring about such reconciliations will be upheld.[27]

Ronald B. Felman

VIOLATION OF NON-MOLESTATION COVENANT OF SEPARATION AGREEMENT NOT DEFENSE IN SUIT TO RECOVER SUPPORT PAYMENTS

Mrs. Shedler brought an action in Westchester County to recover payments claimed to be due under a separation agreement. The agreement stated "that neither party shall molest the other, nor compel nor endeavor to compel the other to dwell or cohabit with him or her by any legal proceeding or otherwise," and that "a default in any part of this agreement may at the option of the non-defaulting party, be deemed a default under the entire agreement." Mr. Shedler claimed the contract was void since Mrs. Shedler had violated the covenant not to molest, and further that she had regularly molested, annoyed, and interfered with defendant's family and business relations. Mrs. Shedler moved for an order to strike the defense. *Held*, The wife's breach of non-molestation provision of a separation agreement was no defense to wife's suit even though the separation agreement provided that default of any part of the agreement might at the option of the non-defaulting party be deemed a default under the entire agreement, since these are independant clauses. *Shedler v. Shedler*, 12 N.Y.2d 828, 187 N.E.2d 311, 236 N.Y.S.2d 348 (1962).

Since matrimonial actions are concerned with the stability of the family, the basic unit of society, the state has a vital interest in the existing marital status of the parties.[1] Such actions are not merely concerned with the private rights of one of the parties, but with public rights. The public policy of the state entails preservation of the existing marital relationship.[2] Generally separation agreements which are supported by consideration or inducements which tend to encourage divorce or separation or destroy the marital relationship are against public policy. New York has consistently refused enforcement of a separation or support contract shown to be "part of a scheme *to obtain or facilitate a divorce*, as when the husband promises to pay alimony as a reward to his wife for getting a divorce, or when the money provisions for her support are a premium or award, inducement or advantage to the wife for procuring a divorce."[3] However, the usual provisions for support payments do not by them-

27. Stahl v. Stahl, *supra* note 26, at 931, 939.

1. Senor v. Senor, 272 App. Div. 306, 316, 70 N.Y.S.2d 909, 917 (1st Dep't 1947), *aff'd*, 297 N.Y. 800, 78 N.E.2d 20 (1948).
2. N.Y. Dom. Rel. Law § 51.
3. *In re* Rhinelander's Estate, 290 N.Y. 31, 37, 47 N.E.2d 681, 684 (1943). *Cf.*

selves facilitate divorce and are valid, as are certain other terms which provide a procedural modus operandi in settling a possible future divorce.[4] While the state has recognized that marriage is the basis of orderly society and must be preserved, in a realistic manner it has also recognized the inevitable destruction of the marital status in certain instances. In these instances, public policy requires that the termination of the relationship be arranged between the husband and wife in an orderly and equitable manner. The underlying notion of this policy is that such agreements, in a sense, preserve order in society. "The will of the parties as expressed by their agreement should be disturbed only where their agreement is repugnant to justice as between them or contrary to the interests of society . . . ."[5] Subsidiary to the former, preservation of ordered society also requires that once an agreement has been made, the support and maintenance provisions be continued in effect to assure the wife a proper place in society, as well as to promote the continued well being and security of any children.[6]

Generally provisions in a separation agreement relating to support and maintenance and those pertaining to molestation are held as independent clauses in the absence of express terms providing for dependency.[7] This view is often sustained by semantics, as where a court holds that such a covenant goes only to a part of the consideration, or that the clauses are independent per se.[8] The husband cannot defend his wife's suit for enforcement of support payments by claiming that her breach of a molestation clause is a condition subsequent to his performance of the contract; but he may bring a separate action for damages, or perhaps even counter-claim in the wife's suit. The key to these decisions is public policy. Because of the inherent differences in the duties and relationship of the parties, the rules of intent which apply to business contracts do not apply to separation agreements.[9] Public policy calls for the nonimpairment of the support provisions. This policy is based on two overriding precepts: (1) the security of the wife and children must remain undisturbed; and (2) while the husband is married he is under legal duty to support his wife whether they live separately or not. A separation agreement merely makes the husband's prior legal duty more explicit even though she en-

Schley v. Andrews, 225 N.Y. 110 (1919); Lake v. Lake, 136 App. Div. 47, 119 N.Y. Supp. 686 (3d Dep't 1909); Deshler v. Rivas, 108 N.Y.S.2d 837 (Sup. Ct. 1951), *aff'd*, 280 App. Div. 775, 113 N.Y.S.2d 673 (1st Dep't 1952).

4. *In re* Fleischer's Estate, 192 Misc. 777, 80 N.Y.S.2d 543 (Surr. Ct. 1948); Gershman v. Lafayette Nat. Bank, 178 Misc. 693, 35 N.Y.S.2d 4 (Sup. Ct. 1942).

5. Fales v. Fales, 160 Misc. 799, 801, 290 N.Y. Supp. 655, 658 (Sup. Ct. 1936), *aff'd*, 250 App. Div. 751, 295 N.Y. Supp. 754 (1st Dep't 1937).

6. Borax v. Borax, 4 N.Y.2d 113, 149 N.E.2d 326, 172 N.Y.S.2d 805 (1958).

7. Fearon v. Aylesford, 14 Q.B.D. 792 (1884); Gloth v. Gloth 154 Va. 511, 153 S.E. 879 (1930); Annot., 71 A.L.R. 723 (1931).

8. For a scintillating discussion on this entire area *cf.* Annot., 160 A.L.R. 471 (1946).

9. Benesch v. Benesch, 106 Misc. 395, 173 N.Y. Supp. 629 (Munic. Ct. N.Y.C. 1918); Fearon v. Aylesford, 14 Q.B.D. 792 (1884).

gages in molestation.[10] Where the wife, who has no preexisting obligation to the husband, promises to support him in an agreement, public policy does not require that the clause be held independent.[11] A New York court has intimated that breach of a molestation clause would be a good defense to an action for support payments if the wife's breach was substantial and malicious.[12] However, in *Borax v. Borax*, 4 N.Y.2d 113, 105 N.E.2d 326, 172 N.Y.S.2d 805 (1958), the leading New York case on construction of molestation clauses, the Court takes a different view. There the wife brought an action for a new agreement alleging the husband's violation of a nonmolestation clause had vitiated a prior agreement. In the absence of an express provision making continuation of the old contract dependent on nonmolestation by the husband, the Court held the clause was independent and that the old agreement was still valid. Therefore the old agreement precluded a subsequent action. The Court concluded that since molestation consists of an attempt to restore the marital status, a policy favored by the law, a nonmolestation clause which purports to prohibit importunities to resume the marital relationship might well be void, and should be construed as an independent covenant in order to prevent vitiation of the entire agreement. Since presently effective support provisions preclude the maintenance of separate actions it is impossible to distinguish whether a molestation clause is dependent or independent according to which party brings the action. It is unwise in both cases to hold that the acrimonious interchanges common to marital dissolution, should end a separation agreement ". . . the chief . . . object of which is to bring some stability and continuity into what is at best a troublesome relationship."[13]

In sustaining Mrs. Shedler's motion to strike, the Court rejected defendant's contention that the continuance of the contract was dependant upon nonmolestation, even though the contract was, in effect, fortified by such an express provision. The Court ruled that the present contract was within the *Borax* rule. The Court of Appeals affirmed on the same ground, in an opinion from which three judges dissented. The dissent maintained that the present case did not fall within the *Borax* rule because (1) that suit was brought to avoid the impact of an existing separation agreement, and (2) the *Borax* contract contained no express provision for termination of the contract for molestation. The dissent concluded that the decisional law on which *Borax* was based as well as the case itself, were not sufficient to establish a rule that molestation clauses were independent per se, because neither contained an express dependency provision.[14] The dissent further stated that it is not be-

10. See generally, Annot., 160 A.L.R. 471, 478 (1946).
11. See Pezzoni v. Pezzoni, 38 Cal. App. 209, 175 Pac. 801 (1918).
12. Benesch v. Benesch, 106 Misc. 395, 173 N.Y. Supp. 629 (Munic. Ct. N.Y.C. 1918).
13. Borax v. Borax, 4 N.Y.2d 113, 116, 149 N.E.2d 326, 328, 172 N.Y.S.2d 805, 808 (1958).
14. Hughes v. Burke, 167 Md. 472, 175 Atl. 335 (1934); Stern v. Stern, 112 N.J. Eq. 8, 163 Atl. 149 (1932); Thomas v. Thomas, 104 N.J. Eq. 607, 146 Atl. 431 (1929). Lindley, Separation Agreements § 9 (rev. ed. 1962).

yond the power of a couple to expressly provide for termination of a separation agreement because the husband's legal duty to support still subsists.[15] Further, enforcing the agreement as is, would not deprive the wife of a remedy for the enforcement of her rights because "she may acquiesce in the termination of the agreement by bringing a matrimonial action and asking the court to fix support . . . [or] she may choose to rely on the agreement and bring an action for its enforcement, in which case she can simultaneously and without repudiating the agreement bring a support proceeding in the State Family Court."[16]

The practical effect of the instant decision is to virtually outlaw the dependancy of molestation clauses in New York State. While the sanctity of the parties agreement is a fundamental aspect of contractual relations, there are certain situations in which this principle must be sacrificed to overriding considerations of the public welfare. The molestation clause presents just such a situation. Although it is abhorrent to concepts of fundamental justice to allow a wife to make a valid support agreement with her husband and then flout the agreement by engaging in the forbidden conduct, it is more abhorrent to conceptions of the public good to allow a husband to escape a responsibility which continues to exist whether there is an agreement or not. There is no rational basis for calling an end to an agreement on grounds of molestation, because such conduct cannot be controlled by contractual provision. Bitter invectives and acrimonious interchanges have been an inherent characteristic of marital dissolution since time began. No matter what the contingency, no contract provision will ever eliminate them. Due to the husband's subsisting duty to support, a provision for the express dependency of the molestation and support clauses is equally futile because even if the agreement is terminated on such grounds, the wife is not deprived of her right to support; but may sue for maintenance in court and again engage in molestation. The only effective way the husband can control molestation is through a separate action. In cases of substantial molestation, he has a claim legally cognizable in tort for damages. Therefore, as a matter of public policy, these clauses should be construed as independent, even in the face of express provisions to the contrary, in order to preserve the support and maintenance provisions of the contract and prevent continual suits upon an issue which cannot be controlled by the agreement.

Thomas M. Agate

INSURANCE

STATE REGULATION OF CREDIT LIFE INSURANCE

Respondent Insurance Company issued thirteen policies of group credit life insurance after the effective date of new provisions of the Insurance Law

15. Lipp v. Lipp, 218 App. Div. 788, 218 N.Y. Supp. 802 (2d Dep't 1926); Verdier v. Verdier, 133 Cal. App. 2d 325, 284 P.2d 94 (1955); Smith v. Smith, 7 Cal. App. 2d 271, 46 P.2d 232 (1935); Lindley, *op. cit. supra* note 14.

16. Instant case at 831-32, 187 N.E.2d at 363, 236 N.Y.S.2d at 351 (1962).