LAW AND THE FAMILY

## Termination of Child Support Agreements

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UNDER NEW YORK LAW,[1](#bottom) child support is defined as a sum to be paid by either or both parents, pursuant to court order or agreement, for an unemancipated child *under the age of 21*. The parties may expand their obligations and agree that child support shall continue beyond the age of 21 [2](#bottom) or that support obligations survive the death of either of them.[3](#bottom) However contractual restrictions on this obligation are severely limited.

In *Goldman v. Goldman,*[4](#bottom)the Court of Appeals held that, where a separation agreement was incorporated in a divorce judgment and survived, the Supreme Court could modify the alimony provisions of the judgment *downward*, based on a substantial change in the husband's financial circumstances, without impeding the contractual provision of a surviving agreement.

In *McMains v. McMains,* the Court held that the Supreme Court could modify the alimony provisions of the judgment *upward*, where the former wife "is actually unable to support herself on the amount heretofore allowed and is in actual danger of becoming a public charge."[5](#bottom) In each case it held that modification of the court's alimony award was independent of and did not vary the terms of the agreement.

Domestic Relations Law (DRL) §236 (B)(9)(b), enacted in 1980 now expressly limits the court's authority to modify the maintenance provisions of a judgment, where there is a surviving agreement, which is incorporated in it, to a showing of extreme hardship. In that case the terms of the judgment, as modified, supersede those in the agreement for such time and under such circumstances as the court determines. This provision, which does not apply to child support provisions, may not survive a constitutional challenge.[6](#bottom)

Where a separation agreement or stipulation is incorporated in or survives a judgment of divorce, modification of the child support provisions of the judgment is limited by the rule of *Boden v. Boden* [7](#bottom) and *Brescia v. Fitts*.[8](#bottom) The court cannot reallocate the child support obligations between the parents unless there is an unanticipated and unreasonable change in circumstances resulting in a concomitant showing of need, or where the child's right to receive adequate support is implicated. In such case the court may increase the amount of child support.

**Limiting Changes Is Disfavored**

Agreements limiting modification of a parent's child support obligation are met with disfavor by our courts and are rejected as against public policy. In *Maki v. Straub*,[9](#bottom) the Third Department held that the terms of an inadequate child support provision in an agreement do not bind the court or the child and cannot support a civil action for breach of contract. In *Priolo v. Priolo* [10](#bottom) and *Pecora v. Cerillo* [11](#bottom) the Second Department declared that an agreement to waive the right to initially seek or obtain a modification of child support violates public policy and is void.

Where an agreement makes a unitary and unallocated provision for the support of the custodial parent and child, courts may not apportion the amount and reduce the paying spouse's obligation because the custodial parent is not supporting the child.[12](#bottom)

In *Stern v. Stern,*[13](#bottom) the Appellate Division held that where, "a separation agreement provides for monthly unallocated payments to the wife [for her support and that of the children], to be reduced under certain conditions [when each of the children reaches 21 years, or dies, or marries] it is only those conditions, and no others not stated, which will permit of such reduction." Therefore, it rejected the husband's contention that the agreement should be construed so that full payment was to be made to the wife only if the children live with her until they either reach majority or marry.

Thus, unless the contract provides otherwise, it is not a defense to an action to enforce the provisions of an agreement providing for the support of a parent and child, that the child is no longer living with her[14](#bottom) or is living with the paying spouse.

**When Child Reaches Age 21**

While a parents child support obligation ordinarily terminates upon the child reaching age 21,[15](#bottom) the parties can agree that the support obligation will continue beyond 21, and such a contract will be enforced.[16](#bottom) Thus, a father was obligated to continue to pay a sum provided for in an agreement, despite his daughter's reaching her majority, where the agreement specified a single sum for the support of the wife and two children.[17](#bottom)

An agreement that the father was to support his child in college or professional school after the child became 21 was held to be enforceable.[18](#bottom) Where a father signed an agreement making him liable for the support of his disabled son beyond the son's majority, if the child's handicap prevented him from being self-supporting, the father remained responsible for the support of his son.[19](#bottom) Unless an agreement provides otherwise, the fact that children become emancipated before reaching 21 does not operate to release the paying parent from his or her obligation to support them under the terms of an agreement.[20](#bottom)

In *Nichols v. Nichols,*[21](#bottom) a 1954 case, the separation agreement was approved by a Nevada decree of divorce. The former wife brought an action to recover arrears of support for the months from August 1950 to August 1951. The defense was based on the fact that in August 1950, defendant took custody of the children who, under the terms of the agreement and decree, had lived with their mother, and in March 1951, the court awarded their custody to their father. The defendant argued that the agreement should be construed as to reduce his alimony payments.

The agreement provided, with respect to alimony:

For the support and maintenance of the wife and for the support, education and maintenance of the children the husband agrees to make the following payments to the wife:

(a) $125,000 in cash upon the delivery of this agreement.

(b) Until the death of the husband or the death or the remarriage of the wife, whichever may first occur, the sum of $2,500 per month on or before the first day of each month.

(c) In the event of the remarriage of the wife, the amount of said monthly payments shall be reduced at the rate of $15,000 per year.

(d) Upon the death or its attaining the age of 25 years, whichever may first occur, of any child, the amount of the monthly payments then being made by the husband shall be reduced at the rate of $5,000 per year in respect to each such child. Provided, however, that if after its attaining the age of 21 years, any child shall not be making its permanent home with the wife, such payments shall also be so reduced for so long as such situation continues and in such event, the husband shall make monthly payments at the rate of $5,000 per year directly to such child until such child returns to the wife's home or attains the age of 25 years.

**Plain Language**

The Court of Appeals held that this language was plain enough. It noted that there was no allocation, as there was in *Matter of Herzog,*[22](#bottom) of a specific monthly amount for the children or for each child or a specific amount for the wife. The $2,500 per month was a single, undivided amount.

Furthermore, the agreement listed categorically the situations in which the monthly $2,500 was to be reduced. "First, on the remarriage of the wife, second, on the death or attainment of the age of [25] years by any child, or third, in the event of the living apart from the mother, after reaching [21] and before reaching [25], of any child."

Not only did that careful listing of exceptions fail to provide for any reduction, but it demonstrated that the parties actually had in mind that one or more children might at some time be living apart from the mother. "So realizing, they provided for a reduction of the alimony at the rate of $5,000 per year for any such child, if he or she should reside apart from the mother's home while that child was between the ages of [21] and [25] years. At the time the father took the children, in August 1950, they were 11, 12 and 14 years of age, respectively."

The Court of Appeals concluded:

How can the courts say that the monthly payment is to be reduced because the children are with their father when the agreement itself lists all the eventualities in which there is to be a reduction, and omits the one that has occurred? The agreement itself in terms destroys this defense since it provides for a reduction as to a child living apart from its mother when the child is between [21] and [25] years of age, only. It is not only the language but the sense of this agreement that, so long as the father is alive and the mother is alive and unmarried, and the children are alive and under [21] years of age, the monthly payment shall be $2,500 per month, no more and no less.

The *Nichols* court noted that in *Rehill v. Rehill* it held that a $200-per-month agreed payment to the wife "for her support and maintenance and for the support and maintenance of their children, until she shall die or remarry" could not be reduced by the husband or by the court simply because, after coming of age, one of the daughters moved out of her mother's residence. To the husband's argument that the parties intended that the full amount should be paid only so long as the wife actually supported both children in her home, the court stated that: "The simple answer to this defense is that the separation agreement contains no such provision."

Recently, in *Merl v. Merl,*[23](#bottom) the parties' separation agreement that was incorporated into but not merged with the judgment of divorce obligated defendant father to pay child support of $110 per week per child and half of each child's college expenses until each child became emancipated. It also obligated him to bequeath two-thirds of his estate to the children.

The wife, who was given custody of the children, remarried. She and her children resided with her new husband, Zimmerman. Defendant sought a modification of the support obligations enuring to his two sons and the obligation to bequeath a part of his estate to them contending that they had abandoned him by legally changing their surname to Zimmerman and refusing to visit with, speak to or maintain any relationship with him.

The Court of Appeals pointed out that the case law distinguishes between modification of a separation agreement and that of a divorce decree. A separation agreement that is incorporated into but not merged with a divorce decree is an independent contract binding on the parties unless impeached or challenged for some cause recognized by law. "Courts of this State enjoy only limited authority to disturb the terms of a separation agreement."

Since the separation agreement was neither impeached nor challenged for any cause recognized by law, the Court held that defendant's request for modification of the support obligations, based on his sons' legal change of their surname, was not a valid basis on which to make the modification as requested.

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Notes

(1) Domestic Relations Law §240 (1-b)(b)(2); Family Court Act §413 (1)(b)(2).

(2) See *Genther v. Genther* (1992, 2d Dept.) 180 AD2d 662.

(3) *Cohen v. Cronin* (1976) 39 NYS2d 42.

(4) 282 NY 296, 26 NE2d 265.

(5) 15 NY2d 283, 258 NYS2d 93.

(6) See *Busetti v. Busetti* 108 AD2d 769 (2d Dept. 1985); *Kleila v. Kleila* 50 NYS2d 277, *Cohen v. Seletsky*, 142 AD2d 111 (2d Dept. 1988).

(7) 42 NY2d 210.

(8) 56 NY2d 132.

(9) 167 AD2d 589 (3d Dept. 1990).

(10) 211 AD2d 627 (2d Dept. 1995).

(11) 207 AD2d 215 (2d Dept. 1995); See also *Harriman v.* *Harriman,* NYS2d 405 (3d Dept*.* 1996); *Strenge v. Bearman,* 645 NYS2d 315 (2d Dept*.* 1996).

(12) *Nichols v. Nichols* (1954) 306 NY 490, 119 NE2d 351. *Rehill v.* *Rehill* (1954) 306 NY 126, 116 NE2d 281. *Harwood v. Harwood* (1944) 182 Misc 130, 49 NYS2d 727, affd 268 App Div 974, 52 NYS2d 573. *Cogswell v. Cogswell* (1927) 130 Misc 541, 224 NYS 59.

(13) (1973, 2d Dept) 41 AD2d 676.

(14) *Rehill v. Rehill*, supra.

(15) *Harwood v. Harwood*, supra.

(16) *Nichols v. Nichols*, supra.

(17) *Olmstead v. Olmstead* (1965, 2d Dept.) 24 AD2d 605, affd 18 NY2d 652.

(18) *Weber v. Weber* (1966) 51 Misc2d 1042.

(19) *M. v. M.* (1977) 90 Misc2d 974. *Harwood v. Harwood*, supra.

(20) *Harwood v. Harwood*, supra. *Ziluck v. Ziluck* (1960) 23 Misc2d 323, revd on other grounds (1st Dept.) 12 AD2d 764).

(21) Supra.

(22) 301 N.Y. 127.

(23) 67 NY2d 359.

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