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Recent Developments: Mendelson v. Mendelson: Enforcement of Spousal Support Agreement Incorporated but Not Merged into Divorce Decree Limited to Terms of Contract

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Recent Developments

Mendelson v. Mendelson:
ENFORCEMENT OF SPOUSAL SUPPORT AGREEMENT INCORPORATED BUT NOT MERGED INTO DIVORCE DECREE LIMITED TO TERMS OF CONTRACT

In *Mendelson v. Mendelson,* 75 Md. App. 486, 541 A.2d 1331 (1988), the Court of Special Appeals of Maryland considered the power of a court to modify a separation agreement after the enrollment of a divorce decree. The court held that the parties were limited to an action at contract since the separation agreement contained a non-merger clause. Thus, the parties' rights to seek modification or termination of contractual spousal support were limited to the conditions of the agreement.

Erwin Mendelson (appellant), and Helene Mendelson (appellee) entered into a separation and property settlement agreement in July 1976. The parties agreed to the payment of spousal support, a cost of living adjustment and the termination of support upon death or appellee's remarriage. Further, appellee waived the right to seek additional alimony provided that appellant upheld the terms of the agreement.

The final section of the agreement provided the terms under which appellant could seek a reduction in spousal support. The parties agreed that if appellant either became disabled, or retired at age 60 or thereafter, "the parties shall attempt to agree on alimony ... payments that are equitable in light of changed financial resources." The Mendelson's stipulated that either could seek relief of court if they were unable to reach an agreement upon the occurrence of the above conditions. *Id.* at 491-92, 541 A.2d at 1334. The separation agreement was incorporated but not merged into the decree of divorce of the Circuit Court of Montgomery County in March 1977.

Several years after the divorce, appellee developed a close personal relationship with Manuel Epstein, who later moved into appellee's home. Epstein shared responsibility for the payment of various household expenses. *Id.*

In November 1985 appellant petitioned the court to terminate or reduce spousal support based on his former wife's changed financial circumstances and "flagrant misconduct" with respect to the terms and conditions of the separation agreement. The domestic relations master determined that appellee's relationship did not significantly alter her financial condition and did not constitute "flagrant misconduct." The circuit court overruled appellant's exceptions and affirmed the master's report. Appellant then sought leave of the decision of the lower court through an appeal to the Court of Special Appeals of Maryland. *Id.*

Judge Bloom, delivering the opinion of the court, avoided ruling on the merits of the arguments upon which the appeal was based. *Id.* at 493, 541 A.2d 1335. *See Atkinson v. Atkinson,* 13 Md. App. 65, 281 A.2d 407 (1971); *Roberts v. Roberts,* 35 Md. App. 497, 371 A.2d 689 (1977); *Meyer v. Meyer,* 41 Md. App. 13, 394 A.2d 1220 (1978); *cert. denied,* 284 Md. 746 (1979). Instead, the court concluded:

> We need not resolve this dispute. We do not reach it because there is a more fundamental basis for affirming the denial of appellant's petition to terminate or modify support. By providing that their agreement should be incorporated but not merged in the divorce decree, the parties deprived the court of any post-enrollment power to end or diminish the contractual support for any reason not specified in the agreement.

Mendelson at 495, 541 A.2d at 1335.

The court began its discussion of the applicable law with a review of the distinctions among alimony, technical alimony and contractual spousal support. The traditional definition of alimony was "court ordered payments to a wife for her support to continue during the joint lives of both husband and wife and so long as the parties live separate and apart." *Id. (citing Bebermeyer v. Bebermeyer,* 241 Md. 72, 215 A.2d 463 (1965)). This definition was later modified to eliminate gender bias and allow awards of alimony for a limited or indefinite duration. *Mendelson* at 496, 541 A.2d at 1336 (citing Md. Fam. Law Code Ann. §§11-106(a), 11-106(c) (1984, 1987 Cum. Supp.)). If the agreed spousal support could have been awarded absent the agreement, the agreement was considered technical alimony once it was made part of the decree. *Bebermeyer* at 77, 215 A.2d at 468. Whereas the court was empowered to award alimony, spousal support could be granted only upon agreement of the parties. *Mendelson* at 496, 541 A.2d at 1336 *(citing Bellofatto v. Bellofatto,* 245 Md. 379, 226 A.2d 313 (1967)). Support provisions which failed to meet the definition of technical alimony remained contractual even though they were made part of the decree. *Mendelson* at 496, 541 A.2d at 1336.

Erosion of these distinctions became clear after 1950. Prior to 1950 a spousal support agreement which did not qualify as technical alimony could be enforced by sequestration, execution and attachment. Contractual spousal support could not, however, be enforced by imprisonment for contempt. Further, contractual spousal support could not be modified by the court. *Id.* at 497, 541 A.2d 1336 *(citing Soldano v. Soldano,* 258 Md. 145, 265 A.2d 263 (1970); *Reichhart v. Brent,* 247 Md. 66, 230 A.2d 326 (1967); *Dickey v. Dickey,* 154 Md. 675, 141 A. 387 (1928)).

These established principles of domestic law were changed significantly by amendments to the Maryland Constitution and the Maryland Family Law Article. Md. Fam. Law Code Ann. § 8-103(b) (1984, 1987 Cum. Supp.)). In 1950, the Maryland Constitution was amended to allow imprisonment for a violation of a divorce decree:

> No person shall be imprisoned for debt, but a valid *decree* of a court of competent jurisdiction *or agreement approved by decree* of said court for the support of a spouse... *shall not constitute a debt* within the meaning of this section.

Md. Const. art III, § 38 (emphasis added). The aforementioned section of the code also states that contractual spousal support is subject to modification unless the parties provide otherwise. *Mendelson* at 497, 541 A.2d at 1336.

With recognition of the plain language of the statutes, the court determined that

> [d]espite the amended language of article III, § 8-103(b) of the Family Law Code, unless the separation agreement is *made part of* the divorce decree, it cannot be enforced by imprisonment for contempt. There being no order to pay the support, *failure to pay would merely be a breach of contract* and not contemptuous disobedience of a court order.

Mendelson at 497-98, 541 A.2d at 1337 (emphasis added). The court concluded that the separation agreement was separate from the decree of divorce despite the clear language of the statute. There was therefore no basis from which to modify the agreement. *Id.*

The *Mendelson* court then examined the case law regarding non-merger clauses and the attendant beliefs held by members of the legal community resulting therefrom. The court recognized that prior to 1983 it was commonplace for attorneys to insert non-merger clauses in separation agreements. Judge Bloom then cited two cases which discussed the effect of non-merger clauses, *Id.* at 1337 *(citing Johnston v. Johnston,* 297 Md. 48, 465 A.2d 436 (1983); *Hamilos v. Hamilos,* 297 Md. 99, 465 A.2d 445 (1983)), and reasoned that:

> [i]t was apparently believed that incorporation would make the agreement part of the decree while non-merger would preserve its contractual status. Thus, in the event of a breach, it was thought, the aggrieved party would have the choice of enforcing the decree or suing on the contract. Since such language is still being inserted in separation agreements, we suspect that *Johnston* has been *ignored or misread.*

Id. at 495, 541 A.2d 1336 (emphasis added).

Mendelson relied primarily on the rationale of *Johnston,* which concerned the question of whether a separation agreement incorporated but not merged into a divorce decree was subject to *collateral attack. Johnston* explained the difference between the terms "incorporation" and "merger." Whereas "incorporation" is the mere identification and approval of the validity of a separation agreement, "merger" is a substitution of rights and duties. *Id.* at 498, 541 A.2d 1337. The separation agreement is said to be superseded by the decree when the agreement is merged into the decree, and when the agreement fails to indicate whether it should be merged. As such, the agreement would be enforceable through contempt proceedings. Alternatively, if the separation agreement contains a non-merger clause, the agreement is not superseded by the decree and retains its "life" as a contract. But, because the agreement is a contract, it is not enforceable through contempt proceedings. In applying *Johnston* to the facts in *Mendelson,* the court held that since the separation and property settlement agreement was not made part of the decree, the agreement remained separate from the decree and thus could not be enforced through contempt proceedings. *Id.* at 499, 541 A.2d 1338.

The court then turned its attention to the question of whether the separation agreement *sub judice* could be modified or terminated by the court. By the terms of the agreement, modification of spousal support could take place only upon appellant's disability or retirement at age 60 or thereafter. Since the separation agreement was not merged, the agreement and not the decree dictated the conditions under which modification could be compelled. Due to the rule foreclosing collateral attack on agreements approved by a court of competent jurisdiction, "[t]he circuit court that issued that decree lost its continuing jurisdiction over it and thus any power to modify it when the decree became enrolled." *Id.* at 500, 541 A.2d 1338.

The court held that the separation agreement was unambiguous regarding the terms under which spousal support could be terminated. The conditions precedent to the termination of spousal support were remarriage of appellee, or the death of either party. Since neither event occured, the court held that the termination provisions had not been activated. *Id.*

The holding in *Mendelson v. Mendelson* will affect many areas of domestic practice in Maryland. Those who entered into separation agreements with non-merger clauses might refuse to pay spousal and perhaps even child support—the only recourse being an action for breach of contract. Cases concerning these and similar issues will undoubtedly lead to a review of *Mendelson* by the Court of Appeals of Maryland. In subsequent actions. *Mendelson* may be attacked as inconsistent with the intent of *Johnston, Hamilos,* the Family Law Article and the Maryland Constitution. Additionally, since the issue of non-merger clauses was clearly not the subject of appellant's action, the court's analysis regarding non-merger clauses may be considered *dicta* and given less weight. Finally, there lies the question of the potential liability of attorneys who inserted non-merger clauses in separation agreements, erroneously assuring clients that, in the event of breach, an action either for breach or contempt of court could be maintained.

— Jules R. Bricker

Coy v. Iowa: PLACING SCREEN BETWEEN DEFENDANT AND WITNESS IN CRIMINAL TRIAL VIOLATES THE RIGHT TO FACE-TO-FACE CONFRONTATION

In *Coy v. Iowa,* ___ U.S. ___, 108 S. Ct. 2798 (1988), the Supreme Court of the United States, in a plurality opinion, held that the Confrontation Clause of the Sixth Amendment to the United States Constitution gives a defendant the right to literal face-to-face confrontation with the witnesses against him. The plurality arrived at its decision by emphasizing that a fair trial requires face-to-face confrontation between the accused and the accuser in a criminal prosecution.

In August of 1985, the appellant, John Avery Coy, was charged with sexually assaulting two minor girls while they were camping out in the backyard of the house next door to his. The girls claimed that Coy came into their tent, with a stocking over his head, while they were sleeping. Coy shined a flashlight in their eyes and told them not to look at him. Consequently, the girls could not identify his face.