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## Separation Agreements in Missouri

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# Comments

## SEPARATION AGREEMENTS IN MISSOURI

### I. INTRODUCTION

We read in the papers that a St. Paul woman has been freed of her marital bonds because her husband trained the family dog to bite her. Or that an undertaker in California has been similarly liberated because his wife made him sleep in his hearse. Or that spouses are considered compatible in Hollywood if they can agree on the size of the alimony. Or that a Nevada divorce obtained by a District of Columbia couple has been rejected in the District of Columbia because the spouses had a merry time together in Reno while the divorce was pending, and the District of Columbia court felt that, whatever the liberality of the Nevada practice, parties to a cause of divorce could not 'litigate by day and copulate by night, *inter sese* and *pendente lite*'.<sup>1</sup>

The above incidents may seem humorous, however in the calendar year of 1968 an estimated 537,000 divorces took place in the United States.<sup>2</sup> In many of these divorces the respective future rights and responsibilities of the parties were fixed in a written agreement known as the "Separation Agreement." The purpose of this comment is to present the practical problems encountered in Missouri in the use of such agreements and to suggest possible solutions for them.

In the absence of an agreement respecting the future responsibilities of the parties, the court's authority in such matters is limited. According to section 452.070, RSMo 1969, the court can grant a decree of divorce or separate maintenance and pursuant to such decree it may award alimony, custody of the children, support for the children, attorney's fees, and court costs.<sup>3</sup> Specific personal property may only be decreed to the wife in a divorce suit pursuant to an agreement of the parties.<sup>4</sup> In *Bishop v. Bishop*, the court stated that, in the absence of an agreement, it has no authority "to adjudicate a settlement of property rights, or to divest the title to property, real or personal out of one party and vest it in the other."<sup>5</sup> Also, a valid separation agreement can limit the court's authority in the disposition of alimony.<sup>6</sup> Therefore, a separation agreement can serve a

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1. A. LINDEY, SEPARATION AGREEMENTS AND ANTI-NUPTIAL CONTRACTS *v.* (1964).

2. *Statistics on Marriage and Divorce*, 3 FAMILY L. Q. 46 (1969).

3. § 452.070, RSMo 1969.

4. *Landau v. Landau*, 71 S.W.2d 49 (St. L. Mo. App. 1934).

5. 151 S.W.2d 553, 556 (St. L. Mo. App. 1941). *But see* *Lane v. Lane*, 439 S.W.2d 550 (K.C. Mo. App. 1969). Although not the issue on appeal, the trial court was permitted to order the transfer of property so that each spouse would own one-half of the total value of the property. The transfer was allowed because the wife's petition characterized the action as an *equitable accounting*.

6. *North v. North*, 339 Mo. 1226, 100 S.W.2d 582 (1936).

very useful purpose and, in effect, either broaden or restrict the court's authority.

## II. VALIDITY

In order to be considered valid, the separation agreement must meet certain standards. It must fulfill general contract requirements such as presence of consideration and competence of parties.<sup>7</sup> In addition, it must be free from fraud,<sup>8</sup> collusion,<sup>9</sup> or compulsion,<sup>10</sup> and be fair to the wife.<sup>11</sup> However, even if the above standards are satisfied, a resumption of marital relations will terminate a valid separation agreement.<sup>12</sup>

### A. Collusion

For a contract to be considered collusive, hence against public policy, it must promote a breakdown of the marriage relationship. It has been held that if the agreement provides for the non-defense of a divorce suit, the Missouri courts will declare it void as against public policy.<sup>13</sup> However, insofar as the agreement merely recognizes as an existing fact that a divorce or separation will soon follow and upon this premise provides for the maintenance of the wife, it is valid and enforceable.<sup>14</sup>

In *Murray v. Murray*,<sup>15</sup> although not actually expressed in the agreement, the court found that the understanding of the parties was that the husband would obtain a divorce and the wife would not contest the action. The court based its conclusion upon the testimony of the wife, who at the trial attacked the validity of the property settlement. She admitted that she signed the agreement in order that she might be free to marry a third person, and that the agreement was conditioned upon a verbal understanding that the husband would prosecute a divorce action if the wife would relinquish all interest in their jointly-owned property, except certain personal property of relatively little value. Thus, under these circumstances, the court found collusion between the parties and declared the contract void as against public policy. However, the wife did not recover the property because the court would aid neither party in recovering property delivered according to the terms of such an invalid contract.<sup>16</sup>

Therefore, it is possible to derive two general rules from the *Murray* case. First, even though an agreement is valid on its face, the parol evidence rule will not prevent the introduction of evidence showing that the contract is actually in violation of public policy. Thus, the frequently drafted

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7. *Johns v. McNabb*, 247 S.W.2d 640 (Mo. 1952).

8. *Gardine v. Cotter*, 360 Mo. 681, 230 S.W.2d 731 (En Banc 1950).

9. *Murray v. Murray*, 293 S.W.2d 436 (Mo. 1956).

10. *In re Mean's Estate*, 284 S.W. 186 (Spr. Mo. App. 1926).

11. *McQuate v. White*, 389 S.W.2d 206 (Mo. 1965).

12. *Johns v. Johns*, 204 Mo. App. 412, 222 S.W. 492 (St. L. Ct. App. 1920); *Harrison v. Harrison*, 201 Mo. App. 465, 211 S.W. 708 (K.C. Ct. App. 1919).

13. *Murray v. Murray*, 293 S.W.2d 436 (Mo. 1956); *Farrow v. Farrow*, 277 S.W.2d 532, 535 (Mo. 1955); *Bloss v. Bloss*, 251 S.W.2d 78 (Mo. 1952).

14. *Rough v. Rough*, 195 S.W. 501, 503 (Spr. Mo. App. 1917).

15. 293 S.W.2d 436 (Mo. 1956).

16. *Id.*

provision to the effect that "irreconcilable disputes have arisen, that the parties are separated, and that a suit for divorce has been filed or is about to be filed"<sup>17</sup> can be contradicted by parol evidence. Second, if the invalid agreement is executed by parties in *pari delicto*, the courts will aid neither party in regaining the transferred property.

In *Farrow v. Farrow*,<sup>18</sup> the plaintiff contended that an agreement stating that the conveyance of property from husband to wife was to take effect "if and when the divorce is granted" was collusive because such a contingency had as its objective the dissolution of the marriage contract. Plaintiff principally relied on *Speck v. Dausman*<sup>19</sup> which had held that a contract between husband and wife conditioned upon a divorce being granted was contrary to public policy. However, in *Farrow* the Missouri Supreme Court held that to the extent that *Speck* is construed to mean that property settlement agreements between a discordant husband and wife are void if they provide that they shall not take effect until a divorce is granted, it is overruled. From a practical standpoint, *Farrow* seems to reach the best result since most separation agreements are made in contemplation of divorce. Furthermore, public policy should not discourage divorce when all legitimate objects of marriage have been frustrated.

The *Farrow* Court also held that failure to disclose the agreement's existence to the divorce court is not necessarily collusive and will not prevent its future specific performance. However, as will be seen, such a disclosure is extremely important in determining whether the wife's support payments are contractual or decretal.

The Missouri courts have pinpointed three provisions in separation agreements which may be considered collusive. In *Jones v. Jones*,<sup>20</sup> it was held that a contract specifically providing that the wife "agrees not to make any contest" in the proposed divorce action is collusive because it would facilitate the obtaining of a divorce by the husband. A provision providing that the plaintiff in a divorce action prosecute his suit to final conclusion would also be held collusive because it would foreclose opportunities for reconciliation.<sup>21</sup> It is also considered collusive for a husband to induce his wife to sue for a divorce by promises of remuneration.<sup>22</sup>

### B. Fairness and Fraud

Assuming that the agreement is not collusive, it will still be invalid if not fair and equitable, and free from fraud.

In *McQuate v. White*,<sup>23</sup> the latest Missouri case considering "fairness" at length, a wife sued to set aside a separation agreement because of unfairness. The parties had agreed that the wife could deal freely with

17. Tremayne, *Separation Agreements*, MISSOURI FAMILY LAW 145 (1967).

18. 277 S.W.2d 532, 535 (Mo. 1955).

19. 7 Mo. App. 165 (St. L. Ct. App. 1878).

20. 325 Mo. 1037, 1042, 30 S.W.2d 49, 52 (1930). *Accord*, *Gardine v. Cottey*, 360 Mo. 681, 230 S.W.2d 731 (En Banc 1950).

21. *Farrow v. Farrow*, 277 S.W.2d 532 (Mo. 1955).

22. *Bishop v. Bishop*, 162 S.W.2d 332 (St. L. Mo. App. 1942).

23. 389 S.W.2d 206 (Mo. 1965).

her own property which was valued at \$6,000, and the husband could deal freely with certain real estate valued at \$65,000. Also, the husband released his rights in the wife's property, and the wife released her rights and interest in the specified real estate. The court held that the agreement was fair.<sup>24</sup> In addition, the court stated that for an agreement to be fair it is not necessary that the wife receive any specific part of the husband's property, or even her share under the law of intestacy.<sup>25</sup> Also, if each party releases all claims in the property of the other, the wife's property need not be equal to that of husband.

In *Speiser v. Speiser*,<sup>26</sup> a separation contract was held invalid because it divested the wife of all interest in her husband's property without giving her anything in return. Thus, although the amount of consideration need not be equal, it must be more than merely a nominal sum.

An example of an agreement patently unfair is found in *Johns v. McNabb*.<sup>27</sup> In that case, the wife agreed to convey her 200 acre farm to her husband for a recited consideration of \$1 and other valuable consideration. The other consideration was the right to custody of the children on a half-time basis when it did not interfere with their school attendance. The court held that under such terms there was no mutual relinquishment of rights and the agreement was invalid.

According to the above-cited cases,<sup>28</sup> it appears that Missouri courts will not invalidate a separation agreement for unfairness unless it is grossly inequitable or there is, in fact, no consideration at all for the release of rights. Any "real" consideration should be sufficient to support the agreement. However, the line between overreaching and a bad settlement is often difficult to draw, hence, under some circumstances results may be difficult to predict. Each party should be prepared to prove that the other was aware of the income, assets, and needs of the other.<sup>29</sup> A recital in the agreement to the effect that both parties were represented by counsel of their choice would tend to indicate that the agreement was fair.<sup>30</sup> In addition, each party should attach a schedule of property owned at the time of agreement in order to facilitate proof in the event of a later disagreement.<sup>31</sup>

Although a settlement agreement seems fair it may be declared invalid if procured by fraud.<sup>32</sup> In *Gardine v. Cottey*,<sup>33</sup> a wife sought to set aside

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24. *Id.* The court noted that an agreement in which the husband permits the wife to deal freely with her own property, by itself, affords no consideration. However, in *McQuate* the husband and wife made mutual promises which the court considered to be sufficient consideration. *Accord*, *Hall v. Greenwell*, 231 Mo. App. 1093, 85 S.W.2d 150 (St. L. Ct. App. 1935).

25. *McQuate v. White*, 389 S.W.2d 206, 213 (Mo. 1965).

26. 188 Mo. App. 328, 175 S.W. 122 (K.C. Ct. App. 1915).

27. 247 S.W.2d 640, 643 (Mo. 1952).

28. *McQuate v. White*, 389 S.W.2d 206 (Mo. 1965); *Johns v. McNabb*, 247 S.W.2d 640 (Mo. 1952); *Speiser v. Speiser*, 188 Mo. App. 328, 175 S.W. 122 (K.C. Ct. App. 1915).

29. *McQuate v. White*, 389 S.W.2d 206 (Mo. 1965).

30. *Beckett, Separation Agreements*, 21 Mo. L. Rev. 286, 293 (1956).

31. *Id.*

32. *Gardine v. Cottey*, 360 Mo. 681, 230 S.W.2d 731 (En Banc 1950).

33. *Id.*

a property settlement on the ground that it was the result of fraud. The evidence established that counsel for the husband assisted the latter in changing the beneficiaries of his life insurance policy from his wife to his estate, and also prepared the husband's will excluding the wife. Counsel thereafter called the wife and told her that if she filed for divorce it would be contested and nasty publicity would result. Furthermore, he told her that a property settlement would provide the most satisfactory results for her. He then drafted the property settlement. The court, in finding that the agreement was procured by fraud, concluded that counsel had improperly represented both parties in adverse litigation without revealing to the wife the serious nature and effect of the transaction upon her financially.

Although fraud in the procurement of a separation agreement is defined the same as fraud in the procurement of any contract, *Gardine* adds a new dimension to the definition. An ethical violation by the attorney may be construed as a fraud upon the party harmed. Avoidance of such an ethical problem would most easily be achieved by the wife and husband retaining different counsel at all times during the settlement proceedings. However, such a solution would not be practical in many instances. Therefore, it is incumbent upon counsel to be impartial and disclose all facts to both parties throughout the settlement negotiations.

*Gardine* also establishes the rule that court approval of an invalid separation agreement will not be *res judicata* on a subsequent suit to set it aside. However, if the validity of the agreement is specifically ruled upon at the initial proceeding it will be *res judicata* in a subsequent suit. It would therefore be advisable in extreme situations where a high degree of mistrust and vindictiveness is present, to have the issue of validity decided by the lower court in order to foreclose subsequent attack.<sup>34</sup>

### III. RELATIONSHIP OF AGREEMENT TO DECREE

The most confusing aspect of separation agreements involves the relationship between the agreement and the subsequent divorce decree. Missouri cases are conflicting and the language employed by the courts is often contradictory, thus making it difficult to reconcile the various cases.

Basically, the relationship of two variables creates most of the problems. (1) It is well settled under Missouri law that a wife and husband, in contemplation of divorce and separation, may, by a valid contract between themselves, settle and adjust all property rights growing out of the marital relation and preclude the court from adjudicating alimony.<sup>35</sup> (2) The court decreeing the divorce has the power to make reasonable orders concerning the alimony and maintenance of the wife and the custody and support of

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34. However, a number of appeals court decisions indicate that what appears to have been a routine approval gave rise to the doctrine of *res judicata*. *McDougal v. McDougal*, 279 S.W.2d 731 (Spr. Mo. App. 1955); *Luedde v. Luedde*, 240 Mo. App. 69, 211 S.W.2d 513 (St. L. Ct. App. 1948); *Poor v. Poor*, 183 Mo. App. 292, 167 S.W.2d 471 (Spr. Ct. App. 1942); *Bishop v. Bishop*, 162 S.W.2d 332 (St. L. Mo. App. 1942).

35. *North v. North*, 339 Mo. 1226, 100 S.W.2d 582 (1936).

the children.<sup>36</sup> However, the court cannot adjudicate a division of assets between the parties.<sup>37</sup>

Often the conflict created by these variables gives rise to many problems. For example, under what circumstances will court approval or decree of the terms of a separation agreement *not* result in a decree enforceable and modifiable as statutory alimony? In the alternative, when *will* the contract terms become part of the decree, hence enforceable and modifiable as statutory alimony? *When* in fact would the separation agreement become a part of the decree? Hopefully, these and other questions will be answered by this comment.

### A. *Support of the Wife*

In Missouri the starting point with respect to the enforceability and modifiability of the wife's support provisions is the case of *North v. North*.<sup>38</sup> In that case the wife obtained a decree of divorce from her husband and an award of alimony of \$500 per month so long as she remained unmarried. On the same day the petition was filed, she and her husband had entered into a written contract adjusting all property rights, in which the husband agreed to pay the wife \$500 a month until her death or remarriage. The contract provided that in consideration of the above provision, the wife released the husband from any obligation to pay alimony, support or maintenance, and relinquished all claims against his property arising out of the marital relation, including dower, alimony, and support. Later, the husband filed a motion to modify the alimony award because of changed financial conditions.<sup>39</sup> The Supreme Court held that a court has no authority to modify contractual provisions made by the parties in lieu of alimony, when, as in this case, the decree on its face shows that the award is not an award of statutory alimony.

In *North* the Missouri Supreme Court established several basic propositions upon which subsequent case law relies. Section 452.070, RSMo 1969 permits modification of an award of alimony but does not authorize the modification of a legal contractual obligation. Therefore, the issue to be decided is whether the allowance (\$500 per month in *North*) is statutory alimony, which can be modified, or whether it is a contractual obligation, which cannot be modified.

The court considered several factors in holding that the decree cannot be modified. First, the provision in the decree awarding the wife \$500 per month so long as she remained unmarried (the same as that provided in the contract between the parties) indicates that the decree was an "approval" of the contract and not an award of alimony, since the court has no authority to make an award of alimony which may continue, beyond

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36. § 452.070, RSMo 1969.

37. *McDougal v. McDougal*, 279 S.W.2d 731 (Spr. Mo. App. 1955). *But see* *Lane v. Lane*, 439 S.W.2d 550 (K.C. Mo. App. 1969).

38. 339 Mo. 1226, 100 S.W.2d 582 (1936).

39. For a thorough discussion of the "change in circumstances" rule in regard to modification of a final judgment, see Smalley, *Modification of Divorce Decrees*, MISSOURI FAMILY LAW, 236-39 (1967).

the husband's death,<sup>40</sup> but it does have authority to approve a contract containing such a provision. Thus, if the wife's allowance in the decree is the result of a previous agreement between the parties and does not fall within the accepted definition of alimony,<sup>41</sup> so that it would have been impossible for the court to have awarded it as statutory alimony, then, notwithstanding the parties and even the court calling it "alimony," the allowance for the wife in the decree will not be construed as statutory alimony.<sup>42</sup>

The second point made by the court was that where a separation agreement is free from fraud and collusion and is fair to the wife, the courts have *no right to disregard it*. This language seems to be predicated upon the assumption that the agreement will be filed with the court or offered into evidence at the trial. In such a situation it seems that a valid agreement for the support of the wife in lieu of alimony *must* be followed by the court if the parties so provided. It is submitted, therefore, that even if the provisions of the agreement are within the court's statutory authority, the court cannot disregard the agreement. Furthermore, the fact that the court decree is the same as a conclusive agreement does not convert such provision for support into statutory alimony.

The third point in *North* is that if the property settlement approved by the court represents a lawful and all-inclusive settlement of the affairs of the parties, it will be presumed that the award is support in lieu of alimony and not modifiable. Hence, it seems that, according to *North*, provisions for support of the wife will not be subjected to modification if: (1) the judgment by its terms exceeds the statutory authority; or (2) the settlement is lawful and disposes of *all* the parties' property.

In *Chappell v. Nash*,<sup>43</sup> the Kansas City Court of Appeals adds to some of the basic tenets set out in *North*. The *Chappell* court states that in determining whether a decree is statutory alimony or support in lieu of alimony, one must consider whether the separation agreement provisions were merely "suggestions" to the divorce court or were submitted to the court as conclusive. This issue becomes especially important when neither of the *North* tests are satisfied, *i.e.*, if the agreement fails to deal with *all* the parties' property and its terms are within the court's authority.

If the *North* tests are not satisfied and the contract is considered merely a suggestion, the court's award will be construed as statutory alimony and

40. *Smethers v. Smethers*, 263 S.W.2d 60 (K.C. Mo. App. 1953).

41. *Id.*

42. The decisions of the Kansas City Court of Appeals in *Edmonson v. Edmonson*, 242 S.W.2d 730 (K.C. Mo. App. 1951) and *Chappell v. Nash*, 399 S.W.2d 253 (K.C. Mo. App. 1965) are in accord with this interpretation. Thus, where a divorce court purports to decree provisions of a separation agreement which would otherwise be beyond the court's authority, such provisions are "made without authority of law and are void." *Edmonson v. Edmonson*, 242 S.W.2d 730, 736 (K.C. Mo. App. 1951). However, in *Jenks v. Jenks*, 385 S.W.2d 370 (St. L. Mo. App. 1964), the St. Louis Court of Appeals seems to assume a contrary position. There the court seems to say that matters outside the court's original authority, if consented to by the parties in their agreement and if the agreement is filed, approved by the court, and made a part of the decree, become a part of the judgment and are merged into the decree.

43. 399 S.W.2d 253 (K.C. Mo. App. 1965).



therefore modifiable. The distinction is best explained by the following language:

Where the parties agree to alimony and then ask the Court to exercise its discretion by granting to the wife the amount agreed upon, such an agreement does not represent an agreement settling their property rights, but represents an award of statutory alimony.<sup>44</sup>

If it is desired that the agreement be something more than a suggestion, it should be either filed with the court or offered into evidence, or the court should be requested to incorporate the applicable provisions verbatim into the decree.<sup>45</sup> Also the agreement itself should not contain language invoking the discretion of the court nor language which could be construed as merely suggestive. However, as pointed out in Part IV, statutory alimony would provide the best results for the parties under certain circumstances, in which case suggestive language should be used in the agreement.

An agreement construed as conclusive on the subject of alimony rather than suggestive is found in *Singer v. Singer*.<sup>46</sup> (1) The agreement was entitled "Agreement for Property Settlement." This is an indication that *all* property rights will be settled and that the agreement is more than merely suggestive. (2) There was a clause in the agreement to the effect that:

[I]n the event the aforementioned Court shall, upon the trial of the said suit, make and enter its decree therein, granting plaintiff a divorce from the bonds of matrimony, *then the settlement hereinafter provided to be made shall at once take effect as an agreement binding the parties with reference to the rights and obligations of each party as the spouse of the other, and with reference to all marital and other rights of either in and to the property and estate of the other party, whether real, personal or mixed, and wherever situated.*<sup>47</sup>

(3) There was also a clause directing the court to adopt the provisions of the agreement. *E.g.*, "Any decree of divorce entered in this matter *shall* provide, etc."<sup>48</sup>

(4) There was also a provision reciting the intentions of the parties involved, *e.g.*, It is the intention of all the parties hereto by this contract to adjust all property rights which said parties may have, and *to fully and finally adjust all claims, present or in the future, for support money and alimony, if any, and such settlement shall be considered final as between said parties as to any claim which each may have against the other . . .* and the execution of this contract shall be a final and full release of any and all claims which either party may now or thereafter have against the other.<sup>49</sup>

44. *Id.* at 256.

45. *Chappell v. Nash*, 399 S.W.2d 253 (K.C. Mo. App. 1965).

46. 390 S.W.2d 605 (St. L. Mo. App. 1965).

47. *Id.* at 606.

48. *Id.*

49. *Id.*

If an agreement containing the above terms is found to be fair, equitable, and free from collusion, it should be considered conclusive and the courts should not be allowed to disregard it. If the above result is desired, in addition the parties should request that the court show in its decree that it adopts the separation agreement. The best means of accomplishing this is to incorporate the agreement verbatim into the decree. It has been held that in such a case there can be no doubt about the court's adoption of the agreement.<sup>50</sup> However, even if the agreement is not set out in full, some other act of the court could show its adoption of the agreement. For example, where the trial court refers to the agreement and indicates approval of it, it was held that the court adopted the agreement.<sup>51</sup> The indication or recital usually found in the decree is that the agreement has been "filed and approved."<sup>52</sup>

The cases cited thus far have held that the support provisions were support in lieu of alimony, rather than statutory alimony. However, there are several cases which have held payments to be statutory alimony even though a separation agreement was in existence. A consideration of these cases and the grounds upon which modification of the decree was permitted may be helpful in obtaining a complete understanding of the various factors upon which the courts rely.

In *Alverson v. Alverson*,<sup>53</sup> a divorced wife sued to modify an alimony decree. Prior to the divorce hearing the parties had prepared a written stipulation in which it was agreed, "subject to the approval of the court," that, in the event the court granted a divorce to the wife, "party defendant is to pay the party plaintiff, *as and for alimony*, the sum of one hundred dollars (\$100) each month . . ."<sup>54</sup> The stipulation was filed at trial. The divorce decree included the stipulation in full and decreed \$100 per month as alimony, until further order of the court (the inclusion of the latter phrase admittedly being a mistake of the clerk). On these facts, the St. Louis Court of Appeals permitted modification.

The court enumerated the following reasons as the basis for construing the payments as statutory alimony: (1) The issue of alimony was raised by the pleadings, indicating that the parties had at least originally intended that the court decide the question of alimony. (2) The instrument filed in court was designated, not a contract, but a "stipulation." (3) There was no adjustment of *all* property rights growing out of the marital relation. (4) The court would have been fully authorized to make such an allowance to the wife in the absence of any stipulation. (5) In drawing the stipulation, the parties identified the sum the husband was to pay as being "as and for alimony," and the court, in its decree, employed identical language. (6) The court, absent objection from the parties, provided that in the event of default on any of the installments, "execution issue therefor."<sup>55</sup> The court felt that although none of these reasons alone was enough to

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50. *Singer v. Singer*, 390 S.W.2d 605 (St. L. Mo. App. 1965).

51. *Tracy v. Tracy*, 205 S.W.2d 947 (St. L. Mo. App. 1947).

52. *Singer v. Singer*, 390 S.W.2d 605, 607 (St. L. Mo. App. 1965).

53. 249 S.W.2d 472 (St. L. Mo. App. 1952).

54. *Id.* at 473 (emphasis added).

55. *Id.* at 475-76.

permit modification, taken as a whole, they indicated that the "stipulation" was intended as merely a suggestion to the court.

It is submitted that *Alverson* was incorrectly decided and is not good authority today, although it has not been expressly overruled. The fact that the issue of alimony was raised in the pleadings, although ordinarily significant, should not have been entitled to much weight in *Alverson* because the "stipulation" was made after the suit was filed. The fact that the instrument was called a "stipulation" rather than a contract is insignificant since attention should be focused on the actual content of the agreement. The fact that the "stipulation" was not a settlement of all property rights and covered matters within the court's authority are not reasons upon which to find a settlement merely suggestive. Although the presence of these two factors is to be considered conclusive according to *North*, their absence should not be construed as indicating that the parties intended the settlement simply as a suggestion to the court. Furthermore, the court's reasoning concerning the use of the word "alimony" in the "stipulation" is directly in conflict with *North*, where the court said that, notwithstanding the parties' and even the court's calling the payments "alimony," the allowance should be construed as contractual. In other words, no particular meaning should be attached to the word "alimony" other than that gained in light of the surrounding circumstances. Although the sixth reason given by the court (the decree provided for execution) is valid, this factor alone cannot support the result reached in *Alverson*. This is especially true in light of the rule laid down in *North* that court adoption of the provisions of a settlement agreement does not necessarily convert contractual payments to statutory alimony. The result in *Alverson* is particularly untenable in light of the fact that the "stipulation" was quoted verbatim in the decree. In *Chappell*, it should be recalled, the court held such a recital conclusive as to the issue of whether the contract is merely a suggestion.

The one lesson, however, that can be learned from *Alverson* is that ambiguity in either the decree or the agreement can sometimes cause unintended results. Therefore, it is imperative that great care be taken in the preparation of the agreement and in advising the court as to the language to be included in the decree.

Excluding cases involving agreements clearly intended to be suggestive, there are three cases in Missouri in addition to *Alverson* construing support allowance to a wife as statutory alimony despite the existence of a prior separation agreement,<sup>56</sup> the most recent and revealing of which is

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56. *Gunnerson v. Gunnerson*, 379 S.W.2d 861 (K.C. Mo. App. 1964); *Wesson v. Wesson*, 271 S.W.2d 214 (St. L. Mo. App. 1954); *Moser v. Moser*, 235 Mo. App. 784, 148 S.W.2d 71 (K.C. Ct. App. 1941).

In *Moser* a divorced husband's motion to modify a decree of alimony was resisted by his former wife on the ground that the judgment was only an affirmance of the contract. In view of the fact that no stipulation or writing concerning a property settlement had been introduced in evidence at the divorce trial, or filed with the court, or shown to the court, the court held, "[U]nder such circumstances, we do not see how it could be said that the court in entering judgment was approving a property settlement between the parties in accordance with a definite and specific contract which they had entered into." *Moser v. Moser*, 235 Mo. App. at 786, 148 S.W.2d at 72.

*Gunnerson v. Gunnerson*.<sup>57</sup> In that case, a wife, who had prayed for alimony in her divorce petition and at trial, was not permitted to obtain specific performance of the support provisions of the pre-existing settlement agreement. The court named several factors upon which it based its conclusion: (1) At the hearing the "property settlement agreement" was not introduced in evidence, marked as an exhibit, or brought to the attention of the court in any manner. If contractual support is desired it is impossible to overcome such a defect because the court cannot possibly approve an agreement it hasn't seen. Therefore, in such a case the decree must be modifiable statutory alimony. (2) The decree provided for execution, should the husband default in his payments, thus indicating that the payments were statutory alimony. (3) The wife's actions at the divorce trial indicated her intention to obtain a judgment for alimony. She prayed for alimony in her petition, and at the trial she specifically asked for an alimony allowance in an amount appearing reasonable in light of the evidence. (4) For four years the wife accepted the allowance adjudged by the court. This is a type of laches argument. (5) She further recognized the judgment and utilized its provisions by exercising the right of execution contained within it.<sup>58</sup> The above reasons are sound, and demonstrate the factors pointing toward a determination of statutory alimony.

The *Gunnerson* court also determined the effect of a decree of statutory alimony upon a prior contract. The contract claim for support money is merged into the decree and at least those parts of the contract covered in the decree become unenforceable.<sup>59</sup>

Where the plaintiff has obtained a valid and final personal judgment against the defendant for the payment of money, the original claim is extinguished and is merged in the judgment. If the plaintiff thereafter brings an action on the original cause of action, the defendant can set up the judgment as a defense.<sup>60</sup>

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In *Wesson* the court reached the same result, stating that no single factor was controlling, but that the property settlement as a whole, the circumstances under which it was made, the nature and value of the property to be divided, and the language of the decree were to be considered. The court stressed the fact that the "plaintiff sought and the court issued an execution upon the judgment to enforce payment of the obligation." *Wesson v. Wesson*, *supra*, at 217.

57. 379 S.W.2d 861 (K.C. Mo. App. 1964).

58. *Id.* at 865-67.

59. This is true of a provision for the support of the wife. But, query: where a provision for a division of assets is contained in a separation agreement and the agreement is not filed with the court, is such a provision unenforceable? It is submitted that such a provision should remain enforceable because there is nothing in the decree which would preempt it. This is because a court in a divorce case has no original authority to adjudicate a division of the parties' assets. § 452.070, RSMo 1969.

On the other hand, where a provision for a division of assets is contained in a separation agreement and the agreement is filed and approved by the court, has the court entered a judgment dividing the assets or has it merely approved the contract? The latter would seem to be the rule. See *Chappell v. Nash*, 399 S.W.2d 253 (K.C. Mo. App. 1965); *Edmonson v. Edmonson*, 242 S.W.2d 730 (K.C. Mo. App. 1951). But see *Jenks v. Jenks*, 385 S.W.2d 370 (St. L. Mo. App. 1965); *McDougal v. McDougal*, 279 S.W.2d 731 (Spr. Mo. App. 1955); and *Bishop v. Bishop*, 151 S.W.2d 553 (St. L. Mo. App. 1941).

60. 379 S.W.2d 861, 867 (K.C. Mo. App. 1964).

If merger is desired, the use of a short stipulation by the parties, embodying only those provisions which are to be suggestions for the court to consider in the exercise of its discretion, is preferable to filing the entire separation agreement which may contain many non-adjudicable matters.

It seems therefore, that the problems created in this area are a result of ambiguous contracts, ambiguous pleadings, and ambiguous language in divorce decrees. Clarity in all of the above would alleviate many of the difficulties that have arisen. Unfortunately, the client will often consult a lawyer only after the ambiguity has already occurred. In such a case, the only approach is to attempt to salvage as much as possible from the damage already done. Hopefully, a knowledge of the above factors as considered by the courts will be helpful in alleviating the harm.<sup>61</sup>

### B. *Child Support and Custody*<sup>62</sup>

It is well settled that the courts may disregard provisions of a separation agreement that affect the future support and custody of children.<sup>63</sup> Thus, the parties cannot deprive the courts of their inherent power to provide for the support and custody of minor children as their welfare requires.<sup>64</sup> The court may, however, adopt the amount agreed upon and the custodial provisions of the agreement by incorporating them into the decree. In such a case the court retains the power to modify the decree when it becomes apparent that new and changed conditions make such a modification necessary. The policy underlying this rule is that the welfare of the child is paramount and cannot be affected by an agreement between the parents.

There is an important distinction between past support payments and future support payments. In a dispute over past payments for support of children committed to the mother by the court, such payments being in the nature of a debt owed to the mother by the husband, the husband and wife may make a contract binding upon the wife in any action at law to recover for such past support.<sup>65</sup> However, as to payments for future support of minor children, which can be affected only by a proceeding to modify the divorce decree, neither mother, nor father, nor both, have any power by contract or agreement to control the court's action.<sup>66</sup>

If suggestions regarding future child support and custody are reason-

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61. Although the tax aspects regarding support payments to the wife are not within the scope of this comment, they are extremely important in drafting a separation agreement. Under Section 71(a) of the Internal Revenue Code of 1954, the tax treatment of support payments is exactly the same whether the wife is divorced or legally separated from her husband under court decree, or if the wife is separated from her husband and there is a written separation agreement.

62. See Tremayne, *Separation Agreements*, MISSOURI FAMILY LAW 154-60 (1967).

63. *Jenks v. Jenks*, 385 S.W.2d 370 (St. L. Mo. App. 1965).

64. § 452.070, RSMo 1969.

65. *LaRue v. Kempf*, 186 Mo. App. 57, 171 S.W. 588 (St. L. Ct. App. 1914).

66. *Jenks v. Jenks*, 385 S.W.2d 370 (St. L. Mo. App. 1965).

able, they will probably be adopted by the court.<sup>67</sup> This is especially true if the agreement has been recently executed and deals extensively with the rights and obligations of the husband and wife.<sup>68</sup> In such a situation it is assumed that the parties gave some consideration to their needs and the future needs of the children at the time the agreement was executed.<sup>69</sup> Thus, the agreement itself becomes evidence of what the parties consider reasonable.<sup>70</sup> Hence, in light of the court's readiness to adopt an agreement which is "reasonable," the agreement itself can play a major role in determining the future obligations of the parties. Although the court can disregard the agreement, the parties can, in effect, provide provisions which they desire to be in the divorce decree.

In regard to child support, there are several devices available to obtain a more satisfactory result for both the husband and wife. The primary duty to support the children of the marriage rests on the husband,<sup>71</sup> and it is not altered by the dissolution of the marriage. Furthermore, this is true even where the decree contains no provision for child support.<sup>72</sup> Thus, the father cannot contract away his obligation of child support.<sup>73</sup> However, the father can fulfill this obligation in a variety of ways, each of which is presentable to the court in a separation agreement.

One of the most important factors in drafting the child support provisions of a separation agreement is the tax considerations involved. Child support payments stated separately from alimony are not deductible by the husband nor taxable as income to the wife.<sup>74</sup> However, if no specific amount is designated as child support and the payments to the wife are intended to meet the needs of both the wife and the child, the entire amount will be treated as alimony, deductible by the husband and taxable to the wife.<sup>75</sup> Thus, it would appear desirable for the husband to specify in the agreement an amount which meets the needs of both the wife and child and call it "alimony" or "support in lieu of alimony." This approach is especially attractive if the husband is in a high tax bracket and the wife is not. However, the creation of one sum for both alimony and child support may give rise to certain problems. Since it is impossible to determine what part of the payment is alimony and what part is child support, the court, due to changed circumstances and as a result of its continuing jurisdiction over the child's welfare may decide to modify the entire sum.<sup>76</sup> If separate sums are created, the court cannot modify the "alimony," assuming it was contractual. Therefore, in each case the tax savings should be weighed against the possibilities of modification.

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67. Reasonableness, in this regard, means in accordance with the financial ability of the father and the needs of the children.

68. *Houston v. Snyder*, 440 S.W.2d 156 (Spr. Mo. App. 1969).

69. *Id.* at 159.

70. *Id.* at 160.

71. *Smith v. Smith*, 300 S.W.2d 275 (Spr. Mo. App. 1957); *Roberts v. Roberts*, 292 S.W.2d 596 (Spr. Mo. App. 1956).

72. *Hunter v. Schwertfeger*, 407 S.W.2d 606 (Spr. Mo. App. 1966); *Bernstein v. Bernstein*, 351 S.W.2d 46 (K.C. Mo. App. 1961).

73. *Messmer v. Messmer*, 222 S.W.2d 521 (St. L. Mo. App. 1949).

74. INT. REV. CODE OF 1954, § 71 (b).

75. *Comm'r. v. Lester*, 366 U.S. 299 (1961).

76. *Maxey v. Maxey*, 203 S.W.2d 467 (Mo. 1947).

There is another problem created by the use of one sum to cover both "alimony" and child support. Ordinarily, the husband is entitled to a reduction in payments of child support when the child reaches majority,<sup>77</sup> but with "alimony" and child support combined the husband cannot be assured of such a reduction.<sup>78</sup> Therefore, in such a case there should be a specific provision in the agreement stating that upon the child's majority a reduction in payments to the wife shall occur. This provision should refer to each child separately because it has been held that a support award to children collectively will not be reduced as each child reaches majority.<sup>79</sup>

One other consideration must be kept in mind in determining whether payments intended for child support should be specifically designated. If the parties decide to combine child support payments with alimony payments, the husband will get a deduction for the full amount as "alimony," but cannot claim a part of the payments as child support for the purpose of determining which spouse gets an exemption for the child.<sup>80</sup> Generally speaking, the exemption is awarded to that parent who has had custody of a particular child for the greater portion of the year. This general rule is followed by two important exceptions. First, the non-custodial parent is entitled to the exemption if he contributes at least \$600 towards the support of the child and the decree of divorce or a written separation agreement between the parties, specifies that he is to receive the exemption. Alternatively, if the non-custodial parent provides at least \$1,200 of child support (regardless of the number of children) then he is *prima facie* entitled to the exemption unless the custodial parent can "clearly establish" that she contributed more toward the support of the child or children than the non-custodial parent.<sup>81</sup> Thus, a husband will have to balance the advantages of a deduction for the child support payment against the possibility of a dependency exemption.

#### IV. PRACTICAL CONSEQUENCES OF STATUTORY ALIMONY AND SUPPORT IN LIEU OF ALIMONY<sup>82</sup>

Part III considered the factors upon which Missouri courts rely in determining whether support payments to the wife are contractual support in lieu of alimony or statutory alimony. This determination is important because different consequences follow one choice as compared with the other.

A judgment of statutory alimony can be modified according to the changed needs and financial positions of the parties,<sup>83</sup> but a valid contract for support in lieu of alimony may not be modified by the court.<sup>84</sup>

77. *Gordon v. Ary*, 358 S.W.2d 81, 84 (K.C. Mo. App. 1962).

78. Tremayne, *Separation Agreements*, MISSOURI FAMILY LAW 155 (1967).

79. *Gordon v. Ary*, 358 S.W.2d 81 (K.C. Mo. App. 1962).

80. This also includes deductible medical expenses.

81. INT. REV. CODE OF 1954, § 152 (a).

82. The consequences of statutory alimony and support in lieu of alimony were obtained from Tremayne, *Separation Agreements*, MISSOURI FAMILY LAW 147-48 (1967).

83. § 452.070, RSMo 1959. "The court, on the application of either party, may make such alteration, from time to time, as to the allowance of alimony and maintenance, as may be proper. . . ."

84. *North v. North*, 339 Mo. 1226, 100 S.W.2d 582 (1936).

Since modification of the provisions of a decree is viewed as an extension of the court's initial jurisdiction, there is no need for personal service of summons upon the defendant or plaintiff within the jurisdiction of the court.<sup>85</sup> It is also possible by contract to provide that the payments to the wife are to remain constant for a specified period of time, after which they are to be subject to modification.<sup>86</sup> If such a result is desired it would be best to obtain statutory alimony and provide in the court approved separation agreement that neither party will seek modification for a specified period of time.

A wife entitled to support payments resulting from a decree awarding her statutory alimony, becomes a judgment creditor of her husband and, as such, she is entitled to all remedies afforded to judgment creditors after default of the judgment debtor.<sup>87</sup> Failure to comply with a contractual provision for support in lieu of alimony requires a new suit on the contract and new service of process. Payments due under a contract are like monies due on account or an installment contract in which case a new judgment is necessary for each periodic default. On the other hand, payments which are in default as a result of a statutory alimony decree are under the judgment automatically as they come due and execution can issue summarily.

However, if the separation agreement is approved by the court and incorporated into the decree, it should be enforceable under the Uniform Reciprocal Enforcement of Support Act<sup>88</sup> even though the support provisions remain contractual. In *State ex rel. Watley v. Mueller*,<sup>89</sup> the ex-wife, a Pennsylvania resident, was seeking accrued child support payments due her under a separation agreement. The parties had been divorced in a Florida court and the defendant subsequently became a Missouri resident. The suit was based upon the Pennsylvania Uniform Enforcement Act<sup>90</sup> which is identical to the Missouri Act.<sup>91</sup> The Florida court had "[O]rdered, Adjudged and Decreed that both plaintiff and defendant carry out the terms of the separation agreement entered into by the parties . . . (the original of which has been introduced into evidence as Plaintiff's exhibit 1 and attached to the transcript of testimony) which this court does hereby approve." The defendant argued that the divorce decree did not order him to make any support payments to the wife or their children and that plaintiff had no court order, judgment or decree requiring him to make any payments to her. The problem before the court was whether the divorce decree was sufficiently final and complete so that the parties could tell with reasonable certainty the extent to which the rights were fixed. The court held that the judgment was sufficient to impose a duty of child support as contemplated by the Uniform Act, either on the theory that the separation agreement, which was filed in the divorce

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85. *Greene v. Greene*, 368 S.W.2d 426 (Mo. 1963).

86. Tremayne, *Separation Agreements*, MISSOURI FAMILY LAW 166, Form 9.1 (1967).

87. § 452.070, RSMo 1969.

88. §§ 454.010 to 454.360, RSMo 1969.

89. 288 S.W.2d 405 (St. L. Mo. App. 1956).

90. 62 P.S. PA. §§ 2043.1-27.

91. §§ 454.010 to 454.360, RSMo 1969.



court with the pleadings, could be referred to, or on the theory that the agreement was incorporated by reference in the divorce decree.

Although *Watley* involved child support payments over which a court has continuing jurisdiction, it is submitted that the same result should follow with respect to payments due a wife which are contractual but incorporated into the divorce decree. Section 454.020, RSMo 1969 defines duty of support as including:

[A]ny duty of support imposed or imposable by law, or any court order, decree or judgment, whether interlocutory or final, whether incidental to a proceeding for divorce, legal separation, separate maintenance or otherwise.<sup>92</sup>

Since the act is liberally construed because it is remedial,<sup>93</sup> the above provision could certainly be construed to include a separation agreement whose terms have been court approved and incorporated into the court record, e.g., a decree which adopts a separation agreement clearly indicating that the parties intend the support payments to the wife to be support in lieu of alimony and unmodifiable. In effect, the separation agreement would become part of the judgment although it retained its contractual nature. This same analysis could be applied to a separation agreement which is not court approved. There is no Missouri case on point, however.

Payments due under a judgment for alimony become a lien on the husband's real estate.<sup>94</sup> A contractual claim will not become a lien until reduced to judgment.

There is no difference between contractual support and statutory alimony with respect to the Federal Bankruptcy Act. Under either approach the payment obligation will not be erased by a discharge in bankruptcy.<sup>95</sup>

No exemption from execution for a head of a family is available against a judgment for statutory alimony.<sup>96</sup> Although there is no Missouri case in point, it would seem that contractual support in lieu of alimony would be exempt from execution since section 452.140, RSMo 1969 refers specifically to a "decree of alimony." Thus, a husband who defaults in support payments due his wife under a decree of statutory alimony will not be able to protect any property from execution. However, if the payments are based upon contract he should be able to have certain property exempt.

By contract, the support payments can be made to survive the husband's death, the wife's remarriage, and even the wife's death.<sup>97</sup> A judgment for alimony terminates on any of the above events.<sup>98</sup>

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92. This provision in the Uniform Reciprocal Enforcement of Support Act is the same as § 454.020, RSMo under the prior Uniform Support of Dependents Law which was repealed in 1959.

93. *State ex rel. Watley v. Mueller*, 288 S.W.2d 405, 409 (St. L. Mo. App. 1956).

94. § 452.080, RSMo 1969.

95. 11 U.S.C. §35 (1938).

96. § 452.140, RSMo 1969.

97. *Smethers v. Smethers*, 263 S.W.2d 60 (K.C. Mo. App. 1953).

98. *Id.*

Whether to use statutory alimony or support in lieu of alimony will depend upon the specific facts which confront the attorney and the party he represents. Application of the foregoing consequences should provide the criteria upon which the determination is made.

#### V. CONCLUSION

The cases discussed in this comment indicate that the courts have not evolved a coherent and rational approach to the various problems posed by separation agreements. This observation is especially valid with respect to the relationship between the divorce decree and the separation agreement.

It is submitted that the courts should, of course, retain ultimate authority over child support, child custody, and the validity of the agreement itself. However, as long as the agreement presented to the court is fair and not collusive, it should ordinarily be conclusive as to all future rights and obligations of the parties other than child support and custody. Often the wife and occasionally the husband desire statutory alimony because of the beneficial consequences which inure. In such a situation, the agreement should either specifically state that statutory alimony is desired or leave the determination of support payments to the wife in the discretion of the court.

Thus, the separation agreement can benefit both husband and wife in obtaining desirable results in accordance with their special situation. It can define with particularity the various rights and obligations of the parties. It can broaden or restrict the court's authority in a manner desired by the parties. Most of all, it can assist in terminating an unsuccessful marriage by creating a "working truce" in the lawyer's office rather than in the court room.

In formulating a better position, it is submitted that the courts should encourage the solution of marital difficulties, by agreement rather than by recourse to the courts.

Litigation means delay, expense, bitterness, almost always undesirable publicity, and sometimes open scandal. Settlement by contract is swift, inexpensive, decent and private. If an attorney finds that a husband and wife are irreconcilably estranged, he should as a matter of social duty and professional ethics, not only counsel but earnestly urge settlement by agreement.<sup>99</sup>

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99. A. LINDEY, *SEPARATION AGREEMENTS AND ANTI-NUPTIAL CONTRACTS* x. (1964).