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**SEPARATION AGREEMENTS — THEIR
PRESENT STATUS?**

Cronin et al. v. Hebditch¹

On January 14, 1948, the plaintiff and the now deceased John C. Hebditch were married. At that time she was eighteen years of age and without any property of her own; and he was seventy-one and worth in excess of \$700,000.

¹ 74 A. 2d 50 (Md. 1950).

They lived together as man and wife until March 20, 1948, at which time she left him and went to live with her parents. In September of that same year she filed a bill in Harford County " 'for separate maintenance and for alimony' on the grounds of 'cruelty of treatment'."²

On January 11, 1949, while still living apart, plaintiff and her husband executed a separation agreement which stated that " 'unfortunate differences have arisen . . . , which renders it inadvisable that they further continue to live together', and 'they have agreed to separate and live apart from each other until due action in the matter of a divorce between them can be had, which action will be shortly instituted in a court of equity, and . . . they have come to an agreement respecting the disposition of the property of each'."³ It was further agreed that plaintiff should release her husband from all obligations of further support, and should also release him and his heirs and assigns from all claims of any sort arising out of the marriage relationship and further "that in said action for divorce or in any other action for divorce growing out of this marriage, she will not make any claim for alimony or counsel fees."⁴

The husband on his part similarly agreed to release his wife from all claims arising out of the marriage. The agreement further stated: "and the said husband, in consideration of the premises, does hereby agree, conditioned upon a decree for divorce, to pay unto the said wife . . . [\$9,000]."⁵ One thousand dollars was to be paid at the signing of the contemplated divorce decree and the remainder in ten annual installments of \$800 each, beginning in 1950. An additional \$1,000 was to be paid at the wife's demand for costs and counsel fees arising out of her contemplated divorce suit. Finally, the husband agreed to pay all of his wife's income taxes upon the \$10,000 over the eleven year period; and she was to withdraw her suit for alimony, which was then pending in Harford County.

Subsequent to the execution of this agreement, there was definite evidence of a brief resumption of marital relations and a reconciliation alleged by the plaintiff-wife. This occurred when she and her husband went to Florida together, she to stay with her aunt in West Palm Beach and he in Miami.

² *Ibid.*, 51.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*, 52.

On March 24, 1949, the husband died at the age of seventy-two. At the time of his death plaintiff still owned no separate property and none jointly nor as tenant by the entireties with him. There had been no children as a result of the marriage.

Plaintiff then brought this bill in the Circuit Court of Harford County against the successors in title or interest to her deceased husband. By the bill plaintiff sought to have declared null and void the separation agreement and also three *inter vivos* transfers in trust. In addition, she sought to have the assets, instead of the shares of stock, of two corporations treated as assets of her husband or his estate and one-third thereof distributed to her as his widow.

Plaintiff contended that the separation agreement was void "(a) by reason of her infancy and 'the fact that it is without consideration and is grossly unfair', (b) because, if it is not void but voidable, she hereby repudiates it, (c) because it is against public policy, and (d) because, if it ever had any legal effect, it has been cancelled and annulled by mutual agreement through reconciliation".⁶ From an order overruling demurrers to this bill the defendants appealed.

The Court of Appeals affirmed, and in its opinion by Markell, J., stated that on the demurrers in question, it was unnecessary to decide as to the validity of the trust agreements. However, the Court held the separation agreement to be invalid since it was an "unlawful agreement to obtain a divorce and pay \$9,000 for it, \$1,000 c.o.d., the balance in ten annual deferred payments".⁷ The Court further held that the agreement was "also an unjust device to deprive the plaintiff-wife of her marital rights without any consideration at all unless the divorce were obtained".⁸ According to the opinion, the policy of the law would be better served by protecting the plaintiff's marital rights than by ruling against her and depriving her of those rights.

Although in the Court below, as well as on appeal, the principal arguments revolved around the effect of the plaintiff's infancy on the validity of the separation agreement, the Court of Appeals in arriving at its decision stated that "we think, however, that we should not avoid the more basic question, distinctly raised by the bill, whether, even if plaintiff had been of full age, this separation agreement would have been effective against her, either under the Act

⁶ *Ibid.*, 53.

⁷ *Ibid.*, 55.

⁸ *Ibid.*

of 1931, Ch. 230 (Md. Code, Art. 16, Sec. 42) or independently of statute".⁹

In the process of reaching its result the majority of the Court then went on to state that the law as stated in *Melson v. Melson*¹⁰ had not been materially altered by the Act of 1931. It based this conclusion upon the last paragraph of the opinion in *Campbell v. Campbell*¹¹ and quoted part of that paragraph. Further strengthening its conclusion as to the *Melson* case still being good law, the Court stated that: "... in the recent case of *Kershaw v. Kershaw*, 73 A. 2d 223, we in effect followed the *Barclay* case"¹² in denying a divorce

⁹ *Ibid.*, 53. The section of the statute referred to provides:

"Any deed or agreement made between husband and wife respecting support, maintenance, property rights, or personal rights, or any settlement made in lieu of support, maintenance, property rights or personal rights shall be valid, binding and enforceable to every intent and purpose, and such deed or agreement shall not be a bar to an action for divorce, either *a vinculo matrimonii* or *a mensa et thoro*, as the case may be, whether the cause for divorce existed at the time or arose prior or subsequent to the time of execution of said deed or agreement, or whether at the time of making such deed or agreement the parties were living together or apart; provided, that whenever any such deed or agreement shall make provision for or in any manner affect the care, custody, education or maintenance of any infant child or children of the parties the court shall have the right to modify such deed or agreement in respect to such infants as to the court may seem proper, looking always to the best interests of such infants."

¹⁰ 151 Md. 196, 205, 134 A. 136, 139 (1926).

¹¹ 174 Md. 229, 241, 198 A. 414, 419, 116 A. L. R. 939 (1938), noted 2 Md. L. Rev. 357-363. This case arose under Chapter 396 of the Acts of 1937 which repealed and reenacted Sec. 38 of Art. 16 of the Code of Public General Laws with an amendment adding an additional supervenient ground for divorce *a vinculo matrimonii*, namely, voluntarily living separate and apart for five consecutive years prior to the filing of the bill and without any reasonable expectation of reconciliation. (This period has now been changed from five to three years by Md. Laws (1947), Ch. 240.)

After granting the divorce sought under this statute, the Court said in the last of its opinion, part of which was quoted in the principal case:

"The provision in the agreement as to the maintenance payments to the defendant will not be affected by the divorce, as that stipulation is in terms operative until her remarriage. In *Melson v. Melson*, *supra*, 151 Md. 196, at page 205 . . . it was said in the opinion of the court, as delivered by Judge Parke: 'The agreement of separation was valid as the agreed equivalent of future maintenance by the husband of the wife, although it was invalid as a contract providing for the relinquishment of the right and duty of cohabitation of the spouses.' The Act of 1931, Ch. 220 (Code [Supp. 1935], Art. 16, Sec. 39A), provides:" (quoting the Act in full and without further comment.)

This would hardly seem to form a basis for concluding that the law of the *Melson* case has not been altered by the Act of 1931. If anything, it would appear that the Court in the *Campbell* case was saying that the agreement as to the maintenance payments would not be affected even under the old law of *Melson v. Melson* and that now with the Act of 1931 in force the agreement would without question be valid.

¹² *Barclay v. Barclay*, 98 Md. 366, 56 A. 804 (1904). This case held, in effect, that a separation agreement may be an acquiescence in abandonment and, therefore, a bar to a subsequent suit for divorce, although it is not *per se* a bar to such a suit.

to a spouse living separate pursuant to a separation agreement — for less than the statutory period under the Act of 1937, Ch. 396, or the Act of 1947, Ch. 240 (Art. 16, Sec. 40, 1939 and 1947 Supp.).¹³ As a consequence of this reasoning, the Court found that the agreement between a penniless wife and a wealthy husband showed on its face that it was without consideration and was unjust and inequitable. It said further that this injustice and inequity might be avoided, without doing violence to the wording of the agreement, by construing it as “‘conditioned upon a decree for divorce’” and therefore ineffective. The Court implied, however, that even this was unnecessary, because “the agreement mentions no grounds for divorce and seems to imply that none exists and that the divorce bargained for is therefore to be a fraudulent divorce”.¹⁴

¹³ In the Kershaw case, 73 A. 223, husband and wife agreed to separate and entered into a separation agreement pursuant to that decision. After living part for over thirteen months but less than the required eighteen months, they filed cross-bills for divorce, both on the grounds of desertion. The Court of Appeals reversed the lower court and dismissed both bills on the grounds that, since the parties voluntarily separated and lived apart as evidenced by, among other things, the separation agreement, they could not obtain a divorce on the basis of desertion under our statute but must wait the required period in order to obtain a divorce on the grounds of having voluntarily lived apart for this time.

At page 225, Marbury, C.J., stated:

“It is our conclusion from all of these facts that these parties entered into an agreement to live separately and have lived separately pursuant to such agreement, but since the time at which a divorce could be granted on that basis has not yet arrived, and since neither of the parties make such a claim, but each relies on the desertion of the other, both bills of complaint must be dismissed.”

This would hardly seem to be a restatement of the rule in the Barclay case as such, or, at least, in exactly the same light in which it would have been construed immediately subsequent to the Melson case. Prior to the Act of 1937 and certainly prior to the Act of 1931, an agreement such as that in the Kershaw case would have barred a divorce on the grounds of desertion since the agreement itself would have been evidence of the fact that there had been no abandonment. Under the Barclay case it would have been construed to have been an acquiescence in the abandonment. Both parties would have been equally guilty, and there could have been no divorce because there were no other grounds for a divorce *a vinculo* under these particular circumstances.

But with the Act of 1937 there was another ground added, that of voluntarily living apart. So it would seem, construing all of these together and in the light of the above quoted portion of Judge Marbury's opinion in the Kershaw case, that all the rule of the Barclay case would do today would be to bar a divorce for desertion because of the separation agreement, but certainly not bar a divorce *a vinculo* on the additional grounds, after the longer time requirement had been met.

In addition, the rule in the Melson case would appear to be no longer the law since the Act of 1937 in effect authorizes a divorce *a vinculo matrimonii* by the mutual consent of the parties after having lived apart voluntarily and for the required time. Up until the decision in the principal case it had been rather generally assumed that the policy which prompted the Melson case was no longer the modern public policy.

¹⁴ *Supra*, n. 7.

It seems singularly unfortunate that the Court should have gone out of its way to base its decision on these grounds. This is especially true when, as pointed out by Henderson, J., in his concurring opinion, there were a number of other grounds upon which the same end result could have been reached¹⁵ and also in view of the uncertainty into which the majority opinion now throws Article 16, Section 42 (the Act of 1931) and the validity of separation agreements in general. Apparently this decision has, in effect, unnecessarily weakened Section 42, and in addition has revived the uncertain doctrine of the *Melson* case as it applies to separation agreements, despite the seemingly clear and steady development of our modern viewpoint concerning divorce laws from the *Barclay* case through the *Melson* case, the Act of 1931, the Acts of 1937,¹⁶ 1941,¹⁷ and 1949,¹⁸ and, finally, the *Campbell* case.¹⁹ The Act of 1937 and the following acts crystallized this development, and in them the legislature expressed the resultant change in public policy away from the old idea that a divorce must embody the elements of a contest with the innocent, complaining spouse establishing the guilt of the other. Instead, the Acts added, in order, three new, non-guilt, supervenient grounds for divorce, viz: voluntary separation, insanity and imprisonment.

Another interesting question raised by the decision in the principal case is its effect upon the *Bushman* case²⁰ and

¹⁵ 74 A. 2d 50, 56:

"(1) that the agreement is voidable because of the infancy of the appellee, (2) that the agreement is unfair in the light of the confidential relationship, or (3) that the agreement is a fraud upon her marital rights in the light of the circumstances alleged. The opinion of this court glosses over these points and reaches out to rest the decision upon the ground that the agreement on its face is unenforceable and illegal, although the parties are not in *pari delicto*. I think this holding ignores the plain language of the statute, substitutes the court's view of public policy for that of the legislature, and decides the case on a point not considered by the chancellor and not argued in this court."

¹⁶ Ch. 396, amending and reenacting Art. 16, Sec. 38, Md. Code (1924), (now Sec. 40, 1947 Supp.).

¹⁷ Ch. 497, adding Sec. 41A to Art. 16, Md. Code (1939).

¹⁸ Ch. 520, repealing and reenacting Art. 16, Sec. 40, Md. Code Supp. (1947).

¹⁹ For a discussion of this historical development of Maryland divorce law and policy apparently culminating in the Act of 1937 with its additional supervenient ground for divorce *a vinculo matrimonii*, see 2 Md. L. Rev., 357.

²⁰ *Bushman v. Bushman*, 157 Md. 166, 145 A. 488 (1929). In this case plaintiff-wife sued defendant-husband for divorce *a mensa et thoro* on the ground of cruelty. But by agreement between the parties entered into in February, 1918, a specific sum in gross was agreed upon to be paid by the husband to the wife, a condition precedent to such payment being that plaintiff-wife should amend the bill to one for a divorce *a vinculo matrimonii*. Some ten years later the wife brought an action to have the husband imprisoned for contempt for failure to pay the sum agreed upon.

the principle stated therein concerning collusive agreements to obtain a divorce. *Bushman v. Bushman*, decided after the *Melson* case and before the Act of 1931, held that, although it was a suspicious circumstance, it was not collusion for one spouse to enter into an agreement to pay the other spouse a specific sum upon the latter obtaining an absolute divorce upon already existing *bona fide* grounds.²¹ Would there not seem to be less likelihood of collusion in the principal case where, in effect, there was an agreement by the husband to pay the plaintiff-wife a specific sum conditioned upon the mere possibility of her obtaining a divorce? And, in addition, in the instant case, although the Court of Appeals spoke of a fraudulent divorce, there appeared to be no evidence to that effect. There was none mentioned by the Court of Appeals, other than the agreement itself, nor was there any mention made of it in the opinion of the lower court.

Viewed in this light it would seem that, under the circumstances of the case, this particular separation agreement would, if anything, have lessened the likelihood of a wife in her late teens going out of her way to obtain collusively a fraudulent divorce for ten thousand dollars when, considering her husband's advanced age, she could in all probability, by merely doing nothing, have received several hundred thousand dollars in a relatively few years time.

The Court held that the award in the decree was not alimony but, instead, was an award for the payment of a specific sum in accordance with the agreement of the parties and that, therefore, the defendant could not be punished by imprisonment for contempt.

At page 170, the Court stated:

"The original bill of complaint was for a divorce *a mensa et thoro* on the ground of cruelty, and the agreement mentioned was subject to the condition precedent that the plaintiff should amend the bill to one praying for an absolute divorce. This . . . is a suspicious circumstance; but, in the absence of any other testimony, and in view of the length of time since the passage of the decree, and its complete acceptance by the parties, the court could not now find, on this single equivocal fact, that the decree was induced by the collusion of the parties, and should regard it as having been made in an effort to secure proper provisions for the maintenance of the wife, who was the innocent party, and for the support of the children because of the inevitable and imminent dissolution of the marital relation on account of an existing statutory basis for a divorce *a vinculo matrimonii*."

²¹ *Ibid.*