Contractual Forbearance from Commencing a Divorce Action[1]

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An extremely rare question of law has appeared twice on the radar screen within the last nine months, both times striking contractual forbearance from commencing a divorce action beyond the minimum statutory period as against public policy and as unconscionable, *P.B. v. L.B.*, 19 Misc.3d 186 (N.Y.Sup. 2008), and *Corso v. Corso*, 21 Misc.3d 1102(A), --- N.Y.S.2d ---- (U) (N.Y.Sup.,2008). I have not found any direct precedent authority in support of this proposition nor does either decision cite any. In fact, the contrary is supported by no less authority than the United States Supreme Court and New York's Court of Appeals. The imponderable questions are to what extent was *Corso* energized by *P.B.*, and does this unlikely coincidental collision of cases augur an incipient epidemic?

P.B. v. L.B.

In *P.B. v. L.B.*, Supreme Court vacated a provision in a separation agreement pursuant to which the husband agreed to forbear from commencing an action for divorce for five years without the wife's prior written consent. *P.B.* held that such a provision was simultaneously unconscionable and an impermissible frustration of the state's public policy of allowing parties to seek a legislatively sanctioned end to irreconcilably "dead marriages." Supreme Court focused on: (1) the Legislature's liberalization of divorce in its enactment of the 1966 Divorce Reform Act, which expanded grounds for divorce beyond adultery (Gleason v. Gleason, 26 N.Y.2d 28 [1970]); and (2) the Court of Appeals' recognition of the Legislature's acknowledgment of the social and moral desirability not to compel parties to retain an illusory and deceptive status, that the best interests of the parties and society are furthered by enabling them "to extricate themselves from a perpetual state of marital limbo."[2] *P.B.* is extremely troublesome because each argument and conclusion runs afoul of deep rooted tenets of contract and statutory doctrines.

Waiver, "Absolute" Rights

The Court of Appeals has repeatedly underscored that marital agreements are contracts subject to the principles of contract construction and interpretation.[3] Because there is a strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements,[4] parties are free to chart their own course and may fashion the basis upon which a

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[1] N.Y.L.J., Nov. 4, 2008.

[2] New York remains the only State without a true no-fault divorce law.

[3] Meccico v. Meccico, 76 N.Y.2d 822 (1990).

[4] Bloomfield v. Bloomfield, 97 N.Y.2d 188 (2001).

particular controversy will be resolved.[5] It is well settled that constitutional protections are no bar to waiver,[6] including, due process to notice and hearing prior to a civil judgment[7] and the Sixth Amendment right to counsel in criminal cases because implicit in the exercise of a right is the concomitant right to forego its advantages.[8]

P.B. cites three cases, all of which are misplaced and none of which is even remotely relevant: *Tantleff v. Tantleff*, 60 Misc.2d 608 (N.Y.Sup., 1969), aff'd, 3 A.D.2d 898 (1st Dept., 1970), *Seligman v. Seligman* 78 Misc.2d 632 (N.Y.Sup. 1974), and *Hummel v. Hummel*, 62 Misc.2d 595 (N.Y.Sup., 1970).

Tantleff held that once there has been a separation for one or more years following the execution of a separation agreement (with which there has been substantial compliance) the right to a divorce becomes "absolute." *P.B.* erroneously focused on the irrelevant fact that the Domestic Relations Law (DRL) "provides no condition or restriction on the right of either party to commence an action for divorce. The statute provides no defense for such an action." *P.B.* confused defense with waiver. "Absolute" (vested) rights can be waived absolutely. A waiver requires no more than the voluntary and intentional abandonment of a known right; it does not rest upon consideration or agreement.[9] Even, child support, a crown jewel in the realm of public policy, may be waived.[10]

Seligman and *Hummel*[11] only address the early statutory interdiction against waiver of a

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[5] Cullen v. Naples 31 N.Y.2d 818 (1972).

[6] People v. Gajadhar, 38 A.D.3d 127 (1st Dept., 2007), aff'd, 9 N.Y.3d 438 (2007), citing In re New York, L. & W. Ry. Co. 98 N.Y. 447 (1885); Mann v. R. Simpson & Co., 286 N.Y. 450 (1941).

[7] D. H. Overmyer Co. Inc., of Ohio v. Frick Co., 405 U.S. 174 (1972); Boddie v. Connecticut, 401 U.S. 371 (1971).

[8] People v. Arroyo, 98 N.Y.2d 101 (2002); see Adams v. U.S. ex rel. McCann, 317 U.S. 269 (1942).

[9] Nassau Trust Co. v. Montrose Concrete Prod. Corp., 56 N.Y.2d 175 (1982).

[10] Dox v. Tynon, 90 N.Y.2d 166 (1997); O'Connor v. Curcio 281 A.D.2d 100 (2nd Dept.,2001).

[11] Hummel, id.

> The legislation 'stripped' both husband and wife 'of power to relieve' 'the husband of his liability to support his wife' and has 'rendered [them] incapable of bargaining away the woman's right to the man's support.' Any such attempts are 'prohibited' by the statute. Such contractual provision ... has been condemned as 'void'; or 'invalid' and as 'doomed to failure.'

husband's obligation to support his wife wherein the contractual lump sum payment to the wife over a term of years violated General Obligations Law § 5-311, thereby disqualifying the agreement as a basis for a conversion divorce. *Seligman* and *Hummel* intrinsically involve *malum prohibitum*.

Consideration

It is settled law that valuable consideration may consist of some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other; so that a promisee who has incurred a specific, bargained for legal detriment may enforce a promise against the promisor, notwithstanding the fact that the latter may have realized no concrete benefit as a result of the bargain.[12] *The promise to forbear from or to relinquish the commencement of legal action constitutes consideration*,[13] *even one which proves to be unenforceable, or doubtful, constitutes valid consideration*.[14]

Adequacy of Consideration

P.B. incorrectly concluded that there had been no reciprocal consideration for the husband's additional four year wait:

> 'The provision [] at issue is breathtaking in its scope. It is [] not *reciprocal*. It only bars the husband, and not the wife, from pursuing a divorce within the five year period. In this, it is strikingly unlike many of the other provisions which are reciprocal ... 'Non-Molestation', 'Separate Ownership', 'Responsibility for Debts', 'Personal Property', 'Other Assets', 'Taxes', 'Mutual Release and Discharge of Claims', and 'Other Presentations' (sic). In the sections concerning the marital residence and retirement accounts, there is explicit consideration for the husband's agreeing to transfer his entire interest in the marital residence to the wife, and her agreement to waive her interest in the husband's financial holdings. Other provisions, such as those concerning spousal maintenance, child support, and medical coverage, while not reciprocal, are seemingly intended to be equitable.

There is no authority which requires individual consideration for each item in an agreement: *consideration for the entire agreement is sufficient – the consideration supports every obligation in the agreement*.[15] Far from consideration needing to be coextensive or even

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[12] Holt v. Feigenbaum 52 N.Y.2d 291 (1981).

[13] Kevin Spence & Sons, Inc. v. Boar's Head Provisions Co., Inc. 5 A.D.3d 352 (2nd Dept., 2004).

[14] Nolfi Masonry Corp. v. Lasker-Goldman Corp. 160 A.D.2d 186 (1st Dept., 1990); Morgan v. Kunker, 268 A.D.2d 749 (3rd Dept., 2000); Admae Enterprises, Ltd.v. Smith 222 A.D.2d 471 (2nd Dept., 1995).

[15] Sablosky v. Edward S. Gordon Co., Inc., 73 N.Y.2d 133 (1989).

proportionate, the value or measurability of the thing forborne or promised is not crucial so long as it is acceptable to the parties.[16] The consideration which supports a contract *need not be equal on both sides* – if a *minima*l yielding of a position by one side promotes an agreement, then it will be deemed enforceable.[17] It is competent for parties to make whatever contracts they please, so long as there is no fraud or deception or infringement of law; a hard bargain does not deprive a contract of validity.[18]

"*Mutuality", in the sense of requiring reciprocity, is not necessary when a promisor receives other valid consideration.*[19] The *adequacy of consideration is not a proper subject for judicial scrutiny, the slightest consideration is sufficient to support the most onerous obligation,*[20] *even if the consideration exchanged is grossly unequal or of dubious value.*[21] *Inadequacy is for the parties to consider at the time of making the agreement, and not for the court when it is sought to be enforced*.[22] Courts do not need to measure the extent either of benefit to the promisor or of detriment to the promisee; if a person chooses to make an extravagant promise for an inadequate consideration, be it never so small, it is his own affair.[23]

Jessup v. Weir, 168 A.D.2d 428 (2nd Dept., 1990), upheld a transfer of the wife's property interest in exchange for the completion of her husband's divorce action against her in time for her scheduled remarriage.

Dissolution of Marriage

It is settled "strong public policy" that the law's purpose is to preserve the continuity of marriage rather than to destroy the marriage relationship.[24] All agreements which are supported

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[16] Daniel Goldreyer, Ltd.v. Van de Wetering 217 A.D.2d 434 (1st Dept.,1995); Mencher v. Weiss, 306 N.Y. 1 (1953).

[17] Silver v. Starrett, 176 Misc.2d 511 (Sup.Ct., 1998).

[18] Lash v. Knapp 143 N.Y.S.2d 516 (Sup.Ct. 1955), citing Mandel v. Liebman, 303 N.Y. 88 (1951).

[19] See, Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458 (1982).

[20] Mencher, id.

[21] Apfel v. Prudential-Bache Securities Inc. 81 N.Y.2d 470 (1993).

[22] Mencher, id; AG Capital Funding Partners, L.P. v. State St. Bank and Trust Co. 10 A.D.3d 293 (1st Dept.,2004).

[23] Mandel v. Liebman, 303 N.Y. 88, 100 N.E.2d 149 (1951).

[24] Weiman v. Weiman 295 N.Y. 150 (1946).

by a consideration or an inducement tending to encourage the severance of the marriage are abhorrent to public policy, and are therefore illegal and unenforceable.[25] The subject provision in *P.B.* did no such thing.

Stat. §§ 177, 240; **DRL § 236B(3)**

P.B. commences the construction of an erroneous argument by stating: "Nowhere in DRL § 236(B)(3) is there a provision specifying that agreements may contain waivers of a party's fundamental right to seek a divorce after a year, or for that matter, any other kind of waiver." *P.B.* misapplies Statutes § 240:

> It is a universal principle in the interpretation of statutes that expressio unius establish exclusio alterius, Statutes § 240 ...That is, the specific mention of one thing implies the exclusion of other things. As otherwise expressed, where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted and not included was intended to be omitted and excluded ... Where a statute creates provisions as to certain matters, the inclusion of such provisions is generally considered to deny the existence of others not mentioned.
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> As such, the "opt out" provisions of DRL § 236(B)(3) [(1) wills and election against an estate; (2) property distribution; (3) spousal maintenance; and (4) custody and child support] do not provide legal cover to contracts purporting to opt out of the provisions of DRL § 170.

Even under this improper argument, a provision intertwined with spousal maintenance is protected under § 236B(3), so that the not uncommon provision to withhold commencement of an action for divorce beyond the statutory minimum as a means of continuing medical insurance for the uncovered spouse indisputably falls under the § 236(B)(3) umbrella. Furthermore, *P.B.*'s argument regarding the absence of consideration fails again because the husband might otherwise have been obligated to contribute towards such insurance.

> Additionally, Stat. § 177 provides:
> The Legislature ordinarily uses appropriate language in statutes to express its intention, and, as a general rule, if there is nothing in an act or surrounding circumstances to indicate a contrary intention, words of command are construed by the courts as peremptory. On the other hand, words of discretion are treated as permissive. That is to say, "may" usually means "may", and "shall" generally means "shall." However, such is not always the case. Whether a given provision of a statute is mandatory or directory cannot be made to depend on form alone; it goes to the substance and is to be determined by the legislative intent, not by the language in which that intent is clothed. So, in effectuating legislative intent,

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[25] Gould v. Gould, 261 A.D. 733 (1st Dept., 1941); In re Rhinelander's Estate 290 N.Y. 31 (1943); General Obligations Law § 5-311.

> mandatory words have been interpreted in a merely permissive sense and vice versa.

P.B. offers no evidence to establish that "may" in § 236B(3) is peremptory. By way of example, marital agreements routinely include the specifically enforceable provision to participate in religious divorce rituals, which has never been held violative of § 236B(3); similarly, parties may agree to cooperate to expedite the processing of a divorce action (*Jessup,* supra).

Unconscionability, Wrongdoing

P.B. states:[26]

> A court of equity does not limit its inquiry to determining the existence of a valid contract, but it further inquires into whether the [interspousal] contract was just and fair and equitably ought to be enforced and provides relief where both the contract and the circumstances require it.

The Court of Appeals, in *Christian v. Christian* 42 N.Y. 2d 63 (1977), stated that "judicial review of separation agreements is to be exercised circumspectly, sparingly, and with a persisting view to the encouragement of parties settling their own differences."

New York's standard of unconscionability is anchored in the U.S. Supreme Court decision, *Hume v. United States*, 132 U.S. 406 (1889), which focused on the wrongdoing therein, fraud. *Christian* also cites *Mandel v. Liebman*, 303 N.Y. 88 (1951), which held that emotionally unencumbered adults may enter into any agreement provided it is not tainted by wrongdoing. The Court of Appeals reaffirmed this principle in *Levine v. Levine*, 56 N.Y.2d 42 (1982): "Although courts may examine the terms of the agreement as well as the surrounding circumstances to ascertain whether there has been overreaching, the general rule is that 'if *the execution of the agreement* * * * be fair, no further inquiry will be made.'"

Christian and its progeny require a predicate inquiry into any wrongdoing surrounding the execution of the agreement; relief will only be granted upon a showing of taint sufficient to invalidate a contract, such as, fraud, duress, or overreaching.[27] In the absence of wrongdoing, the agreement must stand and the court may not explore any further.[28]

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[27] Golfinopoulos v. Golfinopoulos 144 A.D.2d 537 (2nd Dept., 1988), appeal dismissed, 74 N.Y.2d 793 (1989); Cosh v. Cosh 45 A.D.3d 798 (2nd Dept., 2007).

[28] Brennan-Duffy v. Duffy 22 A.D.3d 699 (2nd Dept.,2005); Lounsbury v. Lounsbury, 300 A.D.2d 812 (3rd Dept., 2002).

It is unclear why *P.B.* cites case law from Missouri[29] on prenuptial agreements when New York has a richly developed body of law on marital agreements.

Hurley, Kneetle, State

P.B. cited three additional wholly inapplicable decisions that an agreement to waive rights made in advance of their exercise will not be enforced if against public policy. No surprise: no agreement in violation of public policy is enforceable, prospectively or otherwise.

- *Kneettle v. Newcomb* 22 N.Y. 249 (1860), enforced the Personal Property Law that a person contracting a debt cannot agree with the creditor that, in case of non-payment, he shall be entitled to levy his execution upon exempt property. The statutes, which allow a debtor to retain certain articles of prime necessity, are based upon *policy* and humanity and apply only to householders who have families for which they provide so as to protect poor and destitute families against the improvidence of their head.

- *Hurley v. Allman Gas Engine & Machine Co.* 144 A.D. 300 (2nd Dept., 1911), involved the impact of the Personal Property Law on conditional sales contracts.

- *State v. Avco Financial Service of New York Inc.* 50 N.Y.2d 383 (1980), reversed *Kneetle*. The security clause in a loan agreement constituted an impermissible waiver of the personal property exemption to a judgment debtor under CPLR 5205(a). Unconscionability was never argued. The Court of Appeals reversed based on the humanitarian purposes behind § 5205(a) to not leave debotors and their families in "abject deprivation."

These cases, too, involve *malum in se* and *malum prohibitum*.

Corso v. Corso

While properly finding key provisions in the agreement "nonsensical"and otherwise "incomprehensible", *Corso* piggybacked onto and morphed into *P.B.*, citing *P.B.* as though it were settled law, offering no independent authority.

Conclusion

There is no rational basis, statutory or decisional, to prohibit the right to enter into an agreement which requires forbearance from filing an action for divorce for periods exceeding the one year minimum requirement for a conversion divorce, under DRL § 170(5), or any other statutory period.

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[29] McMullin v. McMullin, 926 S.W.2d 108 (Mo.App. E.D. 1996).