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Divorce Settlement Agreements: The Problem of Merger or Incorporation and the Status of the Agreement in Relation to the Decree

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Divorce Settlement Agreements: The Problem of Merger or Incorporation and the Status of the Agreement in Relation to the Decree

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I. INTRODUCTION

As a general matter, the law encourages parties to resolve their differences privately and to resort to litigation only as a last recourse.

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This policy applies perhaps most appropriately in the context of domestic relations.¹ Assuming two people can negotiate in a reasonable manner, we can certainly expect that the agreement they strike will be tailored more closely to their own individual circumstances, and thus, preferable to any which might be imposed by a judge who is a stranger to them and their relationship.² Settlement reached by consensus offers a greater probability of compliance by the parties.³ Further, private settlement avoids the highly disruptive and painful experience of the public adversarial process which can greatly harm the parties and, more important, their children.⁴

1. Gertrude L.Q. v. Stephen P.Q., 466 A.2d 1213, 1216 (Del. Super. Ct. 1983); Sutter v. Sutter, 61 Ill. App. 3d 201, 204, 377 N.E.2d 862, 864 (1978); Kline v. Kline, 92 Mich. App. 62, 78, 284 N.W.2d 488, 495 (1979); D'Onofrio v. D'Onofrio, 200 N.J. Super. 361, 366, 491 A.2d 752, 755 (1985); White v. White, 141 Vt. 499, 502, 450 A.2d 1108, 1110 (1982); Parra v. Parra, 1 Va. App. 118, 128, 336 S.E.2d 157, 162 (1985); N.Y. DOM. REL. LAW § 236 practice commentary at 226 (McKinney 1986); UNIF. MARRIAGE AND DIVORCE ACT (UMDA) § 306 & comment, 9A U.L.A. 216 (1987); H. CLARK, LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 18.8, at 783 (2d ed. 1988). See Note, *Modification of Spousal Support: A Survey of a Confusing Area of the Law*, 17 J. FAM. L. 711, 715 (1979). But cf. Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1405 (1984) (contract doctrines fail in the divorce context to provide adequate safeguards against unfair results and procedures).
2. Lepis v. Lepis, 83 N.J. 139, 154, 416 A.2d 45, 53 (1980); White v. White, 144 Vt. 499, 502, 450 A.2d 1108, 1110 (1982); Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 957 (1979).
3. Mnookin & Kornhauser, *supra* note 2, at 956-57; J. BLADES, FAMILY MEDIATION: COOPERATIVE DIVORCE SETTLEMENT 10-11 (1985). Noncompliance with the continuing obligations of child support and spousal maintenance and the difficulties of enforcement raise some of the most troublesome issues in the area of family law. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1253-58 (1981); see also Chambers, *Men Who Know They Are Watched: Some Benefits and Costs of Jailing for Nonpayment of Support*, 75 MICH. L. REV. 900, 900-01, 927-33, 936-37 (1977); Mnookin, *Review: Using Jail for Child Support Enforcement*, 48 U. CHI. L. REV. 338, 338-40, 369 (1981) [hereinafter Mnookin].
4. N.Y. DOM. REL. LAW § 236 (McKinney 1986). See J. BLADES, *supra* note 3, at 1-5, 10-11, 26-31. It should be noted that litigation does not corner the market on destructiveness in the divorce context. Negotiation, whether it involves economic issues or matters relating to child custody, visitation or support, can be difficult as well. "[A]ll too often the adversary bent of the law and the psychologically unsophisticated perspective of many of the lawyers, in combination with the emotional turmoil of the clients, produces a negotiating process of which nobody can be proud." K. KRESSEL, THE PROCESS OF DIVORCE: HOW PROFESSIONALS AND COUPLES NEGOTIATE SETTLEMENTS 4 (1985); Sharp, *supra* note 1, at 1428. However, it seems clear that as bad as negotiations might be in some cases, they are unlikely to be worse than a knock-down-drag-out court battle, held in public, and fought by two warriors, each ethically bound to the most zealous championing of her client's cause.

A. Sources of Problems

However, contracts executed between spouses, even soon-to-be-ex-spouses, cannot simply be lumped together with arm's length business contracts. They are different.⁵ The confidential nature of the relationship, the emotional trauma that dissolution of a marriage will have on the contracting spouses, and the very real policy interests of the state counsel against absolute freedom of contract.⁶ This is especially true regarding provisions for children.⁷ But even when the bargain involves only obligations of spousal support or division of property between spouses, absolute freedom of contract might not be appropriate. Some commentators have suggested that the no-fault divorce revolution and its emphasis on or perhaps, assumption of equality, rather than contributing to women's equality, instead has contributed to the feminization of poverty.⁸

This tension between commitment to principles of freedom of contract and to those of protecting public policy interests by regulating contracting between spouses has caused both courts and legislatures to equivocate. Thus, the law of contracting between spouses has evolved as an ambiguous body of decisions that provides precious little guidance to lawyers and laypersons attempting to guide and direct their affairs.⁹

While true to some extent across the entire landscape of domestic relations contracting, the confusion and its impact are most acute when dealing with the question of whether an agreement entered prior to a divorce merges into the subsequent divorce decree, survives as an independent contract, or evolves into some combination of both. Questions arise regarding the effect of incorporation by reference, approval or ratification of the agreement by the divorce court, merger, and the effect of such actions by the court upon later modifiability and available remedies.¹⁰

Some suggest that the problem is exacerbated in this context by

5. Sharp, *supra* note 1, at 1405, 1442, 1459; UMDA § 306 & comment, 9A U.L.A. 216 (1987). See also *Pennise v. Pennise*, 120 Misc. 2d 782, 784, 466 N.Y.S.2d 631, 633, (Sup. Ct. 1983); H. CLARK, *supra* note 1, § 18.8, at 783.

6. See Sharp, *supra* note 1, at 1406. The author observes that "[t]here are inherent, perhaps even irreconcilable, conflicts between the sharing and the altruistic ideologies that are the foundation for the traditional family structure and the individualistic and competitive principles of the marketplace . . . outside the family." *Id.* at 1399. See J. BLADES, *supra* note 3, at 1-4, 19, 22, 26.

7. See *infra* note 27 and accompanying text.

8. See generally L. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 160, 183, 340-43, 350-56 (1985) [hereinafter L. WEITZMAN, *DIVORCE REVOLUTION*]; Sharp, *supra* note 1, at 1407 (citing Weitzman, *supra* note 3, at 1252-53).

9. See H. CLARK, *supra* note 1, § 18.8, at 781-83.

10. *In re Marriage of Forum*, 145 Cal. App. 3d 599, 600-01, 193 Cal. Rptr. 596, 596 (1983); *Phillips v. Phillips*, 93 Idaho 384, 386-87, 462 P.2d 49, 51-52 (1969); Moseley

courts engaging in manipulation of rules in such a way as to achieve desired, and arguably equitable results in sympathetic cases.¹¹ In one case involving questions of incorporation and merger and the resulting impact on modifiability, the West Virginia Supreme Court of Appeals acknowledged that "[a] great deal of incomprehensible domestic relations law in the [s]tate . . . hinges upon the technicality of whether a property settlement has been 'ratified and confirmed' by a court . . . or, alternatively, whether provisions of a property settlement are 'merged' into the divorce decree."¹² The court observed that "[i]n answering the question presented by the case before us any one of numerous results could be justified by relying upon . . . precedent."¹³ The opinion then observed:

Our law is replete with interesting rules which can be manipulated in such a way as to permit a court to arrive at any desired result in a case of this nature. We suspect that previous cases have manipulated these rules in such a way as to arrive at equitable results in those cases; however, the effect of that manipulation process has been untoward with regard to the degree of certainty with which our law can be predicted.¹⁴

To be sure, not all judges will be as candid as Justice Neeley, the author of the West Virginia opinion. However, the problems in interpreting questions of merger and incorporation certainly exist and have been recognized beyond the borders of West Virginia.¹⁵

Putting aside for the moment the debate as to how unfettered the right to contract should be in the domestic relations context, the proposition that agreement is preferable to a court battle cannot be denied. The law, therefore, should encourage parties to reach agreement be-

v. Mosier, 279 S.C. 348, 352, 306 S.E.2d 624, 626 (1983); *In re Estate of Hereford*, 250 S.E.2d 45, 49 (W. Va. 1978). See H. CLARK, *supra* note 1, § 18.8, at 783-84.

11. *In re Estate of Hereford*, 250 S.E.2d 45, 49 (1978).

12. *Id.*

13. *Id.* at 50.

14. *Id.* at 49. In a footnote, Justice Neely elaborated:

Our previous cases on the relation between property settlement agreements and subsequent alimony decrees provide something for everyone; confusion rather than clear guidance has been our most liberally generated product in this area and this writer acknowledges that he is as much if not more, a part of that unfortunate development as any of his illustrious predecessors.

Id. n.1. The court concluded that, given the tradition described above and "the pathetic facts before" it, application of an equitable approach was "perfectly proper." *Id.* at 49. However, the court went on to "disengage [itself] from the mire" and set out explicit rules to be applied prospectively to all property settlement agreements entered into in the state. *Id.* at 51; see *infra* notes 60-64 and accompanying text.

15. See cases cited *supra* note 10. See also I. ELLMAN, P. KURTZ, & A. STANTON, FAMILY LAW 730 (1986)("[t]he causes and consequences of the merger of the separation agreement into the divorce decree are undoubtedly the single most confused area of divorce procedure").

tween themselves, subject to whatever restrictions are appropriate.¹⁶ Unpredictability regarding how agreements will be interpreted and enforced does not entice parties to attempt to resolve the details of their divorce, but rather drives them and their lawyers away from settlement. Worse, the chaotic state of affairs frequently traps the unwary who bargain away rights in good faith upon a given understanding of the law and the incidents of their agreement, only to find later that the state of affairs was not what it had seemed, and that the presumptions upon which they had negotiated were illusory.¹⁷

In this area, perhaps more than any other, unpredictability acts as a serious disincentive to parties negotiating agreements. By their nature, divorce settlement agreements usually cover a much longer term than other contracts. This further emphasizes the need for certainty in how courts, faced with challenges to such agreements long after their execution, will interpret them. To the extent lawyers and lay persons cannot discern whether and how they may make an agreement entered at divorce binding and nonmodifiable, and whether and how they may provide for an agreement to survive entry of the divorce decree or in the alternative to be merged into it, they are discouraged from negotiating agreements.¹⁸

The imprecise use of language by lawyers, judges, and legislators causes at least some of the uncertainty in this area. Terms of art are used loosely and carelessly.¹⁹ The meanings ascribed to the words incorporation, merger, approval, ratification, and confirmation will be taken up in the substantive analysis of this article. However, as a preliminary matter it would help to clarify another area of definitional confusion. Judges, lawyers, and legislators use a number of terms interchangeably to refer to the various sorts of agreements a divorcing couple might enter. Property agreement, separation agreement, consent decree, settlement agreement, property settlement agreement, and others are used with little precision or consistency. "Divorce settlement agreement" will be used in this article to identify a contract between married persons contemplating or in the process of divorce which embodies their agreement on spousal maintenance, property division, child support, child custody, and child visitation.²⁰ The lan-

16. See *infra* notes 21-33 and accompanying text.

17. Cf. *Moseley v. Mosier*, 279 S.C. 348, 353, 306 S.E.2d 624, 626 (1983)(terms of art used in agreement without intending or implying any particular legal consequence which courts later impose on unsuspecting parties); *In re Estate of Hereford*, 250 S.E.2d 45, 50 (W. Va. 1978) ("[a]ny one of numerous results could be justified by relying upon our prior precedent").

18. See H. CLARK, *supra* note 1, § 18.8, at 783.

19. See, e.g., *Phillips v. Phillips*, 93 Idaho 384, 386-87, 462 P.2d 49, 51 (1969); *Moseley v. Mosier*, 279 S.C. 348, 352, 306 S.E.2d 624, 626; *In re Estate of Hereford*, 250 S.E.2d 45, 49-50 n.1 (W. Va. 1978). See also *infra* notes 51-58 and accompanying text.

20. See Sharp, *supra* note 1, at 1399 n.2. See also A. LINDEY & L. PARLEY, SEPARA-

guage used by the particular court, however, will be used in explaining and analyzing specific cases.

This article will focus specifically on questions surrounding incorporation, merger, and survival of divorce settlement agreements. It will first survey the approaches taken in a representative sample of jurisdictions, analyzing their effectiveness. The article will then suggest some conclusions regarding the problems with these approaches, and finally propose a workable model.

B. General Principles

Traditional barriers to contracts between spouses fell in the nineteenth century with universal passage of Married Women's Property Acts.²¹ However, although spouses were able to contract with one an-

TION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS § 3.01, at 3-4 (rev. ed. 1988). The term separation agreement, in its true sense, refers to a contract between a husband and wife detailing their agreement to live separately. Sharp, *supra* note 1, at 1399 n.1. However, the term is frequently employed to identify what is being called a divorce settlement agreement in this article. *Smith v. Smith*, 439 So. 2d 1206 (Ala. Civ. App. 1983)(providing for child support and educational expenses); *East v. East*, 395 So. 2d 78 (Ala. Civ. App. 1981)(providing for custody, alimony, division of personalty, and conveyance of realty to child of marriage); *Sinn v. Sinn*, 696 P.2d 333 (Colo. 1985)(providing for maintenance of spouse and property division); *Solis v. Tea*, 468 A.2d 1276 (Del. 1983)(providing for alimony, child support, private school and college tuition, and children's medical expenses); *Rand v. Rand*, 18 Ohio St. 3d 356, 481 N.E.2d 609 (1985)(providing for child support and college expenses and covenanting to provide religious education with reimbursement of related expenses thereof for custodial parent). Similarly, the phrase "property settlement" is employed by some to distinguish agreements which deal with real and personal property rights at the time of divorce from those agreements which also provide for traditionally modifiable items such as spousal maintenance, child support, child custody, and visitation. *Tucker v. Tucker*, 416 So. 2d 1053 (Ala. Civ. App. 1982)(making the distinction between agreements in which parties intend to execute integrated bargains and those which merely provide for statutorily modifiable alimony); *Gubser v. Gubser*, 126 Ariz. 303, 614 P.2d 845 (1980)(using the terms "separation settlement" and "property settlement" non-interchangeably); *Meehan v. Meehan*, 425 N.E.2d 157 (Ind. 1981)(specifically notice that caption of "Property Settlement" for agreement dealing with child custody and support is misnomer). *Cf. McInturff v. McInturff*, 7 Ark. App. 116, 644 S.W.2d 618 (1983)(distinguishing between property and support settlements). Others, however, use that term more generally to refer to that which is being called a divorce settlement agreement in this article. *Compton v. Compton*, 101 Idaho 328, 612 P.2d 1175 (1980)(including child custody as well as distribution of property with an eye towards providing custodian-father with a greater share of community property for child support purposes); *Esserman v. Esserman*, 136 Cal. App. 3d 576, 186 Cal. Rptr. 329 (1982)(providing for spousal and child support as well as division of property); *Young v. Burkholder*, 142 Ariz. 415, 690 P.2d 134 (Ct. App. 1984)(including child support and college expenses as well). Similarly, the terms "settlement agreement," "post-nuptial agreement," and "consent decree" are used with little precision.

21. In our history married women could not contract with their spouses because a woman, during coverture, lacked the legal capacity to contract with anyone, and

other, they were not granted absolute freedom, at least with respect to matters relating to their marriage. Two restrictions were imposed: spouses could not enter a contract that would alter the essential elements of the marital relationship;²² and spouses could not enter a contract that would encourage divorce.²³ Public policies justifying these restrictions changed as greater equality between the sexes was achieved, and greater freedom to divorce was granted. The states, thus, began to limit application of even these restrictions.²⁴ However, they did not completely abandon supervisory involvement in divorce, but rather, "again reaccommodated their own interests, and those of private parties, in controlling the consequences of dissolution."²⁵ The general rule now is that spouses may contract regarding the incidents of marriage if their agreements are fair, just, and reasonable considering all the circumstances, which will include the presence of a confi-

because of operation of the doctrine that the husband and wife were one person in the law, and a one party contract, like one hand clapping, was an impossibility. A. LINDEY & L. PARLEY, *supra* note 20, at § 3.02, 3-8 to 3-9; L. WEITZMAN, *THE MARRIAGE CONTRACT, SPOUSES, LOVERS AND THE LAW* 338 (1981) [hereinafter L. WEITZMAN, *MARRIAGE CONTRACT*]. However, universal adoption of Married Women's Property Acts in the nineteenth century granted women the power to contract in general, including, with some restrictions, the capacity to contract with their husbands. The Acts also brought the demise of the concept of unity of identity within marriage. *Id.* See also Sharp, *supra* note 1, at 1399-1403; H. CLARK, *supra* note 1, § 7.2, at 289-90.

22. Sharp, *supra* note 1, at 1400. While a definitive statement of what constitutes "the essentials of marriage" is beyond the scope of this article, courts consistently considered the duty of support and the duty to render domestic services as essential obligations. L. WEITZMAN, *DIVORCE REVOLUTION*, *supra* note 8, at 338.
23. Sharp, *supra* note 1, at 1400; L. WEITZMAN, *DIVORCE REVOLUTION*, *supra* note 8, at 338. It should be noted that under traditional fault-based divorce laws, collusion was a defense that would require the court to deny a divorce. H. CLARK, *supra* note 1, § 13.9, at 522-25. Thus, under fault systems, to the extent that a divorce settlement agreement appeared to condition a financial reward upon obtaining a divorce, or appeared to cross the line from civilized ordering of affairs into collusion (a difficult line to draw), the divorce could be denied by the court, and the agreement would be void. *Id.* See also Mnookin & Kornhauser, *supra* note 2, at 952-53. As divorce settlement agreements met with increasing favor, jurisdictions modified this position. For example, Vermont's divorce law specifically provides that "collusion" as used in divorce actions should not be construed to include settlement negotiations. VT. STAT. ANN. tit. 15, § 553 (1974).
24. Sharp, *supra* note 1, at 1400-01. Professor Sharp explains:
[R]estrictions centered on the state's interest in maintaining the status quo of marriage, and thereby the hierarchical relationship of the parties to marriage, with the result that limitations on interspousal freedom to contract became identified with perpetuation of inequality between the sexes. It therefore followed that the movement toward greater equality between the sexes was accompanied by demands for decreased state intervention in the regulation of marriage and divorce and the parties' freedom to contract regarding either.

Id. (footnotes omitted).

25. Sharp, *supra* note 1, at 1401.

dential relationship between the spouses and the possibility of overreaching.²⁶

While the parties may be granted some control over determination of rights and obligations between themselves, even to the point of contracting out of certain of the general principles, this does not hold for provisions relating to children. Child support, child custody, and visitation are always subject to the scrutiny of the court and open to modification, and the parents cannot contract away the child's right to support, nor can they limit the court's jurisdiction with respect to these matters.²⁷

Thus, while the law seems to be encouraging in some cases, and in others, at least accepting divorce agreements, in many instances, the agreement will be subject to judicial supervision or some sort of judicial review.²⁸

Much of the confusion in the area of enforcement of divorce agreements arises from the tension between evolving principles of freedom of contract as applied to domestic relations matters²⁹ and traditional principles of public policy and state interest in marriage, divorce, and its incidents which militate in favor of various levels of state involvement. The result is either studied ambiguity by courts and legislatures on the question of divorce contracting, or worse, unpredictable invocation of "equitable principles" and public policy arguments in cases in which the facts are compelling. Both results contribute to the development as an irreconcilable body of case law.³⁰

The traditional rules regarding modification of domestic relations awards cause further complications. An award of periodic alimony³¹ is

26. *Id.* For a survey of representative state standards of review, see *id.* at 1408 nn.35-37.

27. See UMDA § 306 (f), 9A U.L.A. 217 (1987); H. CLARK, *supra* note 1, § 18.8, at 780-81.

28. Sharp, *supra* note 1, at 1401. See also Note, *supra* note 1, at 715; Annotation, *Divorce: Power of Court to Modify Decree for Alimony or Support of Spouse Which Was Based on Agreement of Parties*, 61 A.L.R.3d 520, 525 (1975); H. FOSTER, JR. & R. BROWN, *CONTEMPORARY MATRIMONIAL LAW ISSUES: A GUIDE TO DIVORCE ECONOMICS & PRACTICE* 689 (1985). Many states statutorily provide for separation agreements, and specify, in that legislation, whether judicial approval is required, and the standard that will be applied. For a survey of such statutory provisions, see Sharp, *supra* note 1, at 1408 nn.35-37. It should be noted, however, that Professor Sharp argues that judicial review requirements are ineffective. *Id.* at 1409, 1442-51.

29. Indeed, some argue for even greater freedom of contract. See Schultz, *Contract Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204 (1982); L. WEITZMAN, *MARRIAGE CONTRACT*, *supra* note 21; Mnookin & Kornhauser, *supra* note 2. For a contrary view, see Sharp, *supra* note 1.

30. See, e.g., *Moseley v. Mosier*, 279 S.C. 348, 352-53, 306 S.E.2d 624, 627 (1983); *In re Estate of Hereford*, 250 S.E.2d 45, 49-52 (W. Va. 1978); L. WEITZMAN, *MARRIAGE CONTRACT*, *supra* note 21, at 342.

31. Periodic alimony should be distinguished from lump sum alimony. The distinc-

generally modifiable by a court upon a showing by one of the parties of materially changed circumstances.³² In contrast, however, contracts are not modifiable by one party or by the court at the behest of one party, other than in certain extraordinary circumstances.³³

tion, however, is not always clear: periodic alimony is spousal support; while lump sum alimony is usually a property distribution and a non-modifiable obligation, despite the fact that it may be payable in installments. *Stone v. Stone*, 254 Ga. 519, 520, 330 S.E.2d 887, 888 (1985); *Oknaian v. Oknaian*, 90 Mich. App. 28, 36-37, 282 N.W.2d 230, 234 (1979) (reviewing relevant Michigan law); *White v. White*, 296 N.C. 661, 666-67, 252 S.E.2d 698, 701 (1979); H. CLARK, *supra* note 1, § 16.5, at 657-58.

Complications of course arise. For example, an award that is intended by the court and the parties to be spousal support, may be set as a specified amount, payable in installments over time, and thus appear more like a lump sum property award. *Stebbins v. Stebbins*, 435 So. 2d 383, 385 (Fla. Dist. Ct. App. 1983); H. CLARK, *supra* note 1, § 16.4, at 653-54.

The distinction must be made, however, since property awards, as contrasted with alimony, are final, and not modifiable. *Cf. In re Marriage of Smiley*, 53 Cal. App. 3d 228, 232, 125 Cal. Rptr. 717, 719 (1975) (distinctions made between awards for support/alimony and those given in consideration for other promises); *White v. White*, 296 N.C. 661, 666-67, 252 S.E.2d, 698, 701 (1979); H. CLARK, *supra* note 1, § 18.8, at 780.

32. H. CLARK, *supra* note 1, § 16.5, at 655-56. Many states provide for modification and enunciate the applicable standard statutorily. *E.g.*, DEL. CODE ANN. tit. 13, § 1519 (1986) (a decree ordering alimony may be modified only upon showing of real and substantial change of circumstances and will be terminated upon death of either party or upon remarriage by party receiving alimony); FLA. STAT. ANN. § 61.14 (West Supp. 1988) (courts have continuing jurisdiction to modify orders or separation agreements as equity requires, with due regard to changed circumstances or financial ability of parties); IND. CODE ANN. § 31-1-11.5-17 (Burns 1987) (modification of order for maintenance shall be made only upon showing of changed circumstances so substantial and continuing as to make terms unreasonable); MO. REV. STAT. § 452.370 (1987) (provisions of maintenance decree may be modified only upon a showing of changed circumstances so substantial and continuing as to make terms unreasonable, considering the financial resources of both parties, including extent to which reasonable expenses of either party are, or should be, shared by spouse or other person with whom he or she cohabits, and earning capacity of a party who is not employed; obligation to pay future statutory maintenance is terminated upon death of either party or remarriage of party receiving maintenance); NEV. REV. STAT. § 125.150 (1986) (decree may be modified upon showing of changed circumstances, whether or not court has expressly retained jurisdiction to modify); WIS. STAT. § 767.32 (1985-86) (court may from time to time, on petition of either parties or of department of health and social services revise and alter judgment respecting amount of maintenance except when judgment waived maintenance payments; receipt of aid to families with dependent children or substantial change in cost of living of either party or as measured by Federal Bureau of Labor statistics is sufficient to justify revision of judgment except that change in obligor's cost of living not sufficient if payments are expressed as percentages of income).
33. *See In re Marriage of Kloster*, 127 Ill. App. 3d 583, 585, 469 N.E.2d 381, 383 (1984) (property settlements set aside upon proof of fraud, duress, or variance with public policy); *McGowan v. McGowan*, 663 S.W.2d 219, 222 (Ky. 1983) (agreement set aside upon showing of overreaching and undue influence by wife); *In re*

Thus, tension develops between the underlying contract and domestic relations principles, tension that causes vacillation by courts, and a resulting lack of clarity in the law. Questions of characterization and intent, always ripe for manipulation, become the determinative factors.

II. THE AGREEMENT AS IT RELATES TO THE DIVORCE DECREE

Whether the agreement of the parties has merged into the court's decree, remains as an independent contract, or evolves as some hybrid presents the major question to be addressed. However, it is not possible to separate completely this issue from the other important question, that is, what result the status of the agreement (merged, independent, or hybrid) will have. It may be necessary to determine whether, and to what extent, merger has occurred in order to decide whether the court may modify a provision for spousal maintenance;³⁴ whether the provision can be enforced with the specialized remedies of, for example, contempt and garnishment of wages;³⁵ whether an action on the contract will lie;³⁶ and whether contract defenses apply or are barred.³⁷ Depending on the circumstances, the availability of a contract remedy or defense as opposed to a judgment remedy or defense can make a crucial difference in the outcome of the case.

When the spouses contemplating a divorce have entered an agreement, three possibilities arise regarding the nature of that contract.³⁸ First, the independent agreement permits the parties to enter an agreement which ordinarily must be presented to the divorce court for approval. The agreement, however, is not set out by the court, or ac-

Marriage of Madden, 683 P.2d 493, 495 (Mont. 1984)(settlement agreement modified and marital property redistributed upon showing of "extrinsic" fraud on part of husband). In addition to these basic contract principles, unilateral modification by the court raises questions concerning violation of the constitutional prohibition against the state impairing private contracts. U.S. CONST. art. I, § 1, cl. 2. See, e.g., *Frizzell v. Bartley*, 372 So. 2d 1371, 1372 (Fla. 1979); *Shoosmith v. Scott*, 217 Va. 789, 793, 232 S.E.2d 787, 789 (1977)(statute permitting modification is not unconstitutional because contract was entered into subsequent to enactment of statute and thus modification is deemed to have been contemplated by parties).

34. See, e.g., *Flynn v. Flynn*, 42 Cal. 2d 55, 57, 265 P.2d 865, 866 (1954); *Solis v. Tea*, 468 A.2d 1276 (Del. 1983); H. CLARK, *supra* note 1, § 18.8, at 780.

35. See, e.g., *Flynn v. Flynn*, 42 Cal. 2d 52, 58, 265 P.2d 865, 866 (1954); *Hollman v. Hollman*, 347 Pa. Super. 289, 300-01, 500 A.2d 837, 842-43 (1985).

36. See, e.g., *Flynn v. Flynn*, 42 Cal. 2d 52, 58, 265 P.2d 865, 866 (1954).

37. *Sharp*, *supra* note 1, at 1410; *Johnston v. Johnston*, 297 Md. 48, 56-57, 465 A.2d 436, 442 (1983).

38. See, e.g., *Johnston v. Johnston*, 297 Md. 48, 56, 465 A.2d 436, 440 (1983); *Davis v. Davis*, 687 S.W.2d 699, 701 (Mo. Ct. App. 1985). The three scenarios presented represent the most common possibilities. Within those three, there are additional variations.

ted on in any way, other than approval for fairness and reasonableness, or for conscionability.³⁹ In this case, the agreement is presented to the court only to identify it and to establish that it meets the substantive or procedural requirements imposed on such contracts by the jurisdiction.⁴⁰ Many jurisdictions require an independent contract to be presented to the court for some sort of review.⁴¹ The Supreme Court of Connecticut has stated that provisions of an agreement not presented to the court, and in fact concealed from the court, were contrary to public policy and therefore void.⁴² On the other hand, some jurisdictions permit the parties to enter an independent contract disposing of maintenance and property rights between them (exclusive of issues relating to children), without any court involvement.⁴³

The second possibility, which represents the middle ground and generates perhaps the most incomprehensible body of law, arises when the divorce settlement agreement is presented to the court, and in some fashion is made a part of the divorce decree without completely merging into it. This creates some hybrid of contract and court order.⁴⁴ It raises complex questions of the ability to modify, the availability of remedies, and the nature of subsequent actions.

Finally, the third possibility occurs when the agreement is presented to the court and is completely merged into the resulting divorce decree, in which case the contract is extinguished and the rights and obligations of the parties arise from the decree exclusively.⁴⁵

39. See, e.g., *Davis v. Davis*, 687 S.W.2d 699, 701 (Mo. Ct. App. 1985); *In re Estate of Hereford*, 250 S.E.2d 45, 49 (W. Va. 1978); Sharp, *supra* note 1, at 1407-08.

40. See, e.g., UMDA § 306(d), 9A U.L.A. 217 (1987); *In re Marriage of Manzo*, 659 P.2d 669, 674 (Colo. 1983); *Johnston v. Johnston*, 297 Md. 48, 56, 465 A.2d 436, 439 (1983). For a discussion of the substantive and procedural standards applied, see Sharp, *supra*, note 1, at 1408 nn.35-37.

41. Sharp, *supra* note 1, at 1408. This requirement may be imposed statutorily, as by UMDA § 306(b), (d), 9A U.L.A. 216-17 (1987), or by case law. Sharp, *supra* note 1, at 1408. The standard imposed varies from state to state, and may require only procedural fairness, or may go on to require substantive fairness. *Id.* For a fuller discussion of this issue, see *id.* at 1408-58.

42. *Baker v. Baker*, 187 Conn. 315, 322, 445 A.2d 912, 915 (1982).

43. See, e.g., *Spencer v. Spencer*, 472 So. 2d 302, 306-07 (La. Ct. App. 1985) (parties may contract regarding alimony independent of the decree in which cases the decree will simply be silent as to alimony and the contract will be enforceable as such); *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983) ("The parties can avoid the burdens of a court judgment by not submitting their agreement to the court. By not coming to the court, the parties preserve their agreement as a contract.").

44. *Davis v. Davis*, 687 S.W.2d 699, 701 (Mo. Ct. App. 1985). See, e.g., *Madnick v. Madnick*, 339 Pa. Super. 130, 132-33, 488 A.2d 344, 345-46 (1985); *In re Estate of Hereford*, 250 S.E.2d 45, 49-50 (W. Va. 1978). The UMDA specifically provides for a hybrid agreement decree in § 306(d), (e), (h). For a fuller discussion of the relevant UMDA provisions, see *infra* notes 157-58 and accompanying text.

45. See, e.g., *East v. East*, 395 So. 2d 78, 80 (Ala. Civ. App. 1981); *Young v. Burkholder*, 142 Ariz. 415, 418, 690 P.2d 134, 137 (Ct. App. 1984); *Phillips v. Phillips*, 93 Idaho

A. Intention of the Parties

A number of courts faced with a question of whether a divorce settlement agreement has been merged, incorporated, or stands independent of the decree entirely will look for the intent of the parties and of the court that granted the decree.⁴⁶ Intent may be found in specific language within the agreement or decree, or may be inferred from the totality of the circumstances.⁴⁷ However, discerning the intent of the parties to an agreement after the fact is at best an inexact science.⁴⁸ In the context of divorce settlement agreements, the pressure exerted by the conflicting policies underlying contract and domestic relations law and the pressure of the frequently compelling circumstances of actual cases further exacerbate the problem.⁴⁹ Additionally, as with most contracts, any attempt to attribute intention to the parties beyond the basic intention to be bound to the general provisions of the agreement involves speculation about the parties' thoughts concerning details and anticipated legal consequences that the parties most likely never considered.⁵⁰

384, 387, 462 P.2d 49, 52 (1969); *Johnston v. Johnston*, 297 Md. 48, 54-55, 465 A.2d 436, 438-39 (1983); *Commonwealth ex rel. Tokach v. Tokach*, 326 Pa. Super. 359, 362, 474 A.2d 41, 42-43 (1984); *In re Estate of Hereford*, 250 S.E.2d 45, 49 (W. Va. 1978). See H. CLARK, *supra* note 1, § 18.7, at 778.

46. See, e.g., *East v. East*, 395 So. 2d 78, 80 (Ala. Civ. App. 1981) ("the question whether a separation agreement or a property settlement is merged in the decree or survives as an independent agreement depends on the intention of the parties and the court."); *Jendrusch v. Jendrusch*, 1 Haw. App. 605, 609, 623 P.2d 893, 896 (1981)(when language of agreement shows intent to make it part of the decree, and the agreement is actually incorporated into the decree, provisions of agreement are superseded and merged into the decree); *Compton v. Compton*, 101 Idaho 328, 332, 612 P.2d 1175, 1179 (1980)("Of course, merger, or its absence, is a question of the parties' intent."); *Johnston v. Johnston*, 297 Md. 48, 56, 465 A.2d 436, 440 (1983)(language of agreement determines intention of parties with respect to merger); *McGough v. McGough*, 361 Pa. Super 391, 394, 522 A.2d 638, 640 (1987)("In determining if the settlement agreement merged with the divorce decree, we must establish whether or not a merger was intended by the parties. This determination is made by analyzing the terms of the agreement itself.").

47. See, e.g., *Jendrusch v. Jendrusch*, 1 Haw. App. 605, 608, 623 P.2d 893, 896 (1981)(intent determined by looking at language of parties); *Johnston v. Johnston*, 297 Md. 48, 56, 465 A.2d 436, 440 (1983)(language of the agreement determines the intention of parties with respect to merger); *McGough v. McGough*, 361 Pa. Super 391, 394, 522 A.2d 638, 640 (1987)(question of merger determined by analyzing terms of agreement); *Nakashima v. Nakashima*, 297 S.E.2d 208, 210 (W. Va. 1982)(in a close case, the totality of circumstances determines the intent of the parties).

48. J. MURRAY, *MURRAY ON CONTRACTS* § 20, at 30-32 (2d rev. ed. 1974).

49. See *supra* notes 29-30 and accompanying text.

50. *Moseley v. Mosier*, 279 S.C. 348, 352-53, 306 S.E.2d 624, 627 (1983)(parties generally use words of art without intending any particular legal consequences); *In re Estate of Hereford*, 250 S.E.2d 45, 50 n.1 (W. Va. 1978)("What all these cases seem to do is ignore the intentions of the parties, quite possibly because the parties did not really *intend* anything—they merely used language the way everyone else uses it, to-wit, carelessly."); J. MURRAY, *supra* note 48, § 20, at 32-33.

1. *Terms of Art*

One distinction that the courts have made is to draw a line between the use of the word "merged" and use of the words "incorporated" or "incorporated by reference," the former indicating that the decree supersedes the agreement and the latter that the contract survives, either independent of the decree entirely, or in some hybrid form.⁵¹ Under this approach, mere incorporation, without more, does not render the agreement merged into the decree. Rather, it serves to identify the agreement and render its validity *res judicata* in any subsequent action.⁵² Were it as simple as using the magic words "incorporation" for one result, or "merger" for another, the practitioner could simply insert the right word and be assured that the appropriate results would follow. However, it is not that simple or clear. For one thing, judges, lawyers, and even legislators use the words carelessly and inconsistently.⁵³ For example, compare two Delaware cases, *Solis*

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51. *Murphy v. Murphy*, 467 A.2d 129, 132 (Del. Fam. Ct. 1983) (an agreement that is merely incorporated retains its contractual character and the court does not have the power to modify the agreement unless the parties have contractually given that power, nor should a contempt citation issue in the first instance of breach, whereas merger causes the rights and obligations of the parties under the agreement to be displaced by the decree, under which those rights and obligations would then be derived and enforced). *See also* *Young v. Burkholder*, 142 Ariz. 415, 418, 690 P.2d 134, 136 (Ct. App. 1984) ("the word 'incorporation' is not synonymous with the word 'merger' and . . . merger does not necessarily occur in every instance in which incorporation of an agreement into the decree takes place").

Exactly what form the "hybrid" incorporated but not merged agreement will take, and what impact that status will have on questions raised above, such as enforcement remedies and modifiability, differs. For one approach, see *Murphy v. Murphy*, 467 A.2d 129 132-33 (Del. Fam. Ct. 1983). *See also* UMDA discussion *infra* notes 157-58.

52. *Young v. Young*, 142 Ariz. 415, 418, 690 P.2d 134, 137 (Ct. App. 1984); *Flynn v. Flynn*, 42 Cal. 2d 52, 58, 265 P.2d 865, 866 (1954); *Murphy v. Murphy*, 467 A.2d 129, 132 (Del. Fam. Ct. 1983).
53. *See, e.g., In re Estate of Hereford*, 250 S.E.2d 45, 50 n.1 (W. Va. 1978) (in discussing West Virginia's "confusing" line of cases on incorporation and merger, Justice Neely observed that "parties merely used language the way everyone else uses it, to-wit, carelessly").

A recently amended Massachusetts statute provides a striking example of a legislature's loose use of the terms of art. MASS. GEN. LAWS ANN. ch. 208, § 1A (West Supp. 1985) (amended 1985) (that allowed for obtaining a consensual divorce by filing of an agreement) formerly provided:

If the finding is in the affirmative, the court shall *approve* the agreement and it shall have the full force and effect of an order of the court and shall be *incorporated* and *merged* into said order, and by the agreement of the parties it may also remain as an independent contract.

Id. (emphasis added). A court faced with interpreting application of that provision had to discern the legislators' meaning and concluded that:

[T]he Legislature, in enacting G.L. c.208, § 1A [Gen. Laws Ann. ch. 208, § 1A] did not intend to use the term "merged" in its technical sense [as] is clearly demonstrated by the phrase which follows that term in the statute. If a separation agreement approved by the court and incorpo-

*v. Tea*⁵⁴ and *Murphy v. Murphy*.⁵⁵ In *Solis*, the Delaware Supreme Court analyzed the applicability of a statutory provision allowing modification of divorce decrees and court orders and concluded it was applicable to "separation agreements merged" with judicial decrees, but not to "unincorporated separation contracts."⁵⁶ In *Murphy*, the Delaware Family Court, discussing the applicability of the same statutory provision, contrasted the opposite results which would occur if the agreement was "merely incorporated into the divorce decree [no modification] or merged therein [modification permitted]."⁵⁷

While these two cases do not show a necessarily irreconcilable use of the words, they do show, at best, a lack of clarity, and at worst, inconsistency. The usage in *Solis* implies that there exist two possibilities: "merged" or its opposite, "unincorporated." Incorporated or incorporated by reference would appear to fall somewhere in the unidentified-in-between. The usage in *Murphy* implies that the possibilities are "merged" or "incorporated" with unincorporated falling into an unidentified category. The point is not whether cases can be reconciled, for surely they can. Rather, the contrast demonstrates that the meanings associated with these "terms of art" or "magic words"⁵⁸ have become blurred through years of imprecise use. Further, just which terms are the current words of choice, and whether they will be consistently interpreted in the future, also cannot be determined with certainty.

2. *Discerning Actual Intent*

Perhaps because of this, most appellate courts do not draw bright lines on the basis of words of art alone, but rather look further to determine what the parties and the trial court intended to accomplish.⁵⁹

rated into an order for judgment were truly to be merged into that order, the separation agreement could not 'by agreement of the parties . . . also remain as an independent contract.'

Stansel v. Stansel, 385 Mass. 510, 513, 432 N.E.2d 691, 694 (1982). Subsequently, the legislature amended the statute and eliminated the inconsistency. MASS. GEN. LAWS ANN. ch. 208, § 1A (West 1987).

54. 468 A.2d 1276 (Del. 1983).

55. 467 A.2d 129 (Del. Fam. Ct. 1983).

56. *Solis v. Tea*, 468 A.2d 1276, 1280 (Del. 1983).

57. *Murphy v. Murphy*, 467 A.2d 129, 132-33 (Del. Fam. Ct. 1983).

58. See *Moseley v. Mosier*, 279 S.C. 348, 352-53, 306 S.E.2d 624, 627 (1983); *In re Estate of Hereford*, 250 S.E.2d 45, 52 (W. Va. 1978).

59. See, e.g., *Commonwealth ex rel. Tokach v. Tokach*, 326 Pa. Super. 359, 361-62, 474 A.2d 41, 42 (1984) ("Although some jurisdictions recognize a distinction between *incorporation* of a settlement agreement and *merger* of an agreement into a divorce decree, no such distinction has ever been held by a Pennsylvania appellate court to affect the power of the trial court to modify the amount of child support."); *Moseley v. Mosier*, 279 S.C. 348, 352-53, 306 S.E.2d 624, 626-27 (1983) (parties' intent rarely revealed from agreement's words of art); *In re Estate of*

As Justice Neely explained in *In re Estate of Hereford*, reliance by the courts on "magic" words of art to determine, after the fact, what the parties intended in their agreement too frequently results in the creation of "outrageous traps for the unwary."⁶⁰ In *Hereford*, the court refused to make, automatically, a distinction based on use of the words "ratified" and "confirmed" on the one hand,⁶¹ and "merged" or "adopted"⁶² on the other.⁶³

Though laudable, efforts to individualize interpretation of settlement agreements and to infer from provisions and circumstances the intent of the parties on a case-by-case basis undermine certainty and predictability, a result identified most eloquently by Justice Neely in *Hereford*.⁶⁴ The Pennsylvania courts' experience illustrates this.⁶⁵

In *Brown v. Hall*,⁶⁶ the Pennsylvania Supreme Court distinguished between support agreements that continue beyond entry of a divorce decree as contractual obligations, and those that merge into the subsequent divorce decree.⁶⁷ The distinction turned on the parties' intent, which the court held was a question of fact.⁶⁸ In *Brown*, the parties "expressly provided in their separation agreement that they wished 'to enter into a financial agreement which will survive any divorce which may occur.'"⁶⁹ Such a specific expression of intent made the determination in *Brown* relatively easy.

Two years later, in *Millstein v. Millstein*,⁷⁰ the superior court considered whether an agreement was merged or not and concluded that

Hereford, 250 S.E.2d 45, 52 (W. Va. 1978)(words of art serve as traps for the unwary).

60. 250 S.E.2d 45, 52 (W. Va. 1978).

61. *Id.* at 51. Presumably "ratified" or "confirmed" were used to represent the case in which the decree did not supersede the agreement.

62. *Id.* Presumably "merged" and "adopted" were used to represent the case in which the subsequent decree superseded the agreement.

63. *Id.* The rule set forth in *Hereford* was announced by the court as prospectively applicable. It applied a presumption of merger absent clear provision to the contrary by the parties in the agreement. *Id.* at 51-52. This presumption approach will be discussed more fully below. See *infra* notes 100-35 and accompanying text.

64. *In re Estate of Hereford*, 250 S.E.2d 45, 51-52 (W. Va. 1978). See *supra* notes 50 & 53.

65. Referring to the Pennsylvania appellate decisions on the question of property settlement and separation agreements, which he, as a family court judge, was frequently required to interpret, Judge Strassburger of the Allegheny County Court of Common Pleas noted: "Regrettably, these decisions have produced more confusion than clarity in this difficult area." *Kravetz v. Kravetz*, 135 Pitt. L.J. 16, 20 n.4 (quoting Ashton, *Clarify Support-Agreement Law*, Pitt. L.J. Rptr. (Dec. 17, 1984)).

66. 495 Pa. 635, 435 A.2d 859 (1981).

67. *Id.* at 639-41, 435 A.2d at 861-62.

68. *Id.* at 640 n.6, 435 A.2d at 861 n.6.

69. *Id.* n.7.

70. 311 Pa. Super. 495, 457 A.2d 1291 (1983).

the parties did not intend their agreement to merge into the decree. The court quoted the parties' language and concluded that the child support obligation in question was "a 'separate and undisputed covenant' . . . that [was to] 'remain in full force and effect regardless of any change in the marital status of the parties.'" ⁷¹ While not as clear a provision as the one in *Brown*, the agreement language in *Millstein* was reasonably easy to interpret.

Then, in 1984, the superior court decided *Commonwealth ex rel. Tokach v. Tokach*,⁷² also a case involving a provision for child support, which, rather than clarifying the developing law, confused it by broadly stating that Pennsylvania appellate courts did not recognize the difference between incorporation and merger. The court held: "[O]nce a settlement agreement is incorporated into a divorce decree, either by reference or set out in full, the settlement agreement merges into the decree and should no longer be given independent effect."⁷³

Although *Tokach* dealt specifically with child support, and, therefore, can be interpreted as applying only to that special situation⁷⁴ (and perhaps only to an attempt at reduction), the court's broad statement appears to encompass all agreements.

Trial courts and subsequent panels of the superior court almost immediately began distinguishing and narrowing *Tokach*.⁷⁵ In *Madnick v. Madnick*,⁷⁶ the superior court observed that if incorporation automatically results in merger, then "the *Tokach* exception [would] swallow the *Millstein* rule"; a result the panel in *Madnick* found neither appropriate nor necessary.⁷⁷ Therefore, in *Madnick*, the superior court again invoked the rule that whether merger occurs depends on the parties' intent, to be discerned from the terms of the agreement.⁷⁸ The panel then found that the parties in *Madnick* intended to create a contractual obligation, independent of the obligation included in the

71. *Id.* at 497, 457 A.2d at 1292. Complicating *Millstein*, and in fact the entire line of cases, are the special considerations that apply to child support obligations. See *supra* note 28 and accompanying text.

72. 326 Pa. Super. 359, 474 A.2d 41 (1984). Again complicating the analysis, *Tokach* dealt specifically with child support.

73. *Id.* at 362, 474 A.2d at 42. Many practitioners had relied on the distinction between incorporation and merger in drafting divorce settlement agreements. Aston, *Clarify Support-Agreement Law*, Pitt. L.J. Rptr. (Dec. 17, 1984).

74. See *supra* notes 70-71 and accompanying text.

75. See, e.g., *McGough v. McGough*, 361 Pa. Super. 391, 522 A.2d 638 (1987); *Lee v. Lee*, 352 Pa. Super. 241, 507 A.2d 862 (1986); *Madnick v. Madnick*, 339 Pa. Super. 130, 488 A.2d 344 (1985); *Stanley v. Stanley*, 339 Pa. Super. 118, 488 A.2d 338 (1985); *Van Kirk v. Van Kirk*, 336 Pa. Super. 502, 485 A.2d 1194 (1984); *Shilling v. Shilling*, 20 Crawford County L.J. 4 (Pa. C.P. 1986); *Price v. Price*, 33 Chester County Rep. 123 (Pa. C.P. 1985); *Kravetz v. Kravetz*, 135 Pitt. L.J. 16 (Allegheny County, Pa. C.P. 1986).

76. 339 Pa. Super. 130, 488 A.2d 344 (1985).

77. *Id.* at 132-33 n.1, 488 A.2d at 345-46 n.1.

78. *Id.* at 132-33, 488 A.2d at 345.

court order, based on the fact that the parties provided in one paragraph that the husband agreed to pay the specified amount of child support, and in the next paragraph, that he agreed to sign a stipulation entering the amount as a court order. The court reasoned that the purpose for requiring that the contractual obligation be entered as a court order was "plainly not to extinguish the contractual obligation as fast as it has been created, but to provide an alternative enforcement method."⁷⁹ Further, the court observed, the agreement purported to settle all claims between the parties, and such final settlement only could be accomplished if the agreement to pay survived as a contractual obligation, since court ordered support would always be modifiable.⁸⁰ While this is certainly a reasonable interpretation of the parties' intention, use of the word "plainly" probably goes too far. Other interpretations are certainly defensible and might be anticipated after *Tokach*.

In *Hollman v. Hollman*,⁸¹ the superior court further clouded matters with a lengthy discourse, not critical to the issues before it or to its holding, on the nature of support agreements in Pennsylvania. The court faced a question of remedies available to enforce spousal support, a question that turned on the status of the agreement. The court cited *Tokach*, and explained that incorporated agreements are enforceable as orders of the court, are reviewable and modifiable, and that unincorporated agreements are enforceable as contracts in assumpsit actions.⁸² This implies an either/or situation, and does not seem to take into account *Madnick's* discounting of the idea that incorporation need not result in automatic merger.⁸³

In *Lee v. Lee*,⁸⁴ the superior court again considered the issue in the context of spousal support. While recognizing the *Madnick* holding, the superior court made a fine distinction. The court found that, when the parties provided in their agreement only that the court could enter an order for the agreed amount of spousal maintenance, the parties did not intend to create a contractual obligation for the payment of support that was separate from the court order, but rather they intended for the agreement to merge into the decree.⁸⁵ The distinction

79. *Id.* at 133-34, 488 A.2d at 346.

80. *Id.* Because court ordered child support always may be modified by the court, the only final way to settle the claim would be through a contract provision, which arguably is not modifiable. However, even a contractual provision will not prevent a Pennsylvania court from *increasing* child support (although it might prevent the court from decreasing such an award), and such an increase may not entitle the obligor to a breach of contract action. See *Millstein v. Millstein*, 311 Pa. Super. 495, 501-02, 457 A.2d 1291, 1294 (1983).

81. 347 Pa. Super. 289, 500 A.2d 837 (1985).

82. *Id.* at 300-04, 500 A.2d at 842-45.

83. See *supra* notes 76-80 and accompanying text.

84. 352 Pa. Super. 241, 507 A.2d 862 (1986).

85. *Id.* at 245, 507 A.2d at 864.

that appears to have convinced the court was the fact that the agreement in *Lee* did not separate a provision for the obligation to pay from a provision for entry of an order, but rather specified only the husband's agreement to entry of an order for spousal support in the amount of \$150 per month.⁸⁶ The result is, perhaps, reasonable, but the fine distinctions relied on by the court might well be lost on the contracting parties.

Next came *Casper v. Casper*,⁸⁷ which involved an attempt to modify spousal support payments being made pursuant to an agreement entered prior to enactment of the new divorce code and, thus, at a time when court ordered spousal support was unavailable. The agreement was "adopted and entered as an Order of the Court."⁸⁸ The panel recognized the distinction between "'court ordered support' and orders which include the terms of a . . . support agreement,"⁸⁹ and concluded that the distinction turned on the parties' intent.⁹⁰ In a footnote, the panel held *Tokach* strictly to its facts, noting that the case dealt with "modification of a child support agreement, an issue which encompasses very different policy consideration."⁹¹ The court concluded that the parties intended to create an independent contractual obligation which was, therefore, not modifiable, but which, by virtue of its entry as a court order, gained for the parties the equitable remedies of the court (contempt, wage attachment, execution).⁹² Thus, the court approved the middle or hybrid category of agreement/order.

Finally, in *McGough v. McGough*,⁹³ another case involving an attempt to decrease child support payments, the superior court returned to the question of incorporation, merger, and the status of support agreements. The court again distinguished *Tokach*, finding its "no-difference-between-incorporation-and-merger" statement did not apply where the agreement and the court order contained an explicit non-merger provision.⁹⁴ Referring to *Millstein*, however, the court noted

86. *Id.*

87. 359 Pa. Super. 559, 519 A.2d 493 (1986).

88. *Id.* at 560, 519 A.2d at 494. Prior to the new Divorce Code, Pennsylvania law did not provide for post-divorce spousal support. The only way parties could provide for post divorce spousal support was through an agreement. *Id.* Such agreements, however, still raised the questions of merger and incorporation, ability to modify, and available remedies. *See id.* at 562-64, 519 A.2d at 495-97.

89. *Id.* at 562, 519 A.2d at 495.

90. *Id.* (citing *Bell v. Bell*, 228 Pa. Super. 280, 323 A.2d 267 (1974)(involving pre-divorce spousal support, not post-divorce support)).

91. *Id.* at 565 n.6, 519 A.2d at 496 n.6.

92. *Id.* at 565, 519 A.2d at 496.

93. 361 Pa. Super. 391, 522 A.2d 638 (1987).

94. *Id.* at 394, 522 A.2d at 640. The divorce decree stated that the "agreement was incorporated into the decree," but later specified that the agreement "'shall not merge with but shall survive' the divorce decree and order." *Id.* at 392, 522 A.2d at 639.

that regardless of the understanding of the parties "as to modifiability, a court is not precluded by the terms of the property settlement agreement from *increasing* the amount of child support."⁹⁵

Pennsylvania Common Pleas Court judges faced with questions of merger and incorporation candidly admit confusion: "Recent decisions have only added to the morass created by . . . *Brown* . . . , *Millstein* . . . , and *Tokach* . . ."⁹⁶ "Unfortunately, it is possible for counsel to cite a superior court case in support of both of the positions they wish to take. . . . [W]e will attempt to trace the various pronouncements of our appellate courts in as logical a fashion as we can."⁹⁷ "We have little doubt that the confused and sometimes contradictory teachings of such recent appellate cases as *Brown* . . . , *Millstein* . . . , and *Tokach* . . . , among others, have led counsel to cast this matter in the unusual procedural posture that it now occupies."⁹⁸

The judges' confusion can only reflect similar confusion on the part of practitioners struggling to decipher from these opinions exactly what provision must be made, what language must be included, and what steps must be taken to achieve the results their clients desire. This line of cases in Pennsylvania is certainly not unique to that Commonwealth, but rather is representative of the problems involved in developing a principled, predictable approach based on discerning the intent of the parties and the court. Pennsylvania has attempted to clarify the situation with amendments to its divorce code specifically addressing the status of agreements.⁹⁹ However, the amendments

95. *Id.* at 393 n.1, 522 A.2d at 639 n.1 (emphasis added). One might conclude then, that provisions in an agreement for child support will always be subject to increase, regardless of whether the agreement survives and retains contractual characteristics. However, survival of the contract may bar modification down. Questions remain, however, regarding the availability of contract damages in a case where child support is increased in the face of a surviving agreement.

96. *Kravez v. Kravez*, 135 Pitt. L.J. 16, 20 n.4 (Allegheny County, Pa. C.P. 1986) (citations omitted).

97. *Shilling v. Shilling*, 20 Crawford County L.J. 4, 4-5 (Pa. C.P. 1986).

98. *Price v. Price*, 33 Chester County Rep. 123, 125 (Pa. C.P. 1986) (citations omitted).

99. In 1988, Pennsylvania amended its divorce code to provide specifically for the status of divorce settlement agreements. In one section, the statute makes available a variety of remedies, including entry of judgment, attachment, garnishment, and a finding of contempt, when a party has failed to comply with an order of equitable distribution, or with the terms of an agreement entered after a hearing. 1988 Pa. Leg. Serv. 13, sec. 1, § 401(k) (Purdon). In a later section, the statute provides that

[a] party to an agreement regarding matters within the jurisdiction of the court under this act, whether or not the agreement has been merged or incorporated into the decree, may utilize a remedy or sanction set forth in this act to enforce the agreement to the same extent as though the agreement had been an order of the court except as provided to the contrary in the agreement.

Id. sec. 2, § 401.1(a). The statute specifies that child support always will be modifiable upon a showing of changed circumstances, but that in the absence of a spe-

may raise as many questions as they answer.

B. Application of a Presumption

As noted above, the law in West Virginia developed in much the same incomprehensible way as it had in Pennsylvania.¹⁰⁰ To solve the problem, or in Justice Neely's words "[i]n order to disengage ourselves from the mire,"¹⁰¹ the West Virginia court, in *Hereford*, announced a new rule employing a presumption which was designed to establish a sure, predictable approach to interpretation of parties' agreements. The court held that parties could agree to virtually anything they wished, as long as the court approved. By way of example, the court explained that the parties could contract out of continuing judicial supervision, could contract for judicial enforcement (i.e., contempt and garnishment), and could contract for nonmodification of spousal maintenance. As long as the court determines that the terms are fair and reasonable, it may approve them, ratify them, or merge them, and by whatever words the court uses, the terms would become part of the decree and binding on everyone including the court.

However, in the absence of a specific provision to the contrary in a property settlement agreement appended to, made part of, or incorporated by reference into the court order, which provision specifically and unambiguously denies the court jurisdiction in one or more of the regards just discussed, it shall be presumed that regardless of the language used, whether it be "ratified and confirmed," "merged," or any other language of the like import, that a periodic payment to which reference is made in a divorce decree is *judicially decreed* . . . and is subject to the continuing jurisdiction of the circuit court.¹⁰²

cific provision to the contrary, a provision regarding, among other things, property rights and alimony is not modifiable by the court. *Id.* § 401.1 (b), (c). While a welcome attempt to untangle the Gordian knot created by the case law that had evolved, the statute leaves much to be desired in terms of clarity. For example, § 401.1(a) permits the listed remedies to enforce an agreement "whether or not it has been merged or incorporated." One wonders whether this contemplates a wholly independent agreement which is not brought to the attention of the court at all. *See supra* notes 39-43 and accompanying text. As suggested in the conclusion of this article, some review of contracts is probably desirable. *See infra* notes 304-10 and accompanying text. Further, the language of § 401(k), when referring to a court order, clearly specifies that the remedies are available to enforce an order of equitable distribution. 1988 Pa. Leg. Serv. 13, sec. 1, § 401(k) (Purdon). However, when dealing in that same sentence with agreements, the statute more broadly refers to "an agreement as entered between the parties, after hearing." *Id.* This raises the question of whether the specified remedies are available for any agreement or only for one dealing with equitable distribution. Further confusing the issue, or perhaps rendering this question irrelevant, is § 401.1 which apparently gives all agreements relating to divorce settlement judgment remedies, which would presumably include those listed in § 401(k).

100. *In re Estate of Hereford*, 250 S.E.2d 45, 49-51 (W. Va. 1978); *see supra* notes 60-64 and accompanying text.

101. *Id.* at 51.

102. *Id.* at 51-52.

Thus, in *Hereford*, the West Virginia Supreme Court set out a clear rule, to be applied prospectively, by which parties could specifically describe the exact result they wished. If approved by the court, the parties could then count on these expressed intentions being honored in the face of later litigation.

Justice Neely's dream of "inaugurating a new system" which would achieve certainty and predictability of contracting in this area was, however, short lived. The *Hereford* holding was announced to take effect for all agreements entered after February 1, 1979.¹⁰³ In October 1979, the Nakashimas entered a divorce settlement agreement that provided, among other things, for the husband to pay spousal maintenance to the wife "for a period of six years, at which time Wife agrees that alimony shall cease and she shall thereafter be entitled to no further payments."¹⁰⁴ The divorce decree entered pursuant to that agreement varied from it in that the agreement provided for spousal maintenance for six years, after which time the wife would be entitled to no more payments, while the decree provided for the agreed-to spousal maintenance with *no* termination date, and stated that payments should continue until "further order of this Court."¹⁰⁵ Further confusing matters, the divorce court stated that it found the parties' agreement to be fair and reasonable, and that the agreement was ratified and confirmed by the court.¹⁰⁶

In 1980, the husband sought and obtained judicial modification of the alimony provision based on a showing of changed circumstances. Thus, the stage was set for consideration of the question of merger, because, if the agreement had merged into the decree, it would be

103. *Id.* at 51.

104. *Nakashima v. Nakashima*, 297 S.E.2d 208, 209 (W. Va. 1982). The court set out the entire paragraph which it identified as the one in issue as follows:

Husband shall pay to Wife as alimony the sum of \$200.00 per month to begin on September 5, 1979, and be due on the 5 [sic] day of each month thereafter, for a period of six years, at which time Wife agrees that alimony shall cease and she shall thereafter be entitled to no further payments in the form of alimony. Further, it is agreed between the parties that the alimony will cease upon any remarriage of Jeannine D. Nakashima.

Id.

105. The court order read as follows:

It is further ORDERED that the Plaintiff shall pay to the defendant as alimony the sum of \$200.00 per month, to begin on September 1, 1979, and be due on the 1st day of each month thereafter payable through the Circuit Clerk's office until further order of this Court.

It further appearing to the Court that the parties hereto have entered into a Property Settlement Agreement dated the 27th day of July, 1979, which agreement appears to be fair and reasonable, it is further ORDERED that said Agreement be, and it hereby is ratified and confirmed by this Court.

Id. at 209-10.

106. *Id.*

modifiable, but if it had not, it could not be modified by the court without the consent of both parties.

In an opinion by Justice Neely, who authored *Hereford*, the court in *Nakashima* found that the case was a close one "because the language and tenor of the property settlement agreement are entirely at odds with the language of the circuit court's order."¹⁰⁷ Thus, the court concluded that it must determine the intent of the parties and the divorce court from analyzing the totality of the circumstances. The court found the intent of the divorcing parties to be obvious: that the amount of alimony would be predictable (nonmodifiable and terminable as contracted).¹⁰⁸ As for the divorce court's intention, since it *did* expressly approve of the agreement despite its inclusion of contradictory language and since *Hereford* indicated that West Virginia favored enforcing fair agreements between divorcing parties, the court found that the divorce court intended to give its approval to the entire contract as entered by the parties and, therefore, held that the alimony provision was not modifiable.¹⁰⁹

Nakashima does not carry forward the spirit of reform heralded in *Hereford*. In *Hereford*, the court announced as close to a bright line rule as one could expect in this area, namely, that in the absence of an express provision in the agreement to the contrary, which provision specifically and unambiguously denies the court jurisdiction to modify alimony, it shall be presumed that "a periodic payment to which reference is made in a divorce decree is *judicially decreed* alimony . . . and is subject to the continuing jurisdiction of the circuit court."¹¹⁰ While it is reasonable to conclude, as the court did, that the divorce court in *Nakashima* in fact meant to approve the provisions contained in the parties' agreement, it is difficult to find the language which "specifically and unambiguously denies the court jurisdiction" over the alimony provision.¹¹¹ The quoted paragraph unambiguously expressed the agreement of the husband to pay alimony for six years, and the wife's agreement to accept that and no more. However, as to denying the court jurisdiction to modify the alimony provisions upon a proper showing of unanticipated changed circumstances, one can only infer that as a *possible* intention of the parties. But, as the court points out, it is a close case, and a close case without the specific, unambiguous language the *Hereford* rule required. Thus, the presumption announced should control, and the payments should have been subject to judicial modification.

While the result in *Nakashima* is probably equitable and even may

107. *Id.* at 210.

108. *Id.*

109. *Id.*

110. *In re Estate of Hereford*, 250 S.E.2d 45, 52 (W. Va. 1978).

111. *Nakashmia v. Nakashima*, 297 S.E.2d 208, 210 (W. Va. 1982).

be an accurate interpretation of the parties'¹¹² and the court's¹¹³ intentions, it is at odds with the *Hereford* holding, and unnecessarily blurs the rule announced in *Hereford*. Thus, it undercuts the predictability that the rule could have brought to divorce settlement agreements in West Virginia.

Although perhaps the most forthright in identifying the problem and proposing a solution, West Virginia is not alone in its approach. Other jurisdictions have attempted to formulate a rule that would clarify the situation. For example, Idaho, as early as 1969, recognized the problems created by an ad hoc, after-the-fact analysis of parties' intentions and in *Phillips v. Phillips*¹¹⁴ rejected this approach.

According to the Idaho Supreme Court:

Cases have held that actual incorporation of the terms of the agreement into a divorce decree or physical attachment of the agreement to the decree will usually, but not always, indicate the intent to merge the agreement into the decree. . . . Other cases have held that "approval," "ratification," or "confirmation" of the agreement by the court is not sufficient to denote merger.¹¹⁵

The court then went on to suggest that these distinctions amounted only to distinctions without real differences and presented no rational basis upon which lawyers and laypersons might guide their actions.¹¹⁶ Thus, in *Phillips*, the Idaho Supreme Court abandoned attempts to decipher the unarticulated intentions of the parties and divorce courts, and adopted a presumption approach.¹¹⁷

The Idaho court held that in the absence of clear and convincing evidence to the contrary, when parties presented a divorce settlement agreement to a court and requested the court to approve, ratify, or confirm the agreement, a presumption would arise that the agreement merged into the decree, would be enforceable as part of the decree, and would be modifiable by the court if necessary in the future.¹¹⁸ On the facts of *Phillips*, the court found no clear intention relating to merger. Therefore, it applied the presumption and held that the di-

112. It is also possible the parties did not intend to divest the court of its continuing jurisdiction over spousal maintenance, as the court itself indicated, calling this a close case. *See id.*

113. The appellate court in *Nakashima* suggested that the disparity between the decree rendered by the divorce court providing for alimony until "further order of this court" and the parties' agreement on the six-year period was simply a clerical error on the part of the divorce court. *Id.* at 211. This is an entirely plausible explanation, and answers the question of whether the divorce court in fact approved the agreement as submitted to it. It does not, however, address the issue of *Hereford's* requirement of a specific provision by the parties in their agreements as necessary to avoid the presumption of continuing jurisdiction to modify.

114. *Phillips v. Phillips*, 93 Idaho 384, 386, 462 P.2d 49, 51-52 (1969).

115. *Id.* at 387, 462 P.2d at 52.

116. *Id.*

117. *Id.*

118. *Id.*

vorice court had continuing jurisdiction to modify an alimony provision.¹¹⁹

Subsequent courts applied the *Phillips* rule.¹²⁰ Then, in *Compton v. Compton*,¹²¹ the court applied, and put a gloss on, the rule. After *Phillips*, the *Compton* court explained: "[I]n close cases a presumption will be indulged in favor of a finding of merger. . . . [I]f there are cross references between the property settlement agreement and the divorce decree, a merger will be presumed unless the parties make it clear that the reference and inclusion is for some other purpose."¹²²

However, this clear rule was confused by the Idaho Supreme Court's decision in *Sullivan v. Sullivan*.¹²³ In *Sullivan*, the parties entered a divorce settlement agreement which provided for alimony, among other things. According to the supreme court's summary of the facts, the agreement provided "that it would be submitted to the court for approval, but *not merged as a part of the judgment*."¹²⁴ The order entered by the divorce court provided that the agreement was "ratified, confirmed and approved, but [was] not merged herein," and "specifically ordered the defendant to make alimony payments."¹²⁵ On these facts, the majority in *Sullivan* concluded that the alimony provision was modifiable by the court, although it ultimately concluded sufficient changed circumstances had not been proven to justify modification.¹²⁶ The problem, of course, as pointedly noted by Justice Shepard,¹²⁷ was that the majority ignored the fact that the parties' agreement specified it was not to be merged, and that the divorce court entered an order stating that the agreement was not so

119. *Id.*

120. *Phillips v. District Court*, 95 Idaho 404, 405, 509 P.2d 1325, 1326 (1973).

121. 101 Idaho 328, 612 P.2d 1175 (1980).

122. *Id.* at 333, 612 P.2d at 1180. It should be noted that the court found the language of the divorce court's order and the agreement "perhaps sufficiently clear" to permit it to hold that the parties intended merger, even without application of the *Phillips* presumption. The agreement provided that it "shall be introduced in evidence in the trial of said divorce action, and subject to the approval of the court, shall be ratified and confirmed in the decree of divorce." The ensuing decree stated "[t]hat all of the terms, provisions and conditions of that certain property settlement and the child custody agreement . . . are hereby ratified, confirmed, approved and made part of this judgment and decree of divorce as if set out here in full." *Id.* at 332-33, 612 P.2d at 1180. While the language of the court order might be so interpreted, the language of the agreement is much less clear, and without the *Phillips* presumption and the gloss added by the court in this case an analysis of intent could go either way.

123. 102 Idaho 737, 639 P.2d 435 (1981).

124. *Id.* at 738, 639 P.2d at 436 (emphasis added).

125. *Id.* at 739 n.6, 639 P.2d at 437 n.6 (emphasis in original deleted).

126. *Id.* at 740, 639 P.2d at 438.

127. *Id.* at 741, 639 P.2d at 439 (Shepard, J., concurring in part and dissenting in part). Justice Shepard concurred in the result, but disagreed with the rationale offered by the majority.

merged.¹²⁸ The majority did not deal with this problem in the body of the opinion but addressed Justice Shepard's criticism in a confusing footnote. The best explanation offered was that neither party had raised the question of the court's ability to modify, and in fact, "*both parties proceeded on the basis that the alimony award was subject to modification.*"¹²⁹

The majority opinion, without citing *Phillips*, acknowledged the general rule that it could not modify a property settlement agreement merely ratified or approved but not merged. However, it found that this general rule did not apply because, in addition to approving the agreement, "*the trial court specifically ordered the defendant to make alimony payments.*" Thus the court had continuing jurisdiction . . . to modify the award."¹³⁰ The majority suggested that even in the face of an explicit non-merger clause in a divorce settlement agreement, a clause which the divorce court apparently approved and included expressly in its order, merger was inferred through application of an old rule providing that merger is accomplished by the court's ordering the parties to do what they have agreed to do in their contract.¹³¹

Concurring specially, Justice McFadden explained that when the trial court ordered the alimony payments "it disregarded the non-merger provisions of the agreement" regarding alimony. The solution, suggested Justice McFadden, was for one of the parties to appeal that portion of the decree. Neither party having appealed, the merger was res judicata, argued Justice McFadden.¹³²

In his concurring and dissenting opinion, Justice Shepard concluded unhesitatingly that no merger was intended by either of the parties, or by the court. This was obvious, he argued, from the circumstances and the explicit provisions of the agreement, the most important one being the provision that said that while the agreement would be submitted to the court for approval, it was not to be merged as part of the judgment. The divorce court's order explicitly held that the agreement was not merged, argued Justice Shepard, when it recited

128. *Id.* at 743, 639 P.2d at 441.

129. *Id.* at 739 n.6, 639 P.2d at 437 n.6. It should be noted that this explanation was offered with respect to the question of whether or not the agreement was "integrated"—that is, whether or not the property and support provisions were so interdependent as to limit the court's authority to modify alimony regardless of merger. Many courts apply the rule that when an agreement covers both support and property arrangements, and when it appears that these provisions are mutually dependent and negotiated one in consideration for the other, modification is inappropriate, despite incorporation or merger, since to modify the support aspects would effectively modify the property aspects. *See, e.g., White v. White*, 296 N.C. 661, 666, 252 S.E.2d 698, 701 (1979).

130. *Sullivan v. Sullivan*, 102 Idaho 737, 739 n.6, 639 P.2d 435, 437 n.6 (1981).

131. *Id.* (citing *Roesbery v. Roesbery*, 88 Idaho 514, 401 P.2d 805 (1965) (holding no merger where court does not order parties to do that to which they have agreed)).

132. *Id.* at 740, 639 P.2d at 439 (McFadden, J., concurring specially).

that the parties' agreement was " 'hereby ratified, confirmed and approved, *but is not merged herein.*' " ¹³³ This, he concluded, totally rebutted the argument that the decree should have been appealed. "It would have been absurd for Sullivan to appeal." ¹³⁴

As in *Nakashima*, it does not appear that the decision in *Sullivan* caused a travesty of justice as far as the parties were concerned. However, the reasoning implicit in the majority opinion cannot be reconciled with *Phillips* and *Compton*. The most satisfactory explanation is that the question of the court's ability to modify simply was not raised by the parties and, therefore, was not before the court. ¹³⁵ However, the majority's willingness to ignore the express agreement of the parties, as well as the apparent approval by the divorce court of all aspects—including non-merger—of the parties' agreement, and to rely instead on inferences drawn from language in the court order not explicitly addressing the issue of merger, unnecessarily resurrects the chaotic approach put to rest in Idaho by *Phillips*.

C. Stipulation or Independent Contract

In considering the status of divorce settlement agreements, Arkansas makes a distinction different than that made by most courts. The decisions recognize two different types of agreements. ¹³⁶ One, labeled an independent contract, although approved by the court and incorporated in the decree, does not merge. ¹³⁷ It retains its contractual character, and thus is not modifiable by the court, although it does carry, in addition to contract remedies, ¹³⁸ the contempt remedy. ¹³⁹ The other

133. *Id.* at 743, 639 P.2d at 441 (Shepard, J., concurring and dissenting).

134. *Id.*

135. *Id.* at 739 n.6, 639 P.2d at 437 n.6. See *supra* text accompanying note 129.

136. *Armstrong v. Armstrong*, 248 Ark. 835, 838, 454 S.W.2d 660, 662 (1970).

137. *Id.*

138. *Id.* at 837-38, 454 S.W.2d at 662.

139. *Id.* Allowing contempt as a remedy where payments of spousal support are not modifiable raises the possibility of harsh results. "[I]nitially fair agreements may be rendered manifestly oppressive" by unforeseeable changed circumstances that may develop over the long term over which many of these agreements will run. *McClain v. McClain*, 15 Ohio St. 3d 289, 291, 473 N.E.2d 811, 814 (1984) (Ford, J., dissenting). See also *In re Marriage of Neilson*, 100 Cal. App. 3d 874, 877-78, 161 Cal. Rptr. 272, 275 (1980). Softening the harshness, however, is the general rule that an obligor only can be found in contempt of court for failure to pay support if the obligor *willfully* fails to pay. See, e.g., *Maggio v. Zeitz*, 333 U.S. 56, 68, 72-73 (1948) (defendant must be able to perform what the court has ordered for imprisonment for civil contempt to lie) (consideration in context of bankruptcy proceeding where defendant failed to comply with court's turnover order); *Sword v. Sword*, 59 Mich. App. 730, 734, 229 N.W.2d 907, 908 (1975) (defendant must be shown able to comply to be found willfully in contempt), *aff'd*, 399 Mich. 367, 249 N.W.2d 88 (1976); *Barrett v. Barrett*, 470 Pa. 253, 261-64, 368 A.2d 616, 619-621 (1977) (following discussion of civil as opposed to criminal contempt court concludes that noncompliance must be willful); H. CLARK, *supra* note 1, § 16.6, at 675.

results when the parties, without making a contract that is intended to confer upon them independent contractual rights and obligations, merely present to the court a stipulated agreement as a means of dispensing with proof on the appropriate amount of support.¹⁴⁰

Distinguishing between "mere stipulations" and "independent contracts" may cause more difficulty than these explanations suggest. In *Armstrong v. Armstrong*, the court considered and found persuasive the comprehensiveness of the agreement¹⁴¹ and the fact that provisions were included which the court would not have had the power to award on its own, absent the agreement, and concluded the parties intended an independent contract.¹⁴²

Attesting to the difficulty in making such decisions with any certainty, the dissenting opinion in *Armstrong*, though agreeing with the majority on the applicable law, reached the exact opposite conclusion.¹⁴³ The dissent noted that the language of the decree, along with the fact that suit was filed and tried less than a month after the agreement was entered, and that the agreement itself was captioned as it would have been if it were a pleading filed or a decree issued, indicated that a stipulation, not an independent agreement was intended. The dissent found "the conclusion that the agreement was merged into the decree inescapable."¹⁴⁴ The dissenting justice had criticized the Arkansas approach in the past, calling it "judicial hairsplitting" and decrying the confusion generated by characterizing seemingly like agreements differently.¹⁴⁵ Intermediate courts were left to further develop and interpret the rules. In *Sterling v. Sterling*,¹⁴⁶ the Arkan-

Thus, inability to pay brought on by changed circumstances would be a defense to a possible jail term. However, it would not help the party who, though able to pay, would, because of changed circumstances, find payment extraordinarily burdensome.

Further, at least under Arkansas law, the rule need not be as harsh as it appears since the court is not required to impose contempt for violation of its decree, and may consider the circumstances in exercising its discretion to do so. *Armstrong v. Armstrong*, 248 Ark. 835, 837-38, 454 S.W.2d 660, 662 (1970).

140. *Armstrong v. Armstrong*, 248 Ark. 835, 838, 454 S.W.2d 660, 662 (1970)(quoting *Seaton v. Seaton*, 221 Ark. 778, 255 S.W.2d 954 (1953)).

141. *Id.* at 839, 454 S.W.2d at 663. The court noted that the agreement covered nine different areas. *Id.*

142. *Id.* For example, the husband agreed to pay alimony for the wife's life, and agreed to support his daughter past the age of majority. The court had no power under Arkansas law to make either of these awards. *Id.* at 839-40, 454 S.W.2d at 663.

143. *Id.* at 840, 454 S.W.2d at 663 (Fogleman, J., dissenting).

144. *Id.* at 841, 454 S.W.2d at 664 (Fogleman, J., dissenting). Justice Fogleman commented, "I cannot conceive of a situation in which the parties might go to greater lengths to merge an agreement into a decree than they went here." *Id.*

145. *Law v. Law*, 248 Ark. 894, 902, 455 S.W.2d 854, 858 (1970)(Fogleman, J., dissenting)(noted in Annotation, *supra* note 28, at 571).

146. 2 Ark. App. 168, 621 S.W.2d 1 (1981).

sas Court of Appeals considered the status of an alimony provision in a divorce settlement agreement. The court applied *Armstrong* to a situation in which the parties had entered into a written agreement concerning alimony. The divorce court, in its decree, made no specific reference to the alimony provided, but did recite that the parties had reached an agreement settling property rights "which was incorporated into this decree by reference and made a part thereof."¹⁴⁷ In applying *Armstrong*, the court of appeals referred to the divorce settlement agreement as a "complete contract," and relied on the facts that the agreement made no reference to the divorce court's decree and that the decree made no reference to alimony, either as provided in the agreement or otherwise, to find that it constituted an "independent agreement" and not a stipulation.¹⁴⁸ *Sterling*, thus, added a gloss to the rule announced in *Armstrong*.

In *Linehan v. Linehan*,¹⁴⁹ the Arkansas Court of Appeals again faced the question of the status of a divorce settlement agreement and applied one of the rules announced in *Armstrong*—that an agreement that provides relief the court could not itself grant, is not intended to be merged. In *Linehan*, the parties informed the divorce court on the day of trial that they had negotiated an agreement which was read into the record. The court referred to the agreement as a stipulation, apparently applying the term in its more generally understood sense—that is to mean a compromise reached between litigants, rather than the term of art set out in *Armstrong*.¹⁵⁰ The agreement provided that it should be "incorporated by reference into the decree of divorce," and resolved every point in controversy between the divorcing parties. The divorce court incorporated the entire agreement with no variations.¹⁵¹ The court of appeals found that since the parties' alimony provision was one the court could not have made,¹⁵² but rather was based upon a negotiated bargain, the agreement must have been intended to be an independent contract.¹⁵³ Again, as in *Armstrong*, the court was persuaded further by the comprehensiveness of the agree-

147. *Id.* at 169, 621 S.W.2d at 2.

148. *Id.* at 172, 621 S.W.2d at 3.

149. 8 Ark. App. 177, 649 S.W.2d 837 (1983).

150. *Id.* at 179-80, 649 S.W.2d at 838-39. Because Arkansas distinguishes between independent contracts, and what it labels mere "stipulations," use of the word stipulation to refer to the parties in-court consensus, which the court found to be an independent contract, unnecessarily confused the analysis. The court did explain the two different meanings of "stipulation," perhaps clarifying matters somewhat. *Id.* at 180, 649 S.W.2d at 839.

151. *Id.* at 179, 649 S.W.2d at 838.

152. *Id.* at 181, 649 S.W.2d at 839. The parties agreed to a lump sum (\$5,000) payable over five years. A court award of such alimony in gross, according to the court of appeals, would be contrary to a long line of Arkansas cases. *Id.*

153. *Id.*

ment.¹⁵⁴ Again, as in *Armstrong*, there was a dissent.

Accusing the majority of "further befuddling an important but already confusing area of our law," the dissent concluded that the agreement was not only a stipulation in the generally understood sense, but also under the rule articulated in *Armstrong*.¹⁵⁵ The dissent reasoned, "[h]ere, the parties' agreement was stipulated—not contracted—and the court's decree was based solely on those stipulations announced in and approved by the chancery court. . . . [T]he parties' stipulations by no stretch of the imagination conferred on either of them an independent contractual right."¹⁵⁶

Thus, the Arkansas approach, like others we have examined, results in the evolution of a confusing, unpredictable body of law.

D. Statutory Solutions

1. *Status of the Agreement*

a. *UMDA Approach*

One way to clarify the matter of divorce settlement agreements is to provide statutorily for the effect such agreements will have. With its stated intention to "promote amicable settlement of disputes between parties to a marriage," the Uniform Marriage and Divorce Act (UMDA) makes specific provision for divorce settlement agreements. It addresses head on the questions of merger and incorporation, the agreement's status following the divorce, and the availability of modification and judgment or contract remedies.¹⁵⁷ In pertinent part, section 306 of the UMDA provides as follows:

(b) In a proceeding for dissolution of marriage or for legal separation, the terms of the separation agreement, except those providing for the support,

154. *Id.*

155. *Id.* at 181-83, 649 S.W.2d at 839-40 (Glaze, J., with whom Cooper, J., joined, dissenting).

156. *Id.* at 182-83, 649 S.W.2d at 840.

157. UMDA § 306, 9A U.L.A. 216 (1987). As of 1987, eight jurisdictions had adopted some version of the UMDA. Adopting states, however, may interpret these statutory provisions somewhat differently. Further, not all states adopting the UMDA did so without revision. See, e.g., ARIZ. REV. STAT. ANN. § 25-317 (1976). The UMDA as promulgated provides that an agreement set forth in the decree is enforceable as both a judgment (remedy: contempt, garnishment) and a contract (remedy: contract damages), that the parties may preclude modification of provisions except those relating to child support, custody, and visitation, and if they do not preclude modification, any modification of the judgment automatically modifies the agreement. Arizona's version, on the other hand, provides that terms set forth in the decree are enforceable by all remedies available for enforcement of a judgment, with no mention of contract remedies, and consistent with this, makes quite different provisions for modification. *Id.* See MO. REV. STAT. § 452.325 (1986). See also *supra* notes 78-96 and accompanying text.

custody and visitation of children, are binding upon the court unless it finds, . . . that the separation agreement is unconscionable. .

. . . .

(d) If the court finds that the separation agreement is not unconscionable as to disposition of property or maintenance, and not unsatisfactory as to support:

(1) unless the separation agreement provides to the contrary, its terms shall be set forth in the decree of dissolution or legal separation and the parties shall be ordered to perform them, or

(2) if the separation agreement provides that its terms shall not be set forth in the decree, the decree shall identify the separation agreement and state that the court has found the terms not unconscionable.

(e) Terms of the agreement set forth in the decree are enforceable by all remedies available for enforcement of a judgment, including contempt, and are enforceable as contract terms.

(f) Except for terms concerning the support, custody, or visitation of children, the decree may expressly preclude or limit modification of terms set forth in the decree if the separation agreement so provides. Otherwise, terms of a separation agreement set forth in the decree are automatically modified by modification of the decree.¹⁵⁸

Thus, the UMDA contemplates two types of agreements. One, the hybrid contract/decreed, occurs when the agreement is set forth in the decree, and the parties are ordered to perform. It is enforceable as a judgment *and* as a contract and is modifiable by the court, unless the agreement expressly provides for nonmodification and the court approves. In this case, modification of the decree automatically modifies the agreement. The other type, more like an independent contract, arises when the agreement is not set forth in the decree pursuant to the express provision to that effect by the parties. It remains as an independent contract only, which has, however, been identified and approved as not unconscionable by the court.

Questions inevitably arise, and, although the statute does not use the words "incorporate," "incorporate by reference," or "merger," some courts interpreting UMDA-based statutes still employ these terms to describe what has or has not occurred with respect to the agreement.¹⁵⁹

In *Yearout v. Yearout*,¹⁶⁰ the Washington Court of Appeals ad-

158. UMDA § 306, 9A U.L.A. 216 (1987).

159. For example, in *Yearout v. Yearout*, 41 Wash. App. 897, 898, 707 P.2d 1367, 1369 (1985), "[t]he Superior Court . . . provided, by incorporating the written separation contract of the parties into the decree, that Mr. Yearout pay maintenance." The court also said, "[t]he paragraph in the dissolution decree incorporating the separation agreement reads." *Id.* The court further held: "[I]n the case before us, the separation agreement clearly had been merged into the decree. Generally, if a prior court decree confirms, approves, or incorporates by reference the terms of a separation agreement a merger has occurred." *Id.* at 900, 707 P.2d at 1370.

160. 41 Wash. App. 897, 707 P.2d 1367 (1985).

ressed whether, under its version of the UMDA,¹⁶¹ a particular divorce decree had approved and set out a nonmodification clause sufficiently to make it part of the decree. The court of appeals held:

[T]he court emphasized full incorporation of the pertinent provisions of the agreement in three ways: (1) 'incorporated herein by reference as if fully set forth,' (2) 'perform all . . . obligations . . . , in the form and in the manner as set forth therein,' and (3) 'each and every obligation of Respondent therein becomes a portion of this Decree.'¹⁶²

The court of appeals' holding is consistent with the statute. Although the divorce court did not set forth the agreement's provisions word for word, it accomplished this in effect when it incorporated them by reference.¹⁶³ The court also expressly ordered the parties to perform, thus complying with both requirements of the statute.

However, the court clouded the issue with its explanation. Instead of tracking the language of the statute and matching it to the language of the divorce decree, the court of appeals quoted the provisions in the divorce decree, and then explained:

[T]he separation agreement clearly had been merged into the decree. Generally, if a prior court decree confirms, approves, or incorporates by reference the terms of a separation agreement a merger has occurred. . . . Ultimately, however, an appellate court will look to the intent of the parties and the trial court as expressed in the documents themselves to determine whether a merger has occurred.¹⁶⁴

Invocation of these tired, equivocal terms was unnecessary in light of the clear provisions of the statute. More important, these terms carry with them conceptual baggage that is inconsistent with the design of the UMDA as adopted by Washington.

Montana, too, adopted the UMDA without substantive changes,¹⁶⁵ and its courts have considered the question of the status of a divorce settlement agreement under the statute. In one case, *In re Marriage*

161. WASH. REV. CODE ANN. § 26.09.070 (1986). Washington adopted § 306 of the UMDA without substantive changes.

162. *Yearout v. Yearout*, 41 Wash. App. 897, 899-900, 707 P.2d 1367, 1370 (1985).

163. Incorporation by reference is a perfectly acceptable way to describe what amounts essentially to a mechanical process of including in one document (here the decree) the terms of another identified or "referenced" document (here the divorce settlement agreement) without actually repeating each and every term. It is not the use of the term "incorporation by reference" as shorthand for actually copying an agreement that has caused confusion. Rather, it is the use of "incorporation" or incorporation by reference with the term "merger" to describe a result carrying with it certain legal baggage that has caused confusion, because of careless, inconsistent and frequently interchangeable use of the terms to describe a variety of results. The *Yearout* court does this.

164. *Yearout v. Yearout*, 41 Wash. App. 897, 900, 707 P.2d 1367, 1370 (1985) (emphasis added).

165. MONT. CODE ANN. § 40-4-201 (1987).

of *Lorge*,¹⁶⁶ the Supreme Court of Montana had to determine the appropriateness of an award of attorney's fees to a wife seeking to enforce a divorce settlement agreement—the award being appropriate if the divorce settlement agreement was set out in the decree and inappropriate if it remained merely a separate contract between the parties.¹⁶⁷ The court quoted the Montana statute and then observed that “the agreement did not provide ‘that its terms shall not be set forth in the decree,’¹⁶⁸ but the parties did not request that it be incorporated into the decree.”¹⁶⁹ The court concluded that the divorce court had followed the procedures set forth in the statute. The divorce court decided whether the terms of the agreement were “reasonable and not unconscionable,” and it did not set forth the terms of the agreement in the decree. Therefore, the supreme court reasoned, the agreement was a private contract between the parties, for “[w]hen the terms of an agreement are not set forth in the decree, the agreement retains the status of a private contract.”¹⁷⁰

The Montana Supreme Court's reasoning, however, is not consistent with the statute. The statute specifically provides that unless the parties provide to the contrary in their agreement, it “*shall be set forth in the decree*.”¹⁷¹ It thus sets up a presumption that the agreement will be set out in the decree, and thereby achieve the hybrid contract/judgment status unless the parties provide to the contrary. If they make no provision, as in *Lorge*, the presumption should control, and the agreement should be set forth by the divorce court in its decree.

However, the Montana Supreme Court in *Lorge* reversed the presumption. While acknowledging that the agreement before it did not specify that it should not be set forth in the decree, the court was persuaded by the fact that the parties did not specifically request that it be incorporated and the fact that the divorce court did not set it forth to justify the result that the agreement was a purely private contract. The divorce court's action created an inconsistency that the supreme court had to resolve. The divorce court's solution and especially its explanation are contrary to the statutory provisions.

The problem, as recognized by the dissent,¹⁷² was created when the

166. 207 Mont. 423, 675 P.2d 115 (1984).

167. *Id.* at 427, 675 P.2d at 117.

168. *Id.* at 428, 675 P.2d at 117. The court here referred to and quoted the statutory language of § 40-4-201(4)(a) (Montana's codification of the UMDA) which provides: “unless the separation agreement provides to the contrary, its terms shall be set forth in the decree of dissolution or legal separation and the parties shall be ordered to perform them.” MONT. CODE ANN. § 40-4-201(4)(a) (1987).

169. *In re Marriage of Lorge*, 207 Mont. 423, 428, 675 P.2d 115, 117 (1984).

170. *Id.*

171. MONT. CODE ANN. § 40-4-202(4)(a) (1987)(emphasis added).

172. *In re Marriage of Lorge*, 207 Mont. 423, 428, 675 P.2d 115, 119 (Sheehy, J., dissenting).

divorce court, in the face of an agreement which did not expressly preclude it, did not set forth the terms of the parties agreement in the decree as the statute required. Thus, contrary to the majority's finding that the "court followed the procedure prescribed in subsection 40-4-201(4)(b),"¹⁷³ the divorce court did not follow the statute when it entered the divorce decree. When the agreement is silent with regard to whether or not it should be set out, the parties simply have not met the statutory requirement of "providing to the contrary." The presumption controls, and the court has no choice but to set forth the agreement's provisions in its decree.¹⁷⁴ Perhaps the suggestion in *Sullivan*¹⁷⁵ that the parties' remedy would have been to appeal the divorce court's order should be applied here. The party seeking the protective provision of the statute had notice that her desires had not been accomplished, and that the court was not complying with the provisions of the statute, and should have sought, in timely fashion, to appeal and correct the order.

However, no appeal was made, and the resulting status of the agreement was, therefore, ambiguous. In the face of this ambiguity, the supreme court would have been better to apply the statute in a straightforward fashion and to correct the error where it was made, as the dissent suggested. Under the statute, the divorce court should have set out the agreement in its decree,¹⁷⁶ and by doing so provided the wife with the protection and enforcement options offered by the statute. It missed its duty in the first instance, so the traditional rule of equity should have been applied, and that which ought to have been done should be regarded as having been done.¹⁷⁷ That is, the same result could be achieved by invoking this equity principle, instead of by manipulation of the statutory provisions.

As it is, the Montana Supreme Court unnecessarily injected ambiguity into application of the statute, which in effect set up a presumption that an agreement will be set forth in the decree and imposed the burden on the parties to avoid this by express language in the agreement. The Montana Supreme Court in its explanation, however, impliedly reversed this, shifting the burden to the parties to get the agreement *into* the decree, rather than to keep it *out*.

By contrast, Missouri, which adopted the UMDA with some revisions,¹⁷⁸ has demonstrated a steady commitment to clarity and consistency under the statute in its cases considering whether or not an

173. *Id.* at 428, 675 P.2d at 117.

174. *Id.* at 431, 675 P.2d at 119.

175. See *supra* note 132 and accompanying text.

176. *In re Marriage of Lorge*, 207 Mont. 423, 431-32, 675 P.2d 115, 116 (1984); MONT. CODE ANN. § 40-4-201(4)(a) (1987).

177. *In re Marriage of Lorge*, 207 Mont. 423, 431-32, 675 P.2d 115, 119 (1984) (Sheehy, J., dissenting) (citations omitted).

178. MO. REV. STAT. § 452.325 (1986).

agreement has been set forth in a decree, or survives as a contract. In *Haggard v. Haggard*,¹⁷⁹ the Missouri Supreme Court announced the general rule under the statute: If the agreement was not expressly excluded from the decree, it became part of the judgment.¹⁸⁰ Subsequent opinions by intermediate appellate courts applied the rule in straightforward fashion.¹⁸¹

In *Bryson v. Bryson*,¹⁸² the court faced a situation in which a finding of merger would have relieved the husband of all obligations to make the payments, leaving the wife remediless. The parties had agreed to a maintenance award based on a percentage of the husband's income, which the divorce court had approved as not unconscionable. The parties' separation agreement made no express provision that it was to survive as a contract. Under the body of law that evolved in Missouri prior to adoption of its UMDA-based Dissolution of Marriage Act, such a percentage-based alimony award made by a court would be deemed too indefinite to be enforced as a decree.¹⁸³ In a declaratory judgment action brought by the wife, the trial court held that, under the statute, the agreement had merged into the decree because the parties did not provide to the contrary. Therefore, it concluded, the agreement lost its contractual nature, and as a decree, it was unenforceable because it was too indefinite.¹⁸⁴

On appeal, the court resisted the temptation to achieve an equitable result by manipulating the explicit statutory provisions regarding whether or not an agreement survives a decree. Rather, it stated and applied the rules to the facts and held that since the separation agreement did not expressly provide that it would remain contractual, it lost its contractual nature and became part of the decree.¹⁸⁵ The wife's remedy was an action for enforcement of the decree, which raised the problem of the indefiniteness of the alimony provision. The court then undertook a principled reanalysis of the old law regarding the enforceability of an uncertain decree such as this.¹⁸⁶ It observed that "[t]he Dissolution of Marriage Act changed the law," and cited the Missouri Supreme Court's statement in *Haggard* that "[i]t is unclear whether the limitations which applied to decretal alimony should also apply to . . . maintenance [under the new Dissolution of

179. 585 S.W.2d 480 (Mo. 1979).

180. *Id.* at 482.

181. *E.g.*, *Blank v. Blank*, 698 S.W.2d 623 (Mo. Ct. App. 1985); *Davis v. Davis*, 687 S.W.2d 699 (Mo. Ct. App. 1985); *Bryson v. Bryson*, 624 S.W.2d 92 (Mo. Ct. App. 1981).

182. 624 S.W.2d 91 (Mo. Ct. App. 1981).

183. *Id.* at 96.

184. *Id.* at 95-96.

185. *Id.* at 96.

186. *Id.*

Marriage Act].'¹⁸⁷ The court concluded that despite its indefiniteness, the decree was enforceable. The court noted that under the new Act the divorce court was bound by the parties' agreement if it was conscionable, and that the divorce court could enter a decree pursuant to an agreement which it did not have the power to make in the absence of the agreement. From this, the court found that precedents regarding unenforceability of indefinite alimony awards were inapplicable to decrees entered pursuant to agreements under the new Dissolution of Marriage Act.¹⁸⁸

However, Missouri's law is not without its own complications. As noted above, Missouri revised the UMDA when it adopted it. The legislature did not retain the UMDA provision which would allow remedies both in contract (i.e., damages) and on the judgment (i.e., contempt, garnishment, etc.) when an agreement is set forth in the decree. Only judgment remedies are available.¹⁸⁹ As a result, an agreement set out in the decree more closely resembles what has traditionally been called merger, as contract rights and remedies do not survive its being set forth or included in the decree. Under the UMDA, the options are an independent contract, approved by the court as not unconscionable,¹⁹⁰ or a hybrid contract/decreed.¹⁹¹ By contrast, under the Missouri statute the two options are an independent contract, or a decree based on but superseding the parties' agreement.¹⁹²

One problem generated by the Missouri approach was faced by the

187. *Id.* at 97 (quoting *Haggard v. Haggard*, 585 S.W.2d 480, 482 (Mo. 1979)).

188. *Id.* at 97-98.

189. The Uniform Marriage and Divorce Act provides as follows: "Terms of the agreement set forth in the decree are enforceable by all remedies available for enforcement of a judgment, including contempt, and are enforceable as contract terms." UMDA § 306(e), 9A U.L.A. 217 (1987).

The Missouri statute provides:

5. Terms of the agreement set forth in the decree are enforceable by all remedies available for the enforcement of a judgment, and the court may punish any party who willfully violates its decree to the same extent as is provided by law for contempt of the court in any other suit or proceeding cognizable by the court.

MO. REV. STAT. § 452.325 (1986).

190. This option, as explained above, entitles the parties to contract remedies only, and does not permit modification unless expressly provided for in the agreement. UMDA § 306, 9A U.L.A. 216 (1987). *See supra* notes 157-58 and accompanying text.

191. UMDA § 306, 9A U.L.A. 216 (1987). This option entitles the parties to both contract remedies and judgment remedies, but the hybrid contract/decreed is modifiable by the court upon a proper showing by one party, unless the parties expressly agree to the contrary and any modification of the decree also modifies the agreement. *See supra* notes 157-58.

192. *See Davis v. Davis*, 687 S.W.2d 699, 701 (Mo. Ct. App. 1985); *Haggard v. Haggard*, 585 S.W.2d 480, 481-82 (Mo. Ct. App. 1979).

Missouri Court of Appeals in *Blank v. Blank*.¹⁹³ In *Blank*, the divorce court specifically found the parties' agreement not unconscionable, and proceeded, pursuant to the statute, to set it forth in the decree, because the parties had not expressly precluded this. However, in setting forth the agreement in the decree, the court inadvertently left out several paragraphs of the agreement relating to spousal maintenance.¹⁹⁴ When the wife sought to enforce the agreement's maintenance provisions, the husband argued that because the Missouri statute provided that the agreement, once set out in the decree was enforceable as a judgment only, it, therefore, was superseded by and merged into the decree. Since the maintenance provisions were omitted from the decree, he reasoned the agreement no longer existed, and the provisions were rendered a nullity.¹⁹⁵

The court of appeals disagreed, citing the statute's express purpose of encouraging parties to enter agreements which they should be able to rely upon as enforceable. To serve that purpose, the court held that the provisions omitted from the decree would remain enforceable as contractually undertaken obligations, and were not superseded by the decree.¹⁹⁶

Of course, the result is not perfectly reconcilable with the statute, but then perfect reconciliation was made impossible by the divorce court's error. Given that no choice would precisely comport with the statutory provisions, the court at least resisted the temptation to manipulate the question of merger. What is most important about the decision is that the Missouri court, when faced with a compelling situation which essentially fell between the cracks, focused on the purpose of the statute—encouragement of private ordering by agreement—and recognized that to achieve that purpose, it had to protect certainty of contract and avoid manipulation of the merger issue.

The parties in *Blank* followed the statute and did exactly what was prescribed in order to have their agreed-to terms become an enforceable judgment of the court. It was the clerical mistake that offered the husband a loophole. The court of appeals reasoned that the obligor should not be allowed later to escape the obligations he freely undertook in the contract because of the clerical error of the divorce court in entering the divorce decree, as this would undermine predictability of contract enforcement and dissuade parties from entering agreements.¹⁹⁷

However, a more appropriate result would have been to leave the parties to the remedy of direct appeal to correct the divorce court's

193. 698 S.W.2d 623 (Mo. Ct. App. 1985).

194. *Id.* at 624.

195. *Id.* at 625-26.

196. *Id.* at 626.

197. *Id.*

error, as suggested earlier in connection with *Lorge and Sullivan*.¹⁹⁸ Of course the parties did not, in fact, appeal in this case, and this approach would leave this wife with no remedy. But she could have appealed and had notice of her grounds by virtue of the court's obvious error in approving the agreement in toto but failing to set out all of its terms.

Other problems arise as well under UMDA-type provisions, and situations will persist in which no easy determination can be made. For example, in *Young v. Burkholder*,¹⁹⁹ the Arizona Court of Appeals, applying that state's UMDA-based divorce code,²⁰⁰ was faced with a case in which it found the language of the agreement and the decree made it quite unclear what the parties intended, and what the court assumed it had accomplished.²⁰¹

The court looked to the statute for guidance, and noted that the statute contemplated two possibilities: (1) that the agreement is superseded by the decree and no contract rights or remedies survive; or

198. See *supra* notes 172-75 and accompanying text. See also *supra* notes 130-35 and accompanying text.

199. 142 Ariz 415, 690 P.2d 134 (Ct. App. 1984).

200. ARIZ. REV. STAT. ANN. § 25-317 (1976). Arizona modeled its legislation after the UMDA, but like Missouri, left out the provision for a hybrid contract/decreed. For a fuller discussion of the difference between this legislation and the UMDA, see *supra* note 157, and the discussion of Missouri law, *supra* notes 178-96 and accompanying text.

201. *Burkholder* involved child support and not alimony. However, the provision in question concerned post-majority support during college, which would not be enforceable as a court award, but would be as a contract. *Young v. Burkholder*, 142 Ariz. 415, 417-18, 690 P.2d 134, 136-37 (Ct. App. 1984). According to the court of appeals opinion, the agreement provided as follows:

[I]rrespective of whether either of the parties secures a decree of dissolution, this Agreement in whole or in part shall be binding upon the parties hereto and upon their agents, employees, representatives, heirs, executors, administrators, successors and assigns.

. . . The parties hereto understand, covenant, and agree that this Agreement shall be submitted for approval to the Superior Court of Arizona, in and for the county of Maricopa, in event an action for dissolution is filed and that at the sole request of the moving party with the approval of the Court, this Agreement shall be incorporated by the said Court in the Judgment and Decree of Dissolution, the same as if fully set forth therein. This Agreement is and shall be considered strictly as an agreement settling and adjusting their mutual rights and obligations and their rights respecting property, and the same being the free and voluntary act of each of the parties hereto.

Id. at 417, 690 P.2d at 136.

The decree entered by the divorce court referred to this agreement as follows:

The Court finds . . . the spouses have agreed to a written property settlement agreement dated the 28th day of February, 1974, a signed copy of which has been filed with this Court and which is hereby incorporated by reference herein setting forth the disposition of the property and terms of support which the Court finds fair and reasonable.

Id.

(2) that the contract survives but no judgment rights or remedies survive. The court then concluded that "[p]ursuant to the statute, incorporation causing merger would be the rule and incorporation merely to identify the agreement would be the exception . . . and would occur if the 'separation agreement provides that its terms shall not be set forth in the decree.'"²⁰²

While this analysis of the statute suggests a straightforward approach, the court allowed itself to be drawn into interpreting the intentions of the parties by its perception of ambiguity in the agreement and decree under consideration. Acknowledging that the agreement before it did not expressly provide that its terms should not be set forth in the decree, the court of appeals noted that the agreement did state that it should be incorporated only at the request of the moving party, which the court reasoned, gave the moving party the right to decide whether to request that the agreement be incorporated or not. The wife, who was the moving party, maintained, at least at the late date of litigation, that she had not intended to "merge" the agreement, and buttressed her argument by language of the agreement which repeatedly alluded to its finality and enforceability as a contract. Further, she argued, merger would be absurd because it would render unenforceable the husband's promise to pay for the children's college educations.²⁰³

Adding to the confusion was the language of the decree. Despite the absence of a non-merger clause in the agreement, the divorce court did not, in its decree, order the parties to perform the terms of the agreement as required by the statute.²⁰⁴ Therefore, the court decided that it could not conclude positively from the language used whether the divorce court was merely identifying and approving the agreement, intending it to survive.²⁰⁵ Thus, the court held that the question of whether the agreement survived had to be determined by analyzing the parties' intentions.²⁰⁶

Arguably a clear, and relatively easy, result could be obtained by applying the statute strictly. Under this approach, because the parties did not provide to the contrary in their agreement, it merged into and was superseded by the decree.²⁰⁷ This would be consistent with the court's analysis that, under the statute, incorporation causing merger is the rule and incorporation merely to identify is the exception.²⁰⁸

202. *Id.* at 419, 690 P.2d at 138.

203. *Id.* at 419-20, 690 P.2d at 138-39.

204. *Id.* at 420, 690 P.2d at 139.

205. *Id.*

206. *Id.* At the beginning of the case, the court discussed Arizona law prior to the adoption of the UMDA-based statute and addressed how the intentions of the parties could be determined. *Id.* at 418-19, 690 P.2d at 137-38.

207. See ARIZ. REV. STAT. ANN. § 25-317(c) (1976).

208. *Young v. Burkholder*, 142 Ariz. 415, 419, 690 P.2d 134, 138 (Ct. App. 1984).

However, although the facts of this case are not as compelling as those in *Hereford*,²⁰⁹ they certainly do beg for a fair result, explaining why the court let itself be drawn back into considering the vague unarticulated intentions of the parties. The father had contractually promised to provide for the children's college educations, presumably in exchange for some consideration from the wife. The court approved the agreement.²¹⁰ Should the husband be permitted to renege on his bargain? Strict application of the no-express-provision-to-the-contrary rule would require this result. However, by ignoring the individual equities of the case, development of a coherent, predictable body of law would better serve the broader goal of providing parties with a certain base from which to bargain.

b. Other Statutory Approaches

Other states, although not adopting the UMDA, have attempted, through statutes, to simplify determination of the status, modifiability, and remedies of divorce settlement agreements.²¹¹ Prior to adoption of a statute addressing the issue, the California courts also engaged in determination of the elusive intentions of the parties,²¹² an analysis which, as one California case noted, caused the case law to develop "complicated distinctions," and resulted in a "constant stream of litigation wherein the courts were required to interpret language of agreements and decrees which were not always as clearly drawn as could be desired."²¹³

However, rather than specifically addressing merger or survival of the divorce settlement agreement following entry of the decree, the California statute deals directly with two of the questions which arise, or more accurately, two of the results which flow therefrom: (1) what remedies are available to the parties; and (2) whether the agreed-to provisions can be modified later by the court. The statute provides that all orders for support "based on the agreement shall be deemed law-imposed and shall be deemed made under the power of the court

209. *In re Estate of Hereford*, 250 S.E.2d 45 (W. Va. 1978). In *Hereford*, the separation agreement provided for alimony beyond the death of the payor but the decree did not make that clear. The payee spouse was, at the time of her husband's death, 71 years old, in a nursing home, and unable to support herself. *Id.* at 48-49.

210. *Young v. Burkholder*, 142 Ariz. 415, 421, 690 P.2d 134, 140 (Ct. App. 1984).

211. *In re Marriage of Smiley*, 53 Cal. App. 3d 228, 232, 125 Cal. Rptr. 717, 719 (1975).

212. See *In re Marriage of Smiley*, 53 Cal. App. 3d 228, 231-32, 125 Cal. Rptr. 718-19 (1975); *Flynn v. Flynn*, 42 Cal. 2d 55, 58-59, 265 P.2d 865, 866-67 (1954). For a discussion of the factors considered in determining the intentions of the parties, see *Flynn v. Flynn*, 42 Cal. 2d 55, 265 P.2d 865 (1954). For a discussion of the development of the law in California, see *In re Marriage of Smiley*, 53 Cal. App. 3d 228, 231-33, 125 Cal. Rptr. 717, 718-20 (1975).

213. *In re Marriage of Smiley*, 53 Cal. App. 3d 228, 231-32, 125 Cal. Rptr. 717, 718-19 (1975).

to make the orders."²¹⁴ This gives the parties the remedies available to enforce court decreed support (i.e., contempt, levy of execution)²¹⁵ without making any determination with respect to merger or incorporation.

With respect to the question of modifiability, the statute provides:

[T]he provisions of any agreement or order for the support of either party shall be subject to subsequent modification or revocation by court order . . . except to the extent that any written agreement, or, if there is no written agreement, any oral agreement entered into in open court between the parties, specifically provides to the contrary.²¹⁶

Again, independent of a determination of merger or incorporation, the statute specifies the result. However, in this case, the parties may, by specifically providing for nonmodification, avoid the statutorily imposed result. What constitutes language in an agreement which "specifically provides to the contrary," is the hook that throws a seemingly clear rule into uncertainty.²¹⁷

Unfortunately, the California statute applies these clarifications only to spousal maintenance and child support. Agreements dealing strictly with property division, though specifically contemplated by the statute,²¹⁸ are left to the old law of determining the intention of the parties.²¹⁹ While it is true that many of the most troubling problems arise because of the modifiability and enforcement issues associated only with child support and spousal maintenance, the question of merger can affect property settlements as well. For example, in *In re Marriage of Lane*,²²⁰ the question arose as to whether the wife had a breach of warranty action (a contract remedy) against her husband for not fully disclosing the extent and value of his assets when their divorce settlement agreement contained an express warranty that all information provided to the wife and her counsel regarding the husband's property was accurate and current. If the agreement had merged, the wife would have no remedy. The question of the fairness of the agreement on its face was determined by the court when it

214. CAL. CIV. CODE § 4811(b) (West 1983 & Supp. 1987).

215. *Id.* § 4380 (West 1983); *see id.* § 4383 (West 1983 & Supp. 1987).

216. *Id.* § 4811 (West 1983 & Supp. 1987).

217. A full analysis of this issue is beyond the scope of this article. However, considerations range from the effectiveness of general boilerplate provisions, *see* *Fukuzaki v. Superior Court*, 120 Cal. App. 3d 454, 174 Cal. Rptr. 536 (1981); *In re Marriage of Nielson*, 100 Cal. App. 2d 874, 161 Cal. Rptr. 272 (1980), to questions of more specific versus more general provisions in a case where the question of modifiability was not addressed directly, *see In re Marriage of Forum*, 145 Cal. App. 3d 599, 193 Cal. Rptr. 596 (1983). For a full discussion of this line of cases in California up to 1984, *see In re Marriage of Hufford*, 152 Cal. App. 3d 825, 199 Cal. Rptr. 726 (1984).

218. *See* CAL. CIV. CODE §§ 4800, 4802, 4811 (West 1983 & Supp. 1987).

219. *See In re Marriage of Lane*, 165 Cal. App. 3d 1143, 1147-50, 211 Cal. Rptr. 262, 265-67 (1985).

220. 165 Cal. App. 3d 1143, 211 Cal. Rptr. 262 (1985).

approved the agreement, making the question of disclosure *res judicata*.²²¹ If, however, the agreement had not merged, the wife retained her breach of contract action on the express warranty of full disclosure.²²² The court referred to the 1954 case of *Flynn v. Flynn*²²³ for the factors to be applied in determining whether an agreement merged into a decree, and was thus enmeshed in making the very sort of difficult, unpredictable distinctions the statute had eliminated in the support and maintenance contexts.

A better approach would be to address the status of the agreement across the board, thus determining all available options and not to restrict the statutory classification to child support and spousal maintenance only. This, however, must be left to the legislature to accomplish, and the court had to deal with the statute as it was drafted.

The law of Massachusetts presents a curious internal contrast, and also raises one of the conceptual complexities inherent in the "hybrid" theory which permits the agreement to become a decree of the court and survive as a contract as well. The internal inconsistency arises from the fact that under Massachusetts law a divorce settlement agreement may come into play in two different contexts: (1) pursuant to a traditional contested fault divorce;²²⁴ or (2) pursuant to the Massachusetts no-fault statute.²²⁵

A couple seeking a traditional fault divorce may enter an agreement and present it to the court. In this instance, under the judicially developed rule, unless the parties expressly provide to the contrary, the agreement will survive a subsequent divorce decree, even if the decree incorporates the agreement by reference.²²⁶

On the other hand, a couple seeking a divorce under Massachusetts' expedited no-fault statute,²²⁷ which requires the parties to present to the court a notarized, comprehensive separation agreement in order to qualify for an expedited order, must act not to *achieve* merger, but to *prevent* it. According to the statute, the court, upon approval of an agreement's provisions, must incorporate and merge

221. *Id.* at 1146-47, 211 Cal. Rptr. at 264-65.

222. *Id.* at 1149, 211 Cal. Rptr. at 266.

223. 42 Cal. 2d 55, 265 P.2d 865 (1954).

224. MASS. GEN. LAWS ANN. ch. 208, § 1 (West 1987).

225. *Id.*

226. *Swift v. Swift*, 8 Mass. App. Ct. 875, 391 N.E.2d 931 (1979).

227. MASS. GEN. LAWS ANN. ch. 208, § 1A, B (West 1987). Other states have similar consensual no-fault provisions requiring submission of comprehensive divorce settlement agreements in order to entitle the parties to the expedited process. *See, e.g., Taylor v. Taylor*, 392 So. 2d 1145 (Miss. 1981) (considering questions of incorporation, modification, and survival of contract remedies under the Mississippi irreconcilable differences statute); MISS. CODE ANN. § 93-5-2 (Supp. 1986); N.Y. DOM. REL. LAW §§ 170, 236 (McKinney 1986); OHIO REV. CODE ANN. § 3105.63 to .65 (Anderson Supp. 1987).

the agreement, unless the parties specify in the agreement that it should be incorporated but not merged.²²⁸

While certainly not a major defect, the inconsistency between the common law rule and Massachusetts' statutory provision can only create confusion and certainly has the potential for trapping unwary parties.²²⁹ For example, if parties relied on a form agreement which happened to be an agreement drafted pursuant to a traditional divorce, it might very well not include a nonmerger clause, even though that is what was accomplished under the traditional rule, and what the no-fault parties intended. To be sure, diligence by parties would avoid this. However, there is no reason to create the risk when the statute simply could have conformed to the common law rule that presumed survival instead of merger. If the legislature was determined for good reason to reverse the presumption, then the better approach would have been to do so consistently for all divorce settlement agreements.

2. Court Modification of "Hybrid" Decrees

a. UMDA Approach

The other problem, which arises in Massachusetts and other "hybrid" jurisdictions in which the agreement may exist as both decree and contract, involves what happens to the agreement (the contract) when the court is asked to modify the decree with respect to alimony or child support. While as a general rule, contracts are not modifiable unilaterally by court order,²³⁰ courts may modify alimony and child support, visitation, and custody provisions upon request of either party and upon a showing of changed circumstances.²³¹ The question be-

228. MASS. GEN. LAWS ANN. ch. 208, § 1A (West 1987).

229. The Massachusetts Legislature did remedy another source of confusion created by the language of an earlier version of § 1A when it revised the statute in 1985. As originally passed the statute provided that the agreement "shall be incorporated and merged into said order, and by agreement of the parties it may also remain as an independent contract." MASS. GEN. LAWS ANN. ch. 208, § 1A (West Supp. 1985)(amended 1985).

Of course, as generally understood, merger means the agreement no longer exists but is superseded by the order. In *Stansel v. Stansel*, 385 Mass. 510, 432 N.E.2d 691 (1982), Massachusetts' highest court explained that the statute could not use the term "merger" in its technical sense, or the parties could not by agreement cause the separation agreement to survive as an independent contract. *Id.* at 513, 432 N.E.2d at 694.

The statute was subsequently revised to read, in pertinent part, as follows: "The agreement either shall be incorporated and merged into said judgment or by agreement of the parties, it shall be incorporated and not merged, but shall survive and remain as an independent contract." MASS. GEN. LAWS ANN. ch. 208, § 1A (West 1987).

230. See *supra* note 34 and accompanying text.

231. *Knox v. Remick*, 371 Mass. 433, 433-38, 358 N.E.2d 432, 434-36 (1976). See also *supra* notes 28, 32-33 and accompanying text.

Some jurisdictions will permit parties to agree that spousal maintenance will

comes, does modification by the court of its decree modify the agreement, or does the agreement stand, and entitle the party to contract remedies for the difference between the court modified amount and that provided for in the agreements?²³²

The UMDA resolves the problem by providing in the hybrid situation²³³ that unless the agreement precludes modification altogether, which it may do except with respect to child related matters, any mod-

not be modifiable. *See, e.g., In re Estate of Hereford*, 250 S.E.2d 45 (W. Va. 1978); UMDA § 306(f), 9A U.L.A. 217 (1987); CONN. GEN. STAT. ANN. § 46b-86 (West 1986). Others provide that, when an order is based on an agreement, a stricter standard of changed circumstances must be applied to modification of spousal maintenance. *See, e.g., Braine v. Braine*, 127 Vt. 211, 213-14, 243 A.2d 797, 799 (1968)(petitioner bears burden of establishing changed circumstances by showing cause for being excused from presumptively fair and binding promise to perform); N.Y. DOM. REL. LAW § 236(B)(9)(b) (McKinney 1986). Still others always will modify a provision for spousal support. *See, e.g., Lepis v. Lepis*, 83 N.J. 139, 149, 416 A.2d 45, 50 (1980)(divorce settlement agreements enforceable in equity, and equitable authority of court to modify spousal maintenance cannot be restricted); *Spingola v. Spingola*, 91 N.M. 737, 741, 580 P.2d 958, 962 (1978)(New Mexico statute providing for modification of spousal maintenance implicitly engrafted into any agreement incorporated by court even in face of specific nonmodification clause).

Child support, custody, and visitation matters, on the other hand, are, according to the virtually universal rule, always modifiable upon a proper showing; the justifications being that the court must always consider the best interest of the child, and that the parents cannot bargain away the rights of the child. *See, e.g., UMDA § 306(f)*, 9A U.L.A. 217 (1987)(ability of parties to preclude later modification does not apply to terms concerning the support, custody, or visitation of children); *Nooner v. Nooner*, 278 Ark. 360, 364, 645 S.W.2d 671, 674 (1983)(regardless of what language in independent contract states, party has right to seek change in child support); *Napoleon v. Napoleon*, 59 Haw. 619, 624, 585 P.2d 1270, 1273-74 (1978)(mother cannot waive right to seek support for minor child); *Meehan v. Meehan*, 425 N.E.2d 157, 160 (Ind. 1981)(child support order entered pursuant to terms of settlement agreement and intended as forever determinative by parties is of no consequence to question whether order should be modified); *Knox v. Remick*, 371 Mass. 433, 437-38, 358 N.E.2d 432, 436 (1976)(court may recast burden of support for child); *Doty v. Doty*, 37 Tenn. App. 120, 124-25, 260 S.W.2d 411, 413 (1952)(agreement does not deprive court of statutory power to modify agreement especially where support of child is involved); *Grijalva v. Grijalva*, 310 S.E.2d 193, 197 (W. Va. 1983)(welfare of child is central to modify support and parents cannot contract away rights of their children); CAL. CIV. CODE § 4801 (West 1983 & Supp. 1987)(“orders for child support, even when there has been an agreement between the parties on the subject of child support, may be modified or revoked at any time at the discretion of the court” even when agreement between parties addresses child support).

232. As is explained in one Massachusetts case, the legal effect of the reduction of the decree aspect of the hybrid decree/contract is to remove the threat of contempt proceedings against the obligor. The obligee may recover in a contract action for the difference between the amount agreed to and that ordered after modification. *Binder v. Binder*, 7 Mass. App. Ct. 751, 758, 390 N.E. 260, 265 (1979).
233. That is, where both contract and judgment remedies are available. *See UMDA § 306(d)(1)*, (e), 9A U.L.A. 217 (1987). *See also supra* notes 157-58 and accompanying text.

ification of the decree automatically modifies the agreement.²³⁴

b. Other Approaches

Other possible resolutions involve byzantine combinations of differing rules for child support and spousal maintenance, and for modification up or modification down, with damages available in some cases and not in others. Analysis of this complex area is beyond the scope of this article, but the nature of the problem may be gleaned from pursuing lines of cases in Massachusetts²³⁵ and Pennsylvania.²³⁶

Kansas has addressed the problem with a straightforward statutory provision.²³⁷ Divorce settlement agreements must be presented to the court for approval in order to be binding.²³⁸ If the court finds the agreement valid, just, and equitable, it must be incorporated into the decree.²³⁹ The result of incorporation is a hybrid contract/decreed of sorts. The agreement continues to be effective and offers the parties contract remedies,²⁴⁰ but they also have the benefit of judgment remedies such as contempt and garnishment.²⁴¹ However, even though the agreement is incorporated, other than with respect to provisions relating to children, it cannot be modified except as provided by the agreement itself, or as later agreed to by both parties.²⁴² While this nonmodification provision does simplify the problems outlined above, it also creates the possibility of harsh results. Divorce settlement agreements are intended to extend long into the future, a future that parties may not be able to anticipate accurately. Thus, changed circumstances may make an initially fair agreement unreasonable.²⁴³

Another way to resolve the problem of the hybrid contract/decreed is simply to eliminate it. Similar to Kansas, under an Indiana statute,²⁴⁴ the agreement must be brought before the court.²⁴⁵ The agreement brought to the court, however, does not survive independent of

234. UMDA § 306(f), 9A U.L.A. 217 (1987).

235. See *Stansel v. Stansel*, 385 Mass. 510, 432 N.E.2d 691 (1982); *Knox v. Remick*, 371 Mass. 433, 358 N.E.2d 432 (1976); *Ross v. Ross*, 371 Mass. 439, 358 N.E.2d 437 (1976); *Binder v. Binder*, 7 Mass. App. Ct. 751, 390 N.E.2d 260 (1979).

236. See *supra* cases cited in note 75 and accompanying text.

237. KAN. STAT. ANN. § 60-1610 (Supp. 1987).

238. *In re Estate of Loughmiller*, 229 Kan. 584, 591, 629 P.2d 156, 161 (1981).

239. KAN. STAT. ANN. § 60-1610(b)(3) (Supp. 1987).

240. *Oehme v. Oehme*, 10 Kan. App. 2d 73, 691 P.2d 1325 (1984); *Long v. Brooks*, 6 Kan. App. 2d 963, 965, 636 P.2d 242, 244 (1981).

241. *Long v. Brooks*, 6 Kan. App. 2d 963, 966-67, 636 P.2d 242, 244-45 (1981).

242. KAN. STAT. ANN. § 60-1610 (Supp. 1987).

243. See, e.g., *In re Marriage of Hufford*, 152 Cal. App. 3d 825, 829, 199 Cal. Rptr. 726, 728 (1981).

244. IND. CODE ANN. § 31-1-11.5-10 (Burns 1987).

245. *Anderson v. Anderson*, 399 N.E.2d 391, 398 (Ind. Ct. App. 1979). See also *Meehan v. Meehan*, 425 N.E.2d 157, 159 (Ind. 1981).

the decree, once it is incorporated and merged.²⁴⁶ While this approach has the virtue of simplicity, it also restricts the remedies available. For any variety of procedural, strategic, and practical reasons, a party may find contract remedies more useful than judgment remedies, or the other way around.²⁴⁷

And despite its simplicity, questions still arise under the Indiana statute concerning what constitutes incorporation and merger. The difficulty arises because incorporation and merger result from court approval of the agreement or individual provisions. When the divorce court clearly articulates what it has done, no problem arises. However, when the divorce court's decree is not explicit, questions arise. In such cases, an invitation is made to speculate and draw inferences regarding what the court intended when it appeared to approve the agreement or some provision, but did not expressly merge it.

For example, in *Meehan v. Meehan*,²⁴⁸ the divorce court did not expressly merge the parties' divorce settlement agreement into its decree. Rather, the court only approved the agreement on its face, incorporating it by paraphrasing its terms and by reference to it.²⁴⁹ The intermediate appellate court, while acknowledging that the statute required express incorporation and merger, nonetheless found that the divorce court had intended merger, and analyzed the agreement as merged.²⁵⁰ The supreme court reversed, stating that the statute requires express language merging the agreement. Consequently, the supreme court reasoned, a court must "carefully delineate in express and unequivocal terms those portions which it is incorporating and

246. Cf. *Anderson v. Anderson*, 399 N.E.2d 391, 398-99 (Ind. Ct. App. 1979).

247. See, e.g., *Young v. Burkholder*, 142 Ariz. 415, 690 P.2d 134 (Ct. App. 1984) (because court's continuing jurisdiction to enforce support decree limited to situation involving minor children, enforcement of agreement to pay child college expenses can be achieved only in contract action); *In re Marriage of Lane*, 165 Cal. App. 3d 1143, 1147, 211 Cal. Rptr. 262, 264 (1985) (when separation agreement was executed with warranty that information and data furnished by husband were accurate and complete, warranty offered wife remedy in contract action for its breach by husband's fraudulent failure to disclose, while attack on decree for fraud based on nondisclosure would be barred by res judicata). For a full discussion of *Lane*, see *supra* notes 219-23 and accompanying text. Cf. *Casper v. Casper*, 359 Pa. Super. 559, 565, 519 A.2d 493, 496-97 (1986) (discussing an agreement deemed entered as an order but surviving an agreement, the court said, "[t]he general reason for entering a support agreement as a court order is to enlist the equitable powers of the court").

248. 425 N.E.2d 157 (Ind. 1981). *Meehan* involved child support, further complicating the analysis, though not affecting its applicability here.

249. *Id.* at 159.

250. *Id.* The intermediate court explained: "[T]he incorporation and merger . . . [were] effected by paraphrase and reference. Nevertheless, we will consider the appeal in light of the terms of the agreement as if fully approved, incorporated, and merged into the decree. *Id.* (quoting *Meehan v. Meehan*, 415 N.E.2d 762, 765 (Ind. Ct. App. 1981)).

merging into its order."²⁵¹ The supreme court explained that not only was such a rule consistent with the statutory provision, but was vital to effective appellate review.²⁵² Whether the agreement is approved or not must be inferred from the divorce court's incorporation and merger of the provision in question. Therefore, if a provision is not clearly and expressly incorporated and merged, the appropriate inference under the statute, according to the Indiana Supreme Court, is that the provision was not approved.²⁵³ The Indiana court rejected the invitation to engage in conjecture, but rather set out a clear standard, requiring express, unequivocal language from divorce courts to accomplish incorporation and merger. This not only assists rational appellate review as the court suggested, but also insures that the parties will have clear notice of grounds for appeal, avoiding the problem that arose in *Sullivan*.²⁵⁴

Another approach, applied by North Carolina, offers a variation on the Indiana theme. It does not require the parties to bring the agreement to the court for approval, but if they do, "it will no longer be treated as a contract."²⁵⁵ The North Carolina court announcing this rule suggested that its results would not be harsh because the parties could avoid the burdens and limitations of a court judgment simply by not coming to court with the agreement.²⁵⁶ In that case, they could preserve the contract to be enforced and modified under traditional contract principles.²⁵⁷ However, again, this rule puts the parties in the position of choosing between remedies, rather than having both a contract and a judgment remedy. Also, permitting court review of the fairness of the agreement in either instance would better serve the ends of justice.

There are, of course, other variations, but the approaches analyzed above describe the spectrum, and highlight the problems in this area.

III. CONCLUSION

Of course, as in any difficult area of the law, there are no simple solutions to the problems surrounding divorce settlement agreements. If there were, certainly the thoughtful judges and lawyers who face the reality of these problems on a daily basis would have found and applied them. However, we can draw certain conclusions from the analysis above, and from the various approaches, glean at least some solutions.

251. *Id.*

252. *Id.*

253. *Id.*

254. See *supra* notes 123-35 and accompanying text.

255. *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983).

256. *Id.*

257. *Id.*

The first, most obvious, and most pressing need is for clarity. Appellate courts and legislatures must state unequivocally what is required to accomplish or avoid merger; parties must articulate clearly what they intend to accomplish in their agreements; and divorce courts must express precisely what they mean to do with respect to agreements brought before them.

A. A Clear Standard

Whether set by the legislature,²⁵⁸ or by the courts,²⁵⁹ a clear, precise standard must be articulated which will inform parties of what they must do or say in order to achieve the results they desire. A good way to achieve such a standard is through application of a presumption that the parties may, by express provision to the contrary, rebut, and therefore avoid. The presumption may be either that the agreement is presumed to merge, absent express provision to the contrary,²⁶⁰ or the reverse, that the agreement is presumed *not* to merge unless the parties expressly provide to the contrary.²⁶¹ Similarly, in jurisdictions that allow for the wholly-independent contract, or for the hybrid contract/decreed suggested by the UMDA,²⁶² analogous presumptions could be applied. The value of applying a presumption as opposed to simply relying on the parties to state their intentions is that it gives the court definite guidance in the case in which the parties have not expressly stated their intentions. When the agreement is silent or equivocal, the presumption controls.²⁶³

Critical to the success of such an approach is a clear, unequivocal articulation of the presumption, perhaps supported by an explanation of its motivation. Justice Neely's opinion in *Hereford* sets a fine example.²⁶⁴ But no rule will solve the problem if it is not construed strictly

258. See, e.g., UMDA § 306, 9A U.L.A. 216 (1987); ARIZ. REV. STAT. ANN. § 25-317(c) (1976); CAL. CIV. CODE § 4811 (West 1983 & Supp. 1988); IND. CODE ANN. § 31-1-11.5-10 (Burns 1987); KAN. STAT. ANN. § 60-1610 (Supp. 1987); MASS. GEN. LAWS ANN. ch. 208, § 1A (West 1987); MISS. CODE ANN. § 93-5-2 (Supp. 1987); MO. REV. STAT. § 452.325 (1986); N.Y. DOM. REL. LAW §§ 170, 236 (McKinney 1986); OHIO REV. CODE ANN. § 3105.63 to .65 (Anderson 1980 & Supp. 1986); WASH. REV. CODE ANN. § 26.09.070 (1986).

259. See, e.g., *Phillips v. Phillips*, 93 Idaho 384, 387, 462 P.2d 49, 52 (1969); *In re Estate of Hereford*, 250 S.E.2d 45, 52 (W. Va. 1978).

260. See, e.g., *Phillips v. Phillips*, 93 Idaho 384, 387, 462 P.2d 49, 52 (1969); *In re Estate of Hereford*, 250 S.E.2d 45, 52 (W. Va. 1978).

261. See *Swift v. Swift*, 8 Mass. App. Ct. 875, 876, 391 N.E.2d 930, 931 (1979). See *supra* note 226 and accompanying text.

262. UMDA § 306, 9A U.L.A. 216 (1987). See *supra* notes 157-58 and accompanying text.

263. E.g., *In re Marriage of Lorge*, 207 Mont. 423, 431, 675 P.2d 115, 119 (1984) (Sheehy, J., dissenting).

264. *In re Estate of Hereford*, 250 S.E.2d 45 (W. Va. 1970). See *supra* note 63 and accompanying text.

and applied consistently by the courts. Judges must resist the temptation to manipulate rules to achieve equitable ends in individual cases.²⁶⁵ The results may be harsh in a few instances, but in the long run fairness will be better served by eliminating the ambiguity and, along with it, the traps that now exist for the unwary who negotiate, bargain, and agree based on certain assumptions, only later to find out that the basis of their bargain was illusory.²⁶⁶

As suggested above, it matters little whether the presumption favors merger or nonmerger, hybrid or independent contract. This may seem arbitrary, but in this context, it is less important *what* the rule is, than that there *is* a rule,²⁶⁷ and that it is clear, strictly construed, and consistently applied. However, the presumption adopted should be applied consistently through the area of divorce settlement contracting to avoid the problem identified with the Massachusetts's approach.²⁶⁸

Given an unambiguous standard, the parties must draft their agreements carefully to conform to the standard, and to express unequivocally their intentions in terms of that standard.²⁶⁹ The parties must realize that courts will not strain to discern their intentions when those intentions have not been stated clearly. In such instances, the presumption will control.

As important, divorce courts faced with divorce settlement agreements must state clearly what they have decided in each case, in language which conforms with the standard set.²⁷⁰ This serves a number of purposes. First, and most obvious, the decree must inform the par-

265. See *supra* note 14 and accompanying text.

266. See *supra* text accompanying note 102.

267. Cf. *Day v. Day*, 80 Nev. 386, 389, 395 P.2d 321, 322-23 (1964) (recognizing the necessity for an arbitrary rule while noting that enforcement rights were of such significance that the issue of agreement survival must be addressed by the trial court).

268. See *supra* notes 224-29 and accompanying text.

269. See *Phillips v. Phillips*, 93 Idaho 384, 387, 462 P.2d 49, 52 (1969) ("In the absence of clear and convincing evidence to the contrary, it will be presumed that . . . the agreement is merged into the decree of divorce, is enforceable as a part thereof and if necessary may be modified by the court in the future."). Clearly, to preserve contractual remedies in a jurisdiction following such a standard, and to overcome the significant burden of proof attached to the presumption, careful drafting and unequivocal language must be employed. See H. CLARK, *supra* note 1, § 18.8, at 783.

270. *Phillips v. Phillips*, 93 Idaho 384, 386, 467 P.2d 49, 51 (1969) (trial courts must make conclusions and findings on the subject of integration and merger at the time the divorce decree issues in order to alleviate problems attempting to ascertain intent after the fact by "technical hairsplitting"); *Meehan v. Meehan*, 425 N.E.2d 157, 159 (Ind. 1981) (since a trial court has discretion to accept, modify, or reject in whole or part of settlement agreement, it is "vital to effective and intelligent appellate review that express and unequivocal language be required to effectuate the incorporation and merger of a settlement agreement," since attempts to decipher trial courts' true intentions have inevitably led to conclusions that are not based solely on the court's actual orders and entries as they should be).

ties of what their rights and obligations are in a straightforward manner if they are to be expected to comply with it.²⁷¹ Additionally, a clear decree permits rational appellate review of subsequent attempts to modify or enforce agreements,²⁷² and insures that the parties have sufficient notice so they may protect their rights through direct appeal when appropriate.²⁷³ The divorce court must, in its decree, articulate exactly what it has decided with sufficient clarity to give the parties notice of possible grounds of appeal. For example, if the court, without grounds, refuses to execute the parties intentions with respect to merger or not, or fails to do what the statute requires to accomplish those intentions, the parties may appeal. However, if the court's decree is ambiguous, as it was in *Sullivan*²⁷⁴ and *Nakashima*,²⁷⁵ the aggrieved party may not know she has grounds for appeal until much later than the statutory appeal period, when the question arises in a collateral proceeding.²⁷⁶ Then it will be too late under this approach.

With respect to rational review, if the divorce court does not state clearly what it intends to do concerning the parties' agreement, an appellate court, faced with a question concerning the status of the agreement,²⁷⁷ would be left to conjecture and speculation. The appellate court would, thus, again become enmeshed in the impossible task of divining unarticulated intentions, in this case the intentions of the divorce court, instead of the parties. As pointed out in *Meehan*,²⁷⁸ "in [the court's] attempt to decipher the trial courts' true intentions it would be inevitable that, as here, conclusions would be reached in a manner inconsistent with the long-standing rule that a court speaks only through its official orders and entries."²⁷⁹

B. A Workable Model

Any standard, rule, or presumption offered as a solution to the problems in this area must be clear, unambiguous, and communicated quickly and effectively. For this reason, the rule should be articulated in a statute rather than through judicial opinions.

271. See H. CLARK, *supra* 1, § 18.7, at 779, § 18.8, at 784.

272. *Meehan v. Meehan*, 425 N.E.2d 157, 159 (Ind. 1981).

273. See, e.g., *Sullivan v. Sullivan*, 102 Idaho 737, 639 P.2d 435 (1981); *Blank v. Blank*, 698 S.W.2d 623 (Mo. Ct. App. 1985); *In re Marriage of Lorge*, 207 Mont. 423, 675 P.2d 119 (1984); *Nakashmia v. Nakashima*, 297 S.E.2d 208 (W. Va. 1982).

274. See *supra* notes 123-34 and accompanying text.

275. See *supra* notes 104-13 and accompanying text.

276. E.g., *Sullivan v. Sullivan*, 102 Idaho 737, 639 P.2d 435 (1981).

277. See *supra* notes 38-45 and accompanying text regarding the various contexts in which the question of when the agreement merged, survived, or exists as a hybrid contract decree might arise.

278. *Meehan v. Meehan*, 425 N.E.2d 157, 159 (Ind. 1981).

279. *Id.* See also *Phillips v. Phillips*, 93 Idaho 384, 462 P.2d 49 (1969).

The UMDA section 306²⁸⁰ provides a good model for legislation. It favors independence of contract,²⁸¹ but maintains some degree of judicial oversight through requirements of approval by the court of the provisions for spousal support.²⁸²

Perhaps the most attractive feature of the UMDA is that it relies on a presumption to determine whether, and in what form, a divorce settlement agreement survives entry of a divorce decree.²⁸³ As suggested above, a presumption represents the clearest way to insure predictability and consistency in answering this question.²⁸⁴ But section 306 works logically to resolve some of the other tricky collateral issues in this area as well.

Under the UMDA, as described above,²⁸⁵ the parties have two options with respect to their contracts: wholly independent agreement (subject to approval by the divorce court); or hybrid contract/decreed.²⁸⁶ Unless the agreement provides to the contrary, its terms will be set forth in the decree, and in that way it becomes the hybrid decree/contract.²⁸⁷ If the agreement does provide that its terms should not be set forth in the decree, the decree will merely identify the agreement and will state that the court has found its terms not unconscionable.²⁸⁸

The hybrid contract/decreed gives the parties both contract and judgment remedies—a valuable choice. Enforcement devices available on the decree, such as contempt and garnishment are certainly strong remedies, frequently necessary to ensure compliance by recalcitrant obligors.²⁸⁹ However, there will be times when they do not represent

280. UMDA § 306, 9A U.L.A. 216 (1987). For the text of § 306, see *supra* text accompanying note 158. In the second edition of his treatise, released during the publication process of this article, Professor Homer Clark, Jr. also concludes that the UMDA "offer[s] the most workable compromise" in the context of the problems addressed here. H. CLARK, *supra* note 1, § 18.8, at 783.

281. For example, the terms, other than those relating to children, are binding upon the court unless the court finds that the provisions are unconscionable. UMDA § 306(b), 9A U.L.A. 216 (1987).

282. *Id.*

283. *Id.* § 306(d).

284. For a discussion of why a presumption is preferable, see *supra* notes 260-68 and accompanying text.

285. For a discussion of the UMDA as adopted by several states, see *supra* notes 160-210 and accompanying text.

286. UMDA § 306(c)-(f), 9A U.L.A. 216-17 (1987). Complete merger of the agreement into the decree is not an option under the UMDA.

287. *Id.* § 306(d), 9A U.L.A. at 216.

288. The unconscionable standard applies only to terms not relating to children. See *id.* § 306(b).

289. Congress addressed the problem of enforcement of support, and made a host of remedies available to improve the effectiveness of child support enforcement. See 42 U.S.C. § 666 (Supp. III 1985). These child support enforcement amendments of 1984 require the states to have in effect laws requiring the use of proce-

the most appropriate or effective remedy.

For example, a party can be found in civil contempt and jailed only if she *willfully* violates the court's order.²⁹⁰ Therefore, if the obligor can prove she cannot comply with the order, she cannot be found in civil contempt. However, the obligee would certainly be entitled to contract damages, since the inability to pay due to changed circumstances simply would not rise to the level of impossibility required to rescind a contract.²⁹¹ In many cases such damages would prove an empty remedy, but in other instances a contract judgment might give the obligee options he might not otherwise have. For example, an obligor who could avoid civil contempt by showing inability to pay might later rebound economically. If the obligee has available a contract remedy that he pursued to judgment, he would be able to enforce the judgment when the obligor recovers economically.

Another example is demonstrated by a California case. In *In re Marriage of Lane*,²⁹² the former wife sought relief because she had relied on her former husband's allegedly fraudulent representation of assets in entering the divorce settlement agreement. Res judicata foreclosed her collateral attack on the fairness of the settlement based on the husband's fraud because the court had already passed on and approved its fairness.²⁹³ However, the agreement contained a war-

dures which include income withholding, judicially and administratively expeditious processes for obtaining and enforcing support orders, withholding of state income tax refunds, lien imposition on real and personal property, making available information on overdue support to a consumer reporting agency, and mandatory withholding from wages along with employer liability for failure to do so when required. *Id.* In enacting the amendment, the Committee on Finance took testimony to determine which procedures were most effective in individual states and designed the amendment to ensure that those procedures would be in effect in all the states, anticipating that uniformity in enforcement procedures would increase compliance nationwide. S. REP. NO. 387, 98th Cong., 2d Sess. 27, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 2423. See also L. WEITZMAN, DIVORCE REVOLUTION, *supra* note 8, at 298-300; Chambers, *supra* note 3, at 900.

290. See *Jameson v. Jameson*, 306 N.W.2d 240, 241 (S.D. 1981); H. CLARK, *supra* note 1, § 16.6, at 675, § 17.3, at 742; I. ELLMAN, P. KURTZ & A. STANTON, *supra* note 15, at 398. Some jurisdictions provide for criminal contempt proceedings against a defaulting obligor, while others allow only civil contempt proceedings. *Id.* at 395-96. See also H. CLARK, *supra* note 1, § 16.6, at 674-75, § 17.3, at 741-43. The inability to pay defense would not be available in a criminal proceeding. See I. ELLMAN, P. KURTZ & A. STANTON, *supra* note 15, at 398.

291. J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS 564-65 (3rd ed. 1987). A defense of impossibility may not be based on subjective impossibility. The promisor is said to have assumed the risk of foreseeable change in circumstances. In order to assert the defense, the promisor must prove, not that she or he cannot perform the obligation, but that in theory "the thing cannot be done." *Id.*

292. 165 Cal. App. 3d 1143, 211 Cal. Rptr. 262 (1985).

293. For an explanation of the res judicata effect of court approval of a divorce settlement agreement, see *In re Marriage of Smiley*, 53 Cal. App. 3d 228, 231 n.4, 125 Cal. Rptr. 717, 719 n.4 (1975).

ranty clause in which the husband guaranteed that he had fully and accurately disclosed all assets. The wife was able to sue in contract for breach of this warranty, and therefore avoid the *res judicata* problem.²⁹⁴

Equally, however, a contract cause of action may prove a hollow remedy, and contempt or garnishment may offer the only realistic means of forcing an unwilling obligor to make payments.²⁹⁵ Thus, separating spouses should not be placed in the position of choosing between remedies, but should have the option of retaining both possibilities, as provided in the UMDA.

As suggested above, the question of the status of a divorce settlement agreement frequently arises in the context of an attempt to modify the agreed to and/or ordered amount upon a showing of changed circumstances. Much of the most confusing law regarding merger or survival of the agreement arises from these questions. Recall that purely court ordered spousal support is modifiable upon a showing of changed circumstances.²⁹⁶ A contract, on the other hand, is not modifiable by a court on the unilateral motion by one party.²⁹⁷ Much confusion is generated when jurisdictions apply a theory of incorporation by reference which falls short of complete merger, creating the hybrid contract/decreed. Can the order be changed without violating prohibitions on impairment of contract,²⁹⁸ or can the contract by its survival prevent modification of the order?²⁹⁹ Courts have come up with many varieties of solutions, involving many variations on the theme.

The UMDA expressly recognizes the hybrid, but solves the problem of modifiability. In the hybrid situation, the parties in their agreement may expressly preclude any future modification of spousal support provisions.³⁰⁰ However, if they do not prohibit modification in the agreement, the court may modify upon a proper showing,³⁰¹ and the modification of the decree automatically modifies the contract.³⁰² This presents a reasonable, uncomplicated resolution of the problem. Limiting modification of an agreement to pay support can work harsh results. By its nature, an agreement to pay support extends over a long period of time, and relies upon presumptions of ability to pay on

294. *In re Marriage of Lane*, 165 Cal. App. 3d 1143, 1147, 211 Cal. Rptr. 262, 264 (1985).

295. *See supra* note 289. *See also* J. CLAMARI & J. PERILLO, *supra* note 291.

296. *See supra* note 32 and accompanying text.

297. *See supra* note 33 and accompanying text.

298. *See, e.g., Sansanelli v. Sansanelli*, 122 Misc. 2d 512, 515, 471 N.Y.S.2d 775, 777 (Sup. Ct. 1984).

299. *See, e.g., In re Estate of Hereford*, 250 S.E.2d 45, 50 (W. Va. 1978).

300. UMDA § 306(f), 9A U.L.A. 217 (1987). Parties may *not* preclude modification of child support, custody, or visitation provisions. *Id.*

301. The UMDA requires "a showing of changed circumstances so substantial and continuing as to make the terms unconscionable." *Id.* § 306(a), 9A U.L.A. at 216.

302. *Id.* § 306(f), 9A U.L.A. at 217.

the part of the obligor. Over the course of time, the presumptions may prove wrong, and the ability of the obligor to pay might change. Similarly, the need of the obligee may change in ways that make the amount or termination date of support inappropriate. However, permitting nonmodification allows parties to maximize the advantages of careful planning, and can represent fair, bargained-for consideration in many cases,³⁰³ and court supervision through the requirement of approval of these agreements provides some control.

Complete freedom of contract is probably not appropriate in this area. The parties may not realize the impact of their agreement because of the emotional trauma that frequently accompanies the dissolution of a marriage, and because the parties frequently are not in an equal bargaining position.³⁰⁴

The UMDA addresses this problem by requiring the court to consider "the economic circumstances of the parties and any other relevant evidence" to determine whether the agreement is "unconscionable" before it sets forth its terms in the decree, or approves them. What is meant by unconscionable is not defined in the UMDA, and adopting jurisdictions have interpreted this differently. A clear definition of what is meant by unconscionable in the statute would be desirable.

It also should be clear that the review undertaken by the court must be a genuine, substantive review.³⁰⁵ Unlike some jurisdictions that apply merely a procedural review,³⁰⁶ the statute should require a substantive analysis.³⁰⁷ However, this can be accomplished only if courts faced with divorce settlement agreements in fact make decisions regarding conscionability after having considered all relevant evidence. This must include analysis of information beyond the agreement itself and perhaps beyond what the parties present. The UMDA specifies that the court should consider the "economic circumstances of the parties and any other relevant evidence *produced by the parties, on their own motion or on request of the court.*"³⁰⁸ In every case, the court should require the parties to provide it with all relevant information, including, but not limited to, their respective economic circumstances. The court must, in every case, carefully consider this information, and inquire into its completeness before it pronounces the agreement not unconscionable, if the review is to have any real meaning in the cases where it matters. This is especially true in view of the fact that once pronounced "not unconscionable," the agreement

303. UMDA § 306 comment, 9A U.L.A. 218 (1987).

304. See *supra* notes 5-8 and accompanying text.

305. See Sharp, *supra* note 1, at 1442-58.

306. *Id.* at 1409-13.

307. UMDA § 306(b), 9A U.L.A. 216 (1987).

308. *Id.* (emphasis added).

is immune from collateral attack.³⁰⁹ As suggested above, our society has not yet reached the point where absolute freedom of contract in the context of divorce settlement agreements would be appropriate.³¹⁰

Adoption of a rational, comprehensive, clear approach such as this, announced in a statute and coupled with strict, consistent application of the statute by the courts and careful, explicit drafting by the parties can eliminate much of the uncertainty in this area, thereby preventing unfairness to parties caught in the mire and eliminating much needless litigation confronting the courts.

309. See *supra* notes 39-43 and accompanying text.

310. Sharp, *supra* note 1, at 1405-07, 1458-60.