



IN BRIEF

MALPRACTICE AVOIDANCE NEWSLETTER FOR OREGON LAWYERS

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DOMESTIC RELATIONS ALERT: STIPULATED JUDGMENTS AND CONTRACTUAL RIGHTS OF PARTIES

There is a significant issue in Family Law that has arisen recently in light of the Oregon Supreme Court opinion in *Webber v. Olsen*, 330 Or 189 (2000). The Supreme Court held in *Webber* that stipulated judgments of dissolution of marriage cannot be enforceable as contracts. Parties are limited to enforcement of judgments by an Order to Show Cause for Contempt or through garnishment. Under certain circumstances, these remedies may not be available at all. Contract remedies, according to *Webber* are unavailable unless they are preserved in a side agreement outside the judgment of dissolution of marriage.

Historically, parties settling a domestic relations case executed a marital settlement agreement, and the settlement agreement was submitted to the court along with a judgment of dissolution of marriage. The judgment incorporated the settlement agreement by reference. This method created a lot of paperwork that clogged up the court file. Gradually, practitioners began to eliminate the settlement agreement in favor of a "Stipulated Judgment" that set out the agreement of the parties. The court approved and adopted the parties' agreement by signing the judgment. This method was preferred by the courts because it reduced paperwork and streamlined the procedure.

Marital settlement agreements are still used; however, typically they are more often reserved for special situations such as where the parties have agreed to delay submitting the final judgment of dissolution in order to achieve some mutually agreeable goal such as filing joint tax returns.

Lawyers who used the traditional method believed that the marital settlement agreement preserved the parties' contractual rights to enforce their settlement. *Webber v. Olsen*, supra, suggests that thinking is not correct. *Webber* says that once a marital settlement agreement is incorporated into the judgment, the parties lose their contractual rights and are left with contempt as their only enforcement remedy.

In summary, *Webber* says that whether the practitioner uses a stipulated judgment or a marital settlement agreement incorporated into a judgment, all that is left is a judgment and the parties lose their contract remedies.

PRACTICAL PROBLEMS

Unfortunately this merger issue can present problems for parties and attorneys who develop thorough, and in many instances, creative settlements. Such settlements often include a party's commitment to do things which current law does not permit a court to order. Common examples are commitments to pay tuition and housing expenses for a child's college education, or a commitment to pay for private school tuition. Under current law, a spouse is not required to pay for these types of obligations. The law only authorizes a court to order the payment of child support to a minor child or a child attending school. Child support as calculated by the Uniform Child Support Guidelines does not provide enough income to cover these expenses.

Often the willingness of one spouse to pay these extraordinary expenses results in the other spouse making certain concessions. For example, a custodial parent may agree to take less child or spousal support per month or terminate child support once the child reaches age 18, as opposed to age 21 when the child is attending school. Other examples of

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creative settlements include such matters as (a) the insertion of warranty provisions; (b) a party's commitment to maintain disability insurance to cover support if the obligor spouse is injured; (c) the commitment to maintain life insurance until the children graduate from college or graduate school; and (d) the commitment to maintain medical and dental insurance until a child graduates from college.

The *Webber* case says that if the spouse who committed to innovative provisions fails to follow through on the commitment, the innocent spouse will be limited to an Order to Show Cause for Contempt as a form of remedy. Some practitioners believe that *Webber* may lead some judges to refuse to enforce the creative portions of a judgment which are not authorized by statute. Others are concerned the contempt statute may not apply at all. ORCP 78C provides that contempt is not available for "an order or judgment for payment of money." It does provide an exception for "orders and judgments for the payment of sums ordered pursuant to ORS 107.095 and 107.105(1)(i) and money for support, maintenance, nurture, education or attorney fees..." Some practitioners interpret this exception to be limited to actual existing support orders and interpret the term "education" as not including college expenses and private school expenses.

Webber creates another area of concern for those practitioners who insert contractual terms in their settlement documents for purposes of enforcement. A common example is the agreement to mediate or arbitrate future disputed issues such as disputes over the sale of a home. These types of provisions would appear to be unenforceable given the holding in *Webber*.

INTERIM SOLUTIONS

Lawyers who are concerned about protecting their clients' contractual rights should consider the following suggestion by the *Webber* court:

"If parties who are dissolving their marriage wish to retain contractual remedies as well as the remedies that are available under the dissolution judgment, then they may do so by **entering into an agreement and identifying which, if any, of the terms of their agreement they wish to have survive as separate agreements** (Emphasis added)." *Webber*, supra at page 196.

In order to implement the court's suggestion, attorneys should consider which, if any, of the terms of a settlement they want to survive and be enforceable as separate contractual rights. The attorney should then draft a separate marital settlement and incorporate it into the dissolution judgment using language similar to the following:

Incorporation of Marital Settlement Agreement. Except for Sections __, __ and __, the marital settlement agreement of the parties which is attached hereto is hereby ratified and approved and made a part of this judgment of dissolution of marriage as if fully set forth herein, and the parties are ordered to carry out all of the terms of said agreement.

Survival of Contract Rights. Sections __, __ and ___ of the parties' marital settlement agreement are not incorporated into this judgment. The contractual commitments and obligations of the parties set forth in those sections shall not be deemed to have merged into the judgment and shall survive entry of the judgment as independently enforceable contractual rights. The pursuit of a contractual remedy shall not be deemed an election of remedies preventing pursuit of other remedies.

In order to preserve all rights of your client, a separate agreement is probably necessary, even though: 1) it is currently unclear which provisions should be in the agreement and which should be incorporated into the judgment of dissolution of marriage, 2) a side agreement produces additional paperwork, and 3) the process creates additional expense to the parties.

POSSIBLE LEGISLATIVE SOLUTIONS

Family law practitioners are working together to address this issue. (See, December 2000 issue of Family and Juvenile Law Newsletter for text of proposed legislation.) In the meantime, carefully think through the rights of your client under the *Webber* case.

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