





Family Court Approval of a Marital Settlement Agreement Over One Party's Objection

By Reid T. Sherard

In a domestic relations case it can be very difficult for a lawyer to help a client negotiate and settle the myriad of issues. Most litigants, even in the most acrimonious disputes, want to manage the outcome and minimize risk. Trials are expensive and demanding of judicial resources. The Supreme Court requires mediation in about two-thirds of counties¹ before a trial can be scheduled, and it “encourage[s] litigants to reach an extrajudicial agreement”² on marital issues. Most cases settle. The unique challenge in the family court, unlike many other civil courts, is any such agreement must be approved by the family court.³ Many times parties commit to settlements and then attempt to back out of the deal prior to the approval hearing. In these circumstances the family court “must assume jurisdiction”⁴ and begin a multi-step analysis to “satisfy itself the agreement is a fair contractual

end to the parties’ marital claims.”⁵ Thereafter the family court may approve the settlement agreement over the objection of a party who adopts such “buyer’s remorse” if proper procedure is followed and appropriate evidence is presented.

Prelude: What is a marital settlement agreement and why does it matter?

The term “marital settlement agreement” is a term of art. It is used but not defined in the statutory code; however, such agreements “are viewed as contracts”⁶ between the parties, and “it is clear that parties may enter into contracts resolving issues ... and that the family court has jurisdiction over those contracts.”⁷

Executing a marital settlement agreement is an important act. For example, the alimony statute provides that “[n]o alimony may be awarded [to] a spouse who commits adultery before the earliest of ... (1)

the formal signing of a written property or marital settlement agreement ...”⁸ Similarly, another statute states that property acquired after the “formal signing of a written property or marital settlement agreement”⁹ constitutes non-marital property, which is not subject to apportionment by the family court. Without the family court conducting the analysis addressed in this article, a conniving party might immediately agree to sign a marital settlement agreement for an ulterior motive—for example, to foreclose the adultery bar to alimony—if that party could then easily repudiate the agreement but remain in compliance with the statute. Moreover, allowing marital settlement agreements to be repudiated without input from the family court would render meaningless the mandatory mediation process and the numerous appellate cases with opposite holdings. Other issues impacted by the approval issue are the length, cost and frustration of the pending litigation, as well as the effect on

the minor children.

Overview of approval

The parties to a family court case generally “may agree to any terms they wish as long as the court deems the contract to have been entered fairly, voluntarily, and reasonably.”¹⁰ In its approval analysis, the family court must find and conclude:

- (1) an agreement exists, including the specific terms;
- (2) the parties freely and voluntarily entered into the agreement;¹¹
- (3) the agreement is fair and reasonable from both procedural and substantive perspectives;¹² and
- (4) the agreement is not detrimental to the minor children whose rights are involved in the proceedings (as relevant).¹³

The court order addressing approval of an agreement “shall set forth the specific findings of fact

and conclusions of law to support the court’s decision.”¹⁴

The vast majority of agreements are approved without incident. In the event one party repudiates, the family court should consider bifurcating the hearing regarding the approval of the agreement from the issues to be tried in the event the agreement is not approved.¹⁵ The parties should be given the opportunity to have a “full hearing”¹⁶ on the approval issue, at which they may testify, call third parties as witnesses and offer other evidence.¹⁷

It is possible that the family court will find the offered agreement to meet all required criteria as to one issue (e.g. equitable apportionment) and not as to another issue (e.g. alimony), and in that situation the family court should partially approve the agreement as to the former issue and set the matter for trial as to the latter issue.¹⁸ Importantly, the family court is entitled to take the parties at their respective under oath

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testimony on any given issue.¹⁹ In other words, if a party misrepresents the truth under oath, that can be considered “invited error” in the event that party appeals;²⁰ it will not void approval and may lead to an attorney’s fees award against that party.²¹

One frequent question is how mediation impacts the issue. Mediation is governed by special rules and is generally confidential.²² Willingness to accept a settlement proposal is not an exception to the general rule.²³ However, “[u]pon the parties reaching an agreement, the mediator shall provide a Memorandum of Agreement ... It is the obligation of the parties to seek approval of the agreement by the family court.”²⁴ Thus, the mediation rules plainly anticipate that an agreement reached in mediation is subject to the approval analysis in this article. Stated another way, the mediation rules do not change the analysis.

Even if one party repudiates the agreement, the family court can and should approve the agreement over such objection if the family court is satisfied that the required factors have been met.

First requirement: Is there an agreement?

Marital settlement agreements typically come in one of two forms, either an agreement that is reduced to writing and executed prior to the final hearing, or an agreement that is not reduced to writing prior to the final hearing but that is orally presented to the family court at such hearing. Importantly, like with any contract, the parties must have a meeting of the minds as to all essential and material terms of the agreement.²⁵ “[E]ven a plain, unambiguous agreement is nevertheless subject to the duty of the Family Court judge to rule upon its fairness”²⁶ before it is approved. As a practical matter, the exact terms of the agreement are also important as benchmarks for any future modification action and any future contempt action.

If the agreement is ambiguous

the family court can take testimony and receive evidence so that it may “first ascertain the intention of the parties by examining the extrinsic circumstances surrounding the agreement and the parties . . . before ruling on its fairness.”²⁷

Rule 43(k), SCRCP warrants mention. Rule 43(k) “is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation”²⁸ and it “plainly applies to all settlement agreements signed by counsel.”²⁹ By its own terms, Rule 43(k) provides no agreement between counsel shall be binding unless signed by counsel and entered in the record, made in open court and noted upon the record, or signed by the parties and their counsel. Unless one of those three conditions is met, the agreement is not enforceable under Rule 43(k).³⁰ Most importantly, an agreement under Rule 43(k) “is still subject to review by the family court to determine its fairness.”³¹

Second requirement: Did the parties freely and voluntarily enter into the agreement?

In analyzing the known agreement for approval, the court first addresses whether the parties “entered the contract freely and voluntarily.”³² Factors that the family court should consider include whether a party was ingesting mind-altering substances or subject to physical and/or verbal abuse, and if counsel ever met privately with the party and inquired into the factual situation behind the agreement.³³ The family court should also consider whether a party was subjected to any duress, not of sound mind or under any unusual stress.³⁴ Critically, “stress normally attendant to the breakup of a marriage” is not sufficient to show a lack of voluntariness.³⁵ The family court should also weigh whether the repudiating party was threatened, forced or coerced, if both parties were together when the agreement was signed, and the length of time from signing to repudiation coupled with the reasoning for the repudiation.³⁶

To sustain a claim of duress in signing the agreement, the positing party must establish: (1) he was coerced to enter into the contract; (2) he was put in such fear that he was bereft of the quality of mind essential to the making of a contract; and (3) the contract was thereby obtained as a result of this state of mind.³⁷ Duress is viewed with a subjective test looking at the individual characteristics of a person.³⁸ While this is a factual question, courts have found agreements to have been entered into freely and voluntarily when both parties “negotiated their agreement with the benefit and advice of independent and experienced counsel.”³⁹ It is acceptable for one party’s lawyer to draft the agreement and the other party’s lawyer to review it.⁴⁰

It is of no surprise to any practitioner that family court judges, heeding the Supreme Court’s mandate to encourage settlement, often do so. Such comments are proper, but a judge should be careful to avoid “[i]nappropriate comments from the bench which induce[] a party to enter into a settlement under duress”⁴¹ and should not “tell[] the parties how he would rule on matters involving factual questions and the exercise of discretion.”⁴² However, a judge’s comment that simply influences a party’s decision “does not constitute anything close to duress by the family court judge.”⁴³

Third requirement: Is the agreement fair from procedural and substantive perspectives?

When a family court judge has found the parties entered the settlement contract freely and voluntarily, she “shall next examine the agreement’s fairness under all the circumstances.”⁴⁴ In deciding fairness “it is not the task of the Court to decide the rights of the husband and wife as if there had been no agreement ... [r]ather, the Court must decide if the agreement is within the bounds of reasonableness from both a procedural and substantive perspective.”⁴⁵ Ultimately, “[a]ll of the relevant

factors must be weighed.”⁴⁶

Procedural examination should precede its substantive counterpart, because “when a husband and wife freely and voluntarily enter into an agreement which is procedurally fair, they should be in a better position than any judge to know whether it is substantively fair.”⁴⁷

Procedural fairness

Procedural fairness is closely related to the voluntariness requirement. In one case, the court of appeals found an agreement to be procedurally fair where the wife was advised of her right to consult a lawyer (even though she did not do so), modified the agreement before signing it, and either knew or had access to the husband’s financial information.⁴⁸ Thus, to determine procedural fairness, a court should investigate a party’s ability to receive counsel, to negotiate the terms of the agreement, and to have access to information necessary to make an informed decision. The family court might also look for guidance to the statute regarding property excluded

by written contract of the parties for an antenuptial agreement, under “which [an agreement] must be considered presumptively fair and equitable so long as it was voluntarily executed with both parties separately represented by counsel and pursuant to the full financial disclosure to each other that is mandated by the rules of the family court as to income, debts, and assets.”⁴⁹

Substantive fairness

Substantive fairness is a broad test to determine, based upon all relevant factors in each case, whether the agreement is “substantively within the bounds of reasonableness.”⁵⁰ Some factors relied upon by courts include “the length of marriage, the parties’ ages, incomes, needs and obligations, as well as their financial status and relative contributions to the marriage.”⁵¹ Other factors include “the parties’ economic circumstances, their contributions, the duration of the marriage, and the absence of marital fault.”⁵² On the other hand, “[a]n agreement

shall not be voided as unfair merely because the agreement did not divide the property on the basis of the parties’ relative incomes and contributions to the marriage.”⁵³ Generosity owing to motives such as desiring to quickly resolve the litigation and/or to atone for past wrongs should be weighed heavily by the family court in its analysis.⁵⁴ Moreover, “[p]arents can contractually obligate themselves beyond the support required by law.”⁵⁵

Essentially all of the evidence of record is important, and the facts of every case are different.⁵⁶

Fourth requirement: Is the agreement detrimental to the children?

Contracts between parents regarding custody of children will be recognized “unless the welfare of the children requires a different disposition,”⁵⁷ and such contracts may not prejudice the rights of the children.⁵⁸ Therefore, the family court must look to the agreement to make sure the best interests of the parties’ children are protected, since the Supreme Court has “held

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in numerous cases that the welfare of the children, and what is for their best interest, is the primary, paramount, and controlling consideration of the court in all controversies between parents over the custody of their minor children.”⁵⁹ Regardless of the binding nature of the decree, the family court retains jurisdiction to modify child-related matters in the future.⁶⁰

Conclusion

The family court is home to tens of thousands of private docket cases every year, and the vast majority end in settlement and not with a contested trial. When two parties reach a negotiated agreement and then one party repudiates the agreement, numerous appellate cases have provided the family court with a roadmap to use to determine whether the agreement should be approved over the objection or whether the case should be set for trial.

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Endnotes

- ¹ Order No. 2013-03-14-01 (S.C. Sup. Ct. dated March 14, 2013). The family court, on its own motion, may order a case to mediation where it is not otherwise mandatory. Rule 3(c), SCADRR.
- ² *McKinney v. McKinney*, 274 S.C. 95, 97, 261 S.E.2d 526, 527 (1980).
- ³ *Moseley v. Mosier*, 279 S.C. 348, 353, 306 S.E.2d 624, 627 (1983).
- ⁴ *Funderburk v. Funderburk*, 286 S.C. 129, 130-131, 332 S.E.2d 205, 206 (1985).
- ⁵ *Drawdy v. Drawdy*, 275 S.C. 76, 77, 268 S.E.2d 30, 30 (1980).
- ⁶ *Gainey v. Gainey*, 382 S.C. 414, 428, 675 S.E.2d 792, 799 n.5 (Ct. App. 2009).
- ⁷ *Swentor v. Swentor*, 336 S.C. 472, 479, 520 S.E.2d 330, 334 (Ct. App. 1999) (citing S.C. Code §§ 20-3-130(G) and 20-3-690).
- ⁸ S.C. CODE ANN. § 20-3-130(A) (1976, as amended).
- ⁹ S.C. CODE ANN. § 20-3-630(A)(1) (1976, as amended).
- ¹⁰ *Moseley*, 279 S.C. at 353, 306 S.E.2d at 627.
- ¹¹ *Funderburk*, 286 S.C. at 131, 332 S.E.2d at 206.
- ¹² *Burnett v. Burnett*, 290 S.C. 28, 30, 347 S.E.2d 908, 909 (Ct. App. 1986).
- ¹³ *Powell v. Powell*, 256 S.C. 111, 116, 181 S.E.2d 13, 16 (1971).
- ¹⁴ Rule 26(a), SCRFC.
- ¹⁵ Rule 42(b), SCRCP.
- ¹⁶ *Burnett*, 290 S.C. at 29, 347 S.E.2d at 909.

- ¹⁷ *See Sauls v. Sauls*, 287 S.C. 297, 299, 337 S.E.2d 893, 895 n.1 (Ct. App. 1985).
- ¹⁸ *Doe v. Doe*, 286 S.C. 507, 514, 334 S.E.2d 829, 833 (Ct. App. 1985).
- ¹⁹ *Young v. Young*, 2009-UP-161 (S.C. Ct. App. April 1, 2009).
- ²⁰ *See Harrison v. Bevilacqua*, 354 S.C. 129, 139-40, 580 S.E.2d 109, 114-15 (2003).
- ²¹ *Kilcawley v. Kilcawley*, 312 S.C. 425, 428, 440 S.E.2d 892, 894 (Ct. App. 1994).
- ²² Rule 8, SCADRR.
- ²³ Rule 8(a)(4), SCADRR.
- ²⁴ Rule 6(g), SCADRR.
- ²⁵ *Davis v. Greenwood Sch. Dist.* 50, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005).
- ²⁶ *McKinney*, 274 S.C. at 97, 261 S.E.2d at 527 (internal citation omitted).
- ²⁷ *Id.*
- ²⁸ *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492, 493-94, 458 S.E.2d 533, 534 (1995).
- ²⁹ *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 638, 627 S.E.2d 724, 726 (2006).
- ³⁰ *See Buckley v. Shealy*, 370 S.C. 317, 322, 635 S.E.2d 76, 78 (2006) (Rule 43(k)'s terms are "mandatory" and the fact that an agreement "is admitted or has been carried into effect" does not satisfy Rule 43(k)).
- ³¹ *Young v. Young*, 2009-UP-161 (citing *Jackson v. Jackson*, 279 S.C. 618, 620, 310 S.E.2d 827, 828 (Ct. App. 1983) ("[w]hile parties are encouraged to reach an extra judicial agreement on the marital issues, such an agreement is still subject to review by the Family Court Judge to determine its fairness")).
- ³² *Funderburk*, 286 S.C. at 131, 332 S.E.2d at 206.
- ³³ *Jackson v. Jackson*, 279 S.C. 618, 620-21, 310 S.E.2d 827, 828 (Ct. App. 1983).
- ³⁴ *Burnett*, 290 S.C. at 30, 347 S.E.2d at 909.
- ³⁵ *Id.*
- ³⁶ *Id.*; *Young v. Young*, 2009-UP-161.
- ³⁷ *Gainey v. Gainey*, 382 S.C. 414, 429, 675 S.E.2d 792, 799 (Ct. App. 2009).
- ³⁸ *Blejski v. Blejski*, 325 S.C. 491, 498, 480 S.E.2d 462, 466 (Ct. App. 1997).
- ³⁹ *Young v. Young*, 2009-UP-161.
- ⁴⁰ *Sauls v. Sauls*, 287 S.C. 297, 300, 337 S.E.2d 893, 895 (Ct. App. 1985).
- ⁴¹ *Blejski*, 325 S.C. at 498, 480 S.E.2d at 466.
- ⁴² *Id.* at 499, 480 S.E.2d at 467.
- ⁴³ *Id.* at 499, 480 S.E.2d at 466.
- ⁴⁴ *Funderburk*, 286 S.C. at 131, 332 S.E.2d at 206.
- ⁴⁵ *Burnett*, 290 S.C. at 30, 347 S.E.2d at 909.
- ⁴⁶ *Funderburk*, 286 S.C. at 131, 332 S.E.2d at 206.
- ⁴⁷ *Burnett*, 290 S.C. at 31, 347 S.E.2d at 910.
- ⁴⁸ *Id.* at 30, 347 S.E.2d at 909.
- ⁴⁹ S.C. CODE ANN. § 20-3-630(A)(4) (1976, as amended).
- ⁵⁰ *Burnett*, 290 S.C. at 30, 347 S.E.2d at 910.
- ⁵¹ *Doe*, 286 S.C. at 514, 334 S.E.2d at 833.
- ⁵² *Young v. Young*, 2009-UP-161.
- ⁵³ *Funderburk*, 286 S.C. at 131, 332 S.E.2d at 206.
- ⁵⁴ *Id.*
- ⁵⁵ *Ex Parte Petition of White*, 299 S.C. 406, 413, 385 S.E.2d 211, 215 (Ct. App. 1989) (citations omitted).
- ⁵⁶ *Burnett*, 290 S.C. at 30-31, 347 S.E.2d at 910.
- ⁵⁷ *Ford v. Ford*, 242 S.C. 344, 354, 130 S.E.2d 916, 922 (1963) (quotation omitted).
- ⁵⁸ *Powell*, 256 S.C. at 116, 181 S.E.2d at 15.
- ⁵⁹ *Ford*, 242 S.C. at 349, 130 S.E. 2d at 920.
- ⁶⁰ *Powell*, 256 S.C. at 116, 181 S.E.2d at 15.