

Making a federal case of surviving separation agreements

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The divorce bar does not often look to the federal trial court for guidance in family law matters. In fact, outside of discovery and the Rules of Civil Procedure, we rarely look to federal courts at all when constitutional rights are not at issue.

But U.S. District Court Judge William G. Young's ruling in *Irish v. Irish* is a noteworthy exception.

Young's findings and conclusions establish contractual liability from a former husband's false statement on his Supplemental Probate Court Rule 401 Financial Statement, filed in a Middlesex Probate & Family Court divorce case and referred to in a separation agreement that the state court incorporated into its divorce judgment. Critically, the agreement survived incorporation in the judgment and did not merge therein.

The federal case concerns a payout to defendant Craig S. Irish that plaintiff Dawn E. Irish, and now Judge Young, view as a form of phantom equity, in which the former wife has continuing contractual rights. Young makes quick and eloquent work of Mr. Irish's contention that a substantial sum received by him after divorce was merely a bonus and, thus, outside the scope of Ms. Irish's property claims.

The forum and the substance both merit close consideration for divorce lawyers.

Contract claim vs. contempt or Rule 60

Enforcement actions arising from divorce are typically heard in Probate

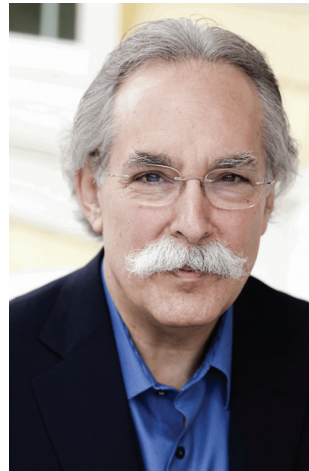
Court contempt proceedings. That court has equitable powers to enforce its own judgments, into which separation agreements are routinely incorporated. Mass. R. Dom. Rel. P. 60(b)(1)-(3) governs motions for relief from judgment for causes including fraud. Those, too, are Probate Court remedies.

We do not know why the *Irish* case left the Probate Court and veered instead to an action at law, let alone in federal court, but we can speculate a bit. The plaintiff initially sued two business entities as well as her former husband, and jurisdiction may have been a challenge in the divorce court.

Second, Rule 60(b)(1)-(3) motions have a one-year limitation from entry of judgment. The *Irish* findings suggest that two years passed from judgment to filing, so Rule 60 proceedings appear to have been time-barred.

Third, the plaintiff may have sought benefit from the lower standard of proof required in a contract action as compared to contempt proceedings (preponderance, rather than clear and convincing evidence), given the technical challenges of the case and the number of critical judicial inferences required for success.

Finally, the separation agreement itself appears not to be ambiguous, which may have limited the admission of parol evidence, otherwise admissible to prove breach of contract.



The decision did not disclose why federal jurisdiction attached, nor if it had been a source of controversy, but the multiple defendants suggest that diversity jurisdiction is the answer. Whatever the reason, Young found himself with the rare duty of addressing an equitable property division case, which, he carefully notes, is normally the exclusive province of state courts.

Addressing the issue, Young concludes that the matter does not impinge on the "domestic relations exception," or the state's preclusive right to "obtain, alter or amend" a divorce judgment, established in state law and recognized by the 1st U.S. Circuit Court of Appeals.

The case demonstrates that divorce practitioners need to think about enforcement matters broadly. Without creative and compelling advocacy, Young would not have encountered the *Irish* case at all. Breach of contract is rarely a practical remedy for individuals. The costs and duration are simply too great. The remedies at law lack coercive equitable powers. Most enforcement matters can be handled more

expeditiously, and less expensively, in the Probate Court. But sometimes, in some circumstances, the opposite is true.

Ms. Irish found her way into the civil side of the federal court, a decision that must look awfully good to her right now.

'Boilerplate' matters

Without the two essential features of the underlying separation agreement, Mr. Irish's conduct may be a wrong without a remedy. Both provisions appear generally in what is frequently called the "boilerplate" section of the agreement. Those are the more or less generic provisions that lawyers include in everyone's separation agreements, often with little or no editing, from case to case.

Most clients skim over the dense legal language, and their lawyers often struggle to capture the attention of clients in review of these important provisions. They are far more interested in the specifically negotiated terms that relate to their own family.

The *Irish* case contains two prime examples of why boilerplate is so important. First, Young found that the separation agreement contains a set of provisions that incorporate both parties' Supplemental Probate Court Rule 401 financial statements into the agreement by reference, with each party swearing to and then warranting accuracy.

Second, the separation agreement provides that it survives incorporation

in the divorce judgment, meaning that all provisions remain contractual despite their incorporation into the divorce judgment. Conversely, merger would mean that the terms cease to have significance as a contract, but exist thereafter as the terms of a judgment only.

Without both provisions, Young would have had no "hook" on which to hang a breach of contract. Effective drafting turned a Rule 401 violation into a contract breach, enhancing the integrity of the transaction and expanding the potential remedies for the aggrieved party.

Without that kind of language, Ms. Irish may well have found herself out of court — and out of luck.

Merger and survival care

Too often, merger and survival are treated indifferently or without sufficient specificity.

For many years, divorce lawyers recited that entire separation agreements merged, meaning that when incorporated into the Probate Court judgment, the agreement ceased to exist as an independent contract, except where explicitly noted. That limited enforcement to contempt actions, as no contract existed from which a breach could arise.

Sometimes, drafters designate property distribution for survival, but allow the agreement otherwise to merge in the judgment.

Neither of those approaches is sufficient. They do not insulate important

foundational contract terms from later modification, as all merged terms are subject to later modification by the Probate Court.

More importantly, they needlessly give away enforceability for breach of contract, undermining the parties' mutual intent and reducing enforcement remedies.

Fortunately, in recent years, drafting has generally evolved in a manner that is more protective of contract language. Rather than have default merger with surviving terms called out, the better practice by far is to draft survival as the default status, with care to exclude that which must be merged, such as custody and parenting matters and, typically, child support.

The *Irish* separation agreement protected the integrity of the deal and gave Ms. Irish a remedial option that otherwise would have been foreclosed. Clearly, Young found Mr. Irish's behavior compelling, but with the wrong contract terms, Ms. Irish would have been half-armed. Comprehensive agreement drafting closed the loop of liability.

Conclusion

It takes nothing away from the resourceful lawyers who made Mr. Irish's financial statement a federal case, but half of the winning ammunition was good "boilerplate." That should be reaffirming for all who toil at creating effective and enforceable separation agreements. **MLW**



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