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# OUTSIDE COUNSEL

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## *Setting Aside a Mediated Divorce Agreement*

The standards for reviewing an application to set aside the parties' marital agreement have been firmly implanted in the minds of all matrimonial practitioners by the Court of Appeals seminal decision in *Christian v. Christian*.[1]

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Agreements between spouses, unlike ordinary business contracts, involve a fiduciary relationship requiring the utmost of good faith. There is a strict surveillance of all transactions between married persons, especially separation agreements. Equity is so zealous in this respect that a separation agreement may be set aside on grounds that would be insufficient to vitiate an ordinary contract.

These principles in mind, courts have thrown their cloak of protection about separation agreements and made it their business, when confronted to see to it that they are arrived at fairly and equitable, in a manner so as to be free from the taint of fraud and duress, and to set aside or refuse to enforce those borne of and subsisting in equity.

What makes a marital agreement unconscionable or manifestly unfair is measured primarily by the difference between what the agreement provides and what the allegedly victimized spouse would likely have otherwise achieved had the resolution been decided by the Court. When that gap is deemed substantial and where the process in arriving at an agreement is tainted by fraud, duress or overreaching, the Courts are quicker to step in and set aside such agreements.

The traditional test relates to

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whether a 'manifestly unfair or unconscionable' agreement would have been entered absent the manipulation of the objectant. That manipulation is assessed in the context of a spouse's vulnerable or weakened emotional state,[2] her tendency to capitulate to her domineering husband,[3] the absence of disclosure,[4] threats,[5] financial misrepresentations,[6] and the extent of each party's legal representation.[7]

The central premise behind setting aside an agreement is grounded in the notion that it would be inequitable to hold someone to a bad bargain entered involuntarily or which was the product of wrongful manipulation. As recently reiterated by the Court of Appeals in *Matter of Greif*:[8]

> Whenever ... the relations between the contracting parties appear to be of such character as to render it certain that ... either on the one side from superior knowledge of the matter derived from fiduciary relation, or from an overmastering influence, or on the other from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable ... it is incumbent upon stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood.
>
> [citations omitted]

## Mediated Agreements

Regrettably, those who thought different rules applied to mediated agreements are mistaken. Mediated agreements executed without the assistance of counsel or as a consequence of a spouse's overreaching, fraud, or duress are initially treated no differently by the Court than other marital agreements. However, the factor that sets a mediated agreement apart from the typical attorney negotiated agreement is the presence of a neutral mediator who, like a judge overseeing an in-court settlement, is duty bound to prevent a manifestly unconscionable agreement from being thrust upon an unwitting or manipulated participant.

To be truly effective, however, the parties must be advised in writing that the primary goal of mediation is not to reproduce what a court might decide; instead, the goal is to foster an atmosphere that enables the parties to determine the outcome on their own. The mediator should also steer clear of explaining how the law might apply to a matrimonial dispute. Any flaw in the mediator's presentation, especially where one party is less knowledgeable than the other, may prove relevant to a charge of overreaching.

While mediators stress the importance of maintaining the confidentiality of the process, the court may disregard that provision, given the need to call the mediator as a witness to confront claims of overreaching or duress. Hence, to best safeguard a party from a frivolous attack on a mediated agreement, a provision must be inserted into the agreement that requires that the losing party pay the attorney fees and all costs generated by the party compelled to defend. Such a provision generally discourages wasteful challenges.

As long as the mediator attests to his or her role in ensuring that the process was untainted by duress through a careful allocation of the parties, his or her attestation may eventually be treated with the same deference as the observations of a judge presiding over a matrimonial action settled in open court.[9] Until the law evolves to that point, anyone under the care of a therapist should be required to produce an affidavit from their therapist confirming that the party freely executed the mediated agreement.

Finally, to fortify the validity and enforceability of the mediated agreement, the execution for the agreement and the parties' allocution should be videotaped or otherwise recorded where significant assets are at stake. Making a challenge to a mediated agreement more costly and more difficult may be the only way to ensure finality to a negotiation no one wants to revisit once it's over.

## Mediator's Perspective

Through the "multi-door courthouse,"[10] in pursuit of the "promise of mediation"[11] and personalized justice, the family mediation community has mistakenly believed that they have freed themselves from the shackles of the traditional legal system. The family mediation community takes great pride in touting mediation as an antidote to the adversarial system. However, the demarcation between mediation and the legal system may, in fact, be more elusive than the family mediation community has believed. Challenged mediated agreements will be evaluated by the same legal standards as other challenged marital agreements.

Mediators should heed the wake-up call. When the legal validity of a mediated divorce agreement is attacked, courts will inquire how the extent of legal representation and how the relational dynamics of the parties may have impinged on a party's ability to negotiate in mediation. Hallmarks of mediation such as capacity to mediate, informed consent and confidentiality may all be subject to legal scrutiny. Now is the time to rethink mediation practice so that mediated agreements may withstand legal challenge.

As part of good mediation practice, the mediator routinely assesses each party's capacity to participate in the process. Ethical mediation requires the mediator to evaluate how domestic violence, intelligence, power, informational imbalance and emotional

capacity may impact the parties' ability to mediate.[12] If there is any concern about a party's capacity to participate, the mediator may meet with the parties, individually or jointly, to discuss what, if any, modifications may be made in the mediation structure to make it a more equitable forum.

Moreover, the mediator must do more than just a basic screening to assess a party's capacity to mediate. One of the factors that was used in challenging the validity of this mediated agreement was the therapist's post-mediation statement alleging the party lacked capacity to mediate. Therefore, if a party informs the mediator that they are under the care of a therapist, does this then raise a red flag that requires the mediator to investigate further? Must the mediator receive a release from that therapist before a party is deemed competent to participate in mediation?

Another issue is at what point in the mediation should attorneys be included in the process. Practice in the family mediation community has been to allow the mediator to provide legal information, as distinguished from legal advice, during the mediation process. Then, once an agreement is reached, parties are encouraged to meet with a reviewing attorney. In the case at issue, the parties also proceeded to mediate without benefit of counsel. Unrepresented, the parties decided to waive their right to financial disclosure during the mediation. The mediator just responded by explaining the law, extolling the value of personal justice and suggesting the parties seek reviewing attorneys once the mediation was concluded. However, agreements reached in this fashion are understandably vulnerable to attack.

The practice of participating in mediation without the benefit of counsel from the beginning flies in the face of informed consent and ethical practice. After all, how is a party to negotiate in mediation and then make knowing and informed decisions without first consulting with an attorney? How is a party to fully define their personal sense of justice, without also considering their options under the law?[13] Rather, independent counsel should represent parties from the beginning of the mediation process.

## Confidentiality

Finally, there is the issue of what expectations of confidentiality the mediator and parties may have, and what obligation does the mediator have to safeguard that expectation. Historically, confidentiality has been a tenet of mediation. The security of confidentiality promotes open and honest discourse and evokes creative problem solving. The recognized family mediation codes all reinforce the centrality of confidentiality, even though they do not define the precise parameters of confidentiality.[14] In addition, it is customary for participating parties to sign Agreements to Mediate, contracts that define and delineate the scope of confidentiality. Therefore, both parties and the mediator share a common expectation of confidentiality, unless otherwise articulated.

It is assumed that parties begin mediation with the expectation of confidentiality. Why would parties freely partake in candid discussions of the issues with a mediator if there were a possibility that the mediator might testify about those revelations as part of a court proceeding? Equally unsettling is the thought that confidentiality might be used as both a shield and a sword. If confidentiality of mediation is absolute, might not an unethical party opt for the mediation forum as a subterfuge? Clearly, the mediator and parties must define the boundaries and limits of confidentiality at the onset of the mediation.

Yet, the more compelling and unanswered question that remains is how absolute are, in fact, the bounds of confidentiality? In other words, if the parties and mediator have every expectation of confidentiality, and they all signed an agreement to mediate memorializing this confidentiality expectation, would the mediator be forever bound to preserve the confidentiality of the process? Because the mediation field in New York is in its embryonic stage, the answer at this point remains elusive. However, in California, a jurisdiction that has been a forerunner in integrating the mediation movement into legal practice, the courts have signaled that confidentiality may not be absolute.

Two recent California decisions have jarred the mediation community to re-think the parameters of a mediator's confidentiality.[15] In *Olam v. Congress Mortgage Company*, 68 F. Supp. 2d 1110 (N.D. Cal.) (1999), federal Magistrate Judge Brazil, compelled the mediator of the court-referred mediation program to testify about whether Mrs. Olam was coerced into her mediated agreement because of "undue influence." In deciding to require the mediator to testify, Magistrate Brazil discounted the California Code that barred mediator testimony, and agreed with the parties who waived their confidentiality rights to compel the mediator's testimony. Magistrate Brazil justified such exercise of judicial discretion by reasoning that the value of "doing jus-

tice" by resolving the case according to the law outweighed the benefit of upholding the mediator's statutory privilege of confidentiality.[16] Similarly, in another California case, *Rinaker*,[17] the court also ordered a mediator of a court-referred program to testify in a juvenile delinquency proceeding so that the juvenile's constitutional right to cross-examine and impeach an adverse witness would be preserved.

## Impact

What implications do these cases have on a mediator's practice? The California decisions may herald a willingness of the courts, on a case-by-case basis, to ignore statutory protections and private expectations, redefine the boundaries of confidentiality, and compel a mediator to testify when the court perceives there is a value in doing so. It appears that the court will confer a value on compelling a mediator's testimony when such testimony may preserve a more valued individual right.

Although New York is just beginning to broach the bounds of confidentiality, pragmatically, the mediator may have a duty to inform parties that there may be instances when a court may determine that the confidentiality protections may not be as absolute as the parties' originally expected.

As family mediators continue to extol the "promise of mediation," mediators must also realize that the mediation process is not immunized from accountability under the law.

Concurrent with the increasing popularity of family mediation and the concomitant integration of mediation into the practice of law, there will also be an inevitable increase in the number of attempts to overturn mediated agreements. The family mediation community must be aware that mediated agreements will be scrutinized and challenged by legal standards. Emerging case law warns that confidentiality may not be absolute. Therefore, parties and attorneys choosing divorce mediation need further assurances that their mediated agreements are likely to survive legal challenges.

If mediators are to truly help their clients secure the personalized justice that they are seeking in mediation, family mediators can no longer naively ignore legal imperatives. Instead, family mediators must reexamine their roles, reaffirm their commitment to confidentiality and prophylactically integrate legal standards into the mediation process.

(1) *Christian v. Christian*, 42 N.Y.2d 63, 396, N.Y.S.2d 817, N.E.2d 849 (1977).

(2) *Jaus v. Jaus*, 168 A.D.2d 487, 562 N.Y.2d 727 (2nd 1990); see also *Terio v. Terio*, 150 A.D.2d 675, 541 N.Y.S.2d 807 (2nd 1989).

(3) *Weinstock v. Weinstock*, 167 A.D.2d 394, 561 N.Y.S2d 807 (2nd Dept. 1990).

(4) *Matter of Greif*, 92 NY2d 341, 680 NYS2d 893 (1998).

(5) *Polito v. Polito*, 121 A.D.2d 614, 503 N.Y.S.2d

(6) *Manes v. Manes*, 215 A.D.2d 455, 626 N.Y.S.2d 471 (2nd Dept. 1995).

(7) *Surlack v. Surlack*, 95 A.D.2d 371, 466, N.Y.S.2d 461 (2nd Dept. 1983).

(8) *Matter of Greif*, 92 NY2d 341, 680 NYS2d 893 (1998).

(9) *Matter of Dolgin Elder & Corp.*, 31 N.Y. S2d 1, 334 N.Y.S.2d 83 3; *Sontag v. Sontag*, 114 A.D.2d 892, 495, N.Y.S2d 65.

(10) Frank E. Sander, "Varieties of Dispute Processing in The Pound Conference: Perspectives on Justice in the Future" (A. Leo Levin et al. eds., 1979). In 1976, Professor Frank Sander introduced the vision of the "multi-door" courthouse at the Pound Conference. The "multi-door" courthouse is a courthouse that offers parties a menu of dispute resolution services from which they may select the most appropriate method for resolving their dispute.

(11) Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation* (1994).

(12) See, e.g., Guidelines for Dispute Resolution Centers Regarding Domestic Violence; Academy of Family Mediators, Standards of Practice sec. IX (1998); Model Standards of Practice for Divorce and Family Mediator, Standard XI, XII (Draft August, 1999).

(13) Elayne E. Greenberg, "Family Mediation in Practice," *New York Law Journal*, Sept. 9 1996; Jacqueline M. Nolan-Haley, "Informed Consent in Mediation: A Guiding Principle For Truly Educated Decision-Making," 74 *Notre Dame L. Rev.* 775 (1999).

(14) See, e.g., Academy of Family Mediators Standards of Practice, sec VI (1998); Unif. Mediation Act (Draft 1999); and Model Standards of Practice for Divorce & Family Mediators (Draft August 1999).

(15) Richard C. Reuben, "Court Issues Major Ruling on Confidentiality," *Dispute Resolution Magazine* 25 (Fall 1999).

(16) *Olam v. Congress Mortgage Company, et al*, 68 F. Supp. 2d 1110 at 1136.

(17) *Rinaker v. Superior Court of San Joaquin County*, 62 Cal. App.4th 155 (1998).

# LIS PENDENS

## Bronx County

### OCTOBER 12, 2000

Block No. 5409 Lot No. 716; PNC Mtge. Corp. of America, v. Frank DiMaio, et al (Foreclosure of Mtge.); Atty Certilman Balin Adler & Hyman 90 Merrick Ave., East Meadow, NY.

Block No. 4271, Lot No. 6; Key Bank, USA v. Salvaore Calisi, et al (Foreclosure of Mortgage); Atty Weinreb & Weinreb, 475 Sunrise Highway, West Babylon, NY.

Block No. 3275 Lot No. 103; NYCTL 1996-1 Trust, v. Jaffe Webster Properties Inc., et al. (Foreclosure of Tax Lien); Atty Fischbein Badillo Wagner Harding 909 Third Ave., NY.

Blk No. 4631 Lot No. 23; Greenpoint Bank, v. Yvonne Russell, et al (Foreclosure of Mortgage); atty Berkman, Henoch, Peterson & Peddy, 100 Garden City Plaza Garden City, NY.

### OCTOBER 20, 2000

Blk No. 3432 Lot No. 1132; The Chase Manhattan Bank, v. Eva I. Toledo et al. (Foreclosure of Mortgage); Atty. Charles G. Stiene, 222 Old Country Road, Mineola, NY.

Blk No. 3132 Lot No. 68; Larry I. Slakky, v. Rosa Hernandez; (Seeking Guardian for Rosa Hernandez); Atty. Garfunkel, Wild & Travis, 111 Great Neck Road Great Neck NY.

### OCTOBER 24, 2000

Blk No. 3943 Lot No. 2267; Cadlerock Joint Venture, L.P., v. Patricia Gary, et al. (Foreclosure of Mortgage); atty Vlock & Associates, 230 Park Ave. NY.

Blk No. 3938 Lot No. 3206; Same, v. Patricia Gary, et al. (Foreclosure of Mort-