

That the property settlement and separation

agreement entered into by and between the parties, dated March 13, 1981, is incorporated herein in its entirety and specifically made a part hereof.

The separation agreement, however, provided:

if consistent with the rules of practice of the court granting a decree of absolute divorce, the provisions of this agreement, or the substance thereof, shall be incorporated in such decree, but not withstanding such incorporation, this agreement shall not be merged in such decree, but shall in all respects survive the same and be forever binding and conclusive upon the parties. (Emphasis added)

The divorce in this matter was granted on May 5, 1981.

At the hearing neither the defendant nor defendant's counsel appeared. The decree, which was drafted by plaintiff's counsel, states defendant appeared generally by filing a Notice of Appearance, Waiver and Consent to a hearing without further notice. In fact, though, the defendant first filed an answer and a notice of appearance, waiver and consent. Subsequently, she filed an answer in which she neither admitted nor denied the allegations of the complaint, offered no objection to a hearing without notice and stated that the parties had entered into a separation agreement. The court, therefore, assumes that the defendant and counsel did not appear in reliance on the separation agreement that was entered into by the parties.

As a result, this court entered an order directing the plaintiff to show by what authority this court appropriately could find the defendant, who resides in Washington, D.C., in contempt. Plaintiff, through counsel, has responded by merely quoting the separation agreement and stating that this court has jurisdiction by reason of the parties

marriage in St. Thomas. Plaintiff's memorandum, however, totally misses the point of this court's order.

There is a great difference of view among the cases on what will constitute "incorporation" of the agreement into the decree so as to make contempt proceedings available to enforce its support provisions. The decisions rely on at least three factors: (a) the intent of the parties as shown by the agreement; (b) the extent to which, and method by which the agreement is set forth in the decree; and (c) whether the decree specifically orders performance of the agreement. If there is intent to incorporate plus incorporation verbatim in the decree, plus a specific direction in the decree for the performance of the agreement, it is clear that the provisions of the agreement will be enforceable by contempt, at least so far as they relate to alimony. But if the agreement is only incorporated by reference, or if the decree merely approves the agreement without specifically ordering it to be performed, the wife may be unable to enforce by contempt.

In spite of contrary statements in the cases the intention of the parties is not relevant to whether contempt should be available, but only to the question whether the court should approve the agreement and make it part of the decree. The other two factors mentioned above ought to be present, however, before the provisions of the agreement can be said to be superseded by the decree, or "merged" in the decree for purposes of enforcement by contempt. The husband is entitled to have his obligations spelled out in detail in the decree, and to have a specific order of the court underlie the penalties of contempt. If the agreement is merely incorporated by reference, its provisions may not even be available in the court's file, and at the least will not be ascertainable solely by looking at the decree. Under such circumstances the husband will have insufficient notice of his duty. There is no hardship on the wife, and little inconvenience to the court, in requiring the decree to set out the agreement verbatim. For this reason the fact that incorporation by reference is sufficient to allow modification of a decree based on an agreement would not justify a holding that it is sufficient to place the husband in contempt when he fails to pay the alimony.

Of course, no contempt proceedings can be brought against the husband when he failed to perform an

agreement which is not incorporated in the decree. The remedies, if any, are on the contract.

Clark, Law of Domestic Relations §16.12, at 556 (1968)

Clark's use of the word "incorporation" for purposes of contempt proceedings, is synonymous with merger. As such, "i/f the separation agreement is 'incorporated' in the divorce decree, the courts find that the contractual obligations of the agreement are converted into obligations based upon the decree by the process called 'merger'." Id. at 554.

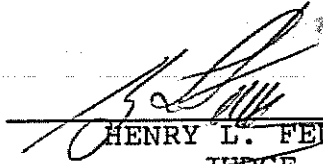
This same view is endorsed by Alexander Lindy in his two volume work, Separation Agreements and Anti-Nuptial Contracts §31.80 (1961).

Where the execution of a separation agreement is followed by a divorce, whatever the interval, the question arises as to whether the agreement is merged in the decree. The consequences of merger are clear; but whether or not, given a state of facts, a merger occurs, is often difficult to determine. The result may depend on (a) whether the agreement is presented to the court; (b) whether it is incorporated in the decree; (c) whether it contains any provision as to merger; and (d) the intention of the parties.

A reading of the divorce decree in this case shows an absence of a specific order of performance of the agreement or the provision at issue. In addition, not one term of the agreement is included except that relating to the parties having waived alimony. That, when coupled with the circumstances under which the divorce was granted and the decree was signed, makes it abundantly clear that there was no "merger" of the agreement as that term is understood. The agreement's language is plain and direct in stating that the

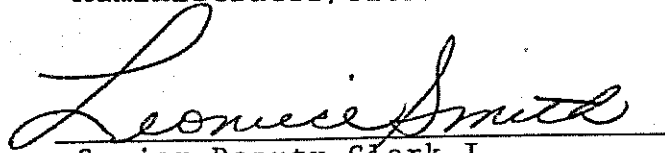
agreement was to survive the divorce decree. "It has been said that if a post nuptial agreement is incorporated in a divorce decree and there is language in the agreement indicating that a merger was not intended, the purpose of incorporation is only to identify the agreement for res adjudicata . . ." Id. §31.83. Consequently, the sole remedy of the plaintiff in this instance is to sue on the contract. E.g. Zwerling v. Zwerling, 255 S.E.2d 50 (S.C. 1974). Therefore, it is

ORDERED that the plaintiff's motion for contempt is denied.


HENRY L. FEDERZEIG
JUDGE

ATTEST:

VIOLA E. SMITH
Administrator/Clerk of the Court



Senior Deputy Clerk I