

(REVISED 5/01)

HAMPSHIRE PROBATE AND FAMILY COURT

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SPECIAL LANGUAGE
REGARDING THE FINALITY OF
THE TERMS OF YOUR
SEPARATION AGREEMENT



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Merger vs. Survival as an Independent Contract

This is an explanation of one of the most difficult and technical issues you will encounter in your divorce. Please consider the importance of hiring an attorney to help you understand this issue and to guide you on the appropriate way to include it in your Separation Agreement.

1. The General Rule. Your Separation Agreement must contain special language about the finality of its provisions. The terms which are applied to Separation Agreements are "merges" or "survives as an independent contract". You must decide which term is applicable to your Separation Agreement. The following is a general explanation of these terms:

IF THE AGREEMENT "MERGES" WITH THE JUDGMENT OF DIVORCE, SOME PARTS OF THE JUDGMENT (see Section III below) MAY BE CHANGED IN THE FUTURE IF THERE IS A SUBSTANTIAL CHANGE IN CIRCUMSTANCES. IT IS ENFORCEABLE ONLY IN THE PROBATE AND FAMILY COURT.

IF THE AGREEMENT "SURVIVES AS AN INDEPENDENT CONTRACT," IT IS FINAL AND ORDINARILY NOT SUBJECT TO CHANGE IN THE FUTURE. IT IS ENFORCEABLE IN THE PROBATE AND FAMILY COURT OR IN THE SUPERIOR COURT.

II. ISSUES REGARDING CHILDREN MUST "MERGE." Under Massachusetts law, the child care plan (legal custody, physical custody and visitation) and the child support plan both remain modifiable in the future so that the court can remain responsive to children if circumstances change after you sign your agreement. Therefore, the Separation Agreement must provide that all issues regarding children "merge" with the Judgment of Divorce.

III. ISSUES REGARDING DIVISION OF MARITAL PROPERTY ARE FINAL. Under Massachusetts law; the division of marital property is final and won't be reopened by a judge over the objection of one party. That is, you may mutually agree to make a change in the division of property after you sign your agreement, but a judge won't change it if one of you disagrees. The only exception is in cases where fraud can be proven.

IV. YOU MUST DECIDE IF PROVISIONS FOR ALIMONY MERGE OR SURVIVE AS AN INDEPENDENT CONTRACT. The issue of the finality of your alimony agreements is not predetermined by Massachusetts law. You must decide whether the provisions you make about alimony are final or remain open to modification in the future.

If you decide the alimony agreement is final, the Separation Agreement must contain a clause that says that the alimony provision "survives as an independent contract." That phrase means that your alimony provisions cannot be changed later. That is, if you give up ("waive") alimony in the Separation Agreement, that decision is final. There is only one exception to that finality: if, at a later time, one of you is in desperate financial need, the court may consider a request for alimony from the former spouse even, under some circumstances, if the recipient spouse has remarried in the meantime. The desperate need most often means that one of you is about to seek public assistance. In that case, the court-at that later time-would examine the need of the recipient spouse and the ability of the other spouse to pay enough to avoid public assistance.

The phrase "survives as an independent contract" also has another important meaning: if the Agreement survives as an independent contract, either of you can use the Probate and Family Court OR the Superior Court to enforce your Separation Agreement.

If you decide that the alimony provisions are to remain open for modification in the future, then you will use language that provides that the alimony agreements "merge" with the Judgment of Divorce. Some people want the alimony provision to merge so that each of you has flexibility in the future if there are financial changes. Some want the alimony provision to merge so that they can share future financial success. Some want alimony to merge only if specific catastrophes occur in the future - for example, a spouse becomes disabled and can't work, or a child or other close family member becomes disabled so that one of the spouses must give up a job to care for the disabled person. You may write the alimony provisions of your Separation Agreement with any details that make sense for your own situation. And if you say that the provisions "merge," you preserve flexibility to reexamine alimony at a later date.



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