Oral Modifications of Written Marital Settlement Agreements

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Can a written marital settlement agreement be modified orally? What if the agreement requires that all future modifications must be in writing?

After prolonged litigation, lengthy negotiations and multiple redrafts of agreements, parties to agreements may be reluctant to return to their attorneys to modify their agreements if they believe they have reached an agreement with the other party to make a change to the agreement or to modify the way it is to be implemented. If the newly reached agreement between the parties is not memorialized in writing, the he said/she said battle that was resolved by the initial written agreement, particularly between two former spouses, may resume. For that reason, agreements, including marital settlement agreements, frequently contain the following language:

> "No modification or waiver of any of the terms of this Agreement unless in writing and signed by both parties."

Despite the inclusion of such language, divorced spouses implementing the terms of their agreement may make adjustments to those terms or agree not to receive certain benefits due to him or her under the agreement in exchange for the other party relinquishing other benefits, but they may not reduce those adjustments to writing. If the original agreement included language requiring modifications to be in writing, and the modification was not in writing, does that allow a party to renege on his or her oral agreement, including in situations where he or she has already received the benefit of the oral agreement?

In the 1996 case of Somerset Community Hospital v. Mitchell, 454 Pa.Super. 188, 685 A.2d 141 (1996), the Superior Court held that "an agreement that prohibits non-written modification may be modified by [a] subsequent oral agreement if the parties' conduct clearly shows the intent to waive the requirement that the amendments be made in writing." The Somerset Court's decision suggests that a substantive modification to an agreement may be agreed upon orally if the parties are, by their conduct, first modifying the provision of the agreement that requires modifications to be in writing and then substantively modifying their agreement.

In considering whether the conduct of the parties suggests that they are modifying or waiving the requirement that a modification to an agreement be in writing, the Courts consider whether the parties' conduct demonstrates that they have implemented or relied on the underlying alleged oral modification, without that agreement being in writing. The Courts require 'clear, precise and convincing evidence'" Fina v. Fina, 1999 Pa.Super. 201, 737 A.2d 760 (1999) that the

parties to a written agreement have orally modified their written agreement declined to require that the modification be written.

Clear, precise and convincing evidence of an oral modification may include reviewing whether a party has taken any actions to implement the modified agreement and whether the other party's conduct affirmed the modified agreement. In Fina, the appellee, Father, requested that appellant, Mother, allow Father to reduce his child support payments so that Father could accept a lower paying job. Mother argued that there was not clear and convincing evidence that the parties had orally agreed to modify their agreement. The Court found that Father's testimony that he would not have accepted the lower paying job if Mother had not agreed to the reduced child support and the fact that Mother had not taken any action to require Father to pay the prior higher child support amount for several years was clear and convincing evidence that there had been an oral modification of the parties' agreement.

Although appellate cases have established that parties can orally modify their written agreement despite the language of their agreements requiring modifications to be in writing, a non-precedential, and therefore, non-binding (pursuant to Operating Rule of the Pennsylvania Superior Court §65.37), February 2015 Superior Court case takes the opposite approach in finding that an agreement's prohibition against oral modifications should be followed. (Although non-precedential decisions are non-binding, they have become more readily accessible as they are available on the Superior Court's website.) In Britt v. Britt, the parties' Marital Settlement Agreement provided for Wife to receive $42,000 from a particular 401(k) savings plan. After the Agreement was executed, Husband requested that Wife receive an alternate 401(k) account, and Wife agreed. The parties subsequently disagreed as to whether Wife was to receive any increase in value on the $42,000 of 401(k) funds that were to be transferred to her. Wife filed a Petition for Special Relief requesting that the Court enforce the agreement that Husband and Wife had reached after they executed their Marital Settlement Agreement. The trial court determined that the parties reached an oral agreement modifying their written agreement and ruled in Wife's favor. Husband appealed and a panel of the Superior Court held that, based on the language of the Marital Settlement Agreement that required any modification to be in writing, "any alleged 'side deal' between the parties was required to be in writing and signed by the parties in order to properly modify the Agreement" and, because there was no written agreement, "the trial court had no authority to change the Agreement…"

In Britt, the Court noted that Husband's counsel sent Wife a written amendment to the Marital Settlement Agreement memorializing the terms that Husband asserted he and Wife had agreed to. Although the Court did not refer to the draft written amendment as part of its rationale for declining to permit an oral modification (instead referring to the draft amendment as possible proof that Husband and Wife had not reached the agreement depicted by Wife), the fact that there was a draft written agreement would suggest that Husband had not intended to waive or modify the provision of the Agreement that required modifications to be in writing. The Britt case may,

therefore, not necessarily be a departure from established appellate case law as the fact that Husband had prepared a written agreement, with terms contrary to terms of the alleged oral agreement, would have made it unlikely that Wife could have proved that the parties' conduct suggested that they were waiving the requirement of their agreement that modifications be in writing or that there was clear, precise and convincing evidence that the parties had orally modified their agreement.

Although requirements that modifications to written agreements must be in writing may not necessarily preclude the possibility that an oral modification of a written agreement will be enforceable, given the high standard of proof as well as the significant possibility that a party may either deny the existence of the oral modification, or that the parties will disagree as to the specific terms of their oral modification, the best practice is to continue to tell clients what they are told throughout the course of the case – "get it in writing".