

Separation and Property Settlement Agreements: When does breach by one party excuse performance by the other?

Father files a complaint alleging mother breached terms of an agreement by not paying alimony and child support. Mother admits she has not paid but argues that she should not have to pay because dad consistently has failed to comply with the custody provisions of the agreement by refusing to allow her to see the children and has repeatedly violated a provision in the agreement that he would not harass her.

Can father enforce the contract against mother if mother proves he also breached the contract? Does his breach excuse mother's performance?

Reciprocal Breach of Contract

A breach of an agreement by one party does not necessarily excuse the other party's performance under any contract, including a separation or property settlement agreement. While the general rule is that if either party to a bilateral contract commits a material breach of the contract, the non-breaching party is excused from the obligation to perform further, [Lake Mary Ltd. Part. v. Johnston, 145 N.C. App. 525 \(2001\)](#), the failure to perform an independent promise does not excuse nonperformance on the part of the other party. [Coleman v. Shirlen, 53 N.C. App. 573 \(1981\)](#); [Lake Mary Ltd. Part. V. Johnson](#).

Breach by one party will excuse performance by the other only if the promises are interdependent rather than independent and the breach was substantial in nature, not caused by the breach of the other party, and was committed in bad faith. *Smith v. Smith*, 225 N.C. 189 (1945). See also *Reeder v. Carter*, 226 NC App 270 (2013), for discussion of impact of breach by party seeking order of specific performance.

When are terms interdependent?

In determining whether a promise is independent or dependent, the N.C. Supreme Court has stated the following:

"Whether covenants are dependent or independent, and whether they are concurrent on the one hand or precedent and subsequent on the other, depends entirely upon the intention of the parties shown by the entire contract as construed in the light of the circumstances of the case, the nature of the contract, the relation of the parties thereto, and other evidence which is admissible to aid the court in determining the intention of the parties." [Harris & Harris Const. Co. v. Crain & Denbo, Inc., 256 N.C. 110, 117, 123 S.E.2d 590, 595 \(1962\)](#) (quoting [Wade v. Lutterloh, 196 N.C. 116, 120, 144 S.E. 694, 696 \(1928\)](#)).

Williams v. Habul, 219 NC App 281 (2012)(provisions in settlement agreement were independent of the promise to dismiss lawsuit with prejudice).

If the agreement itself provides that the provisions are interdependent, the language controls. *Wheeler v. Wheeler*, 299 N.C. 633 (1980)(because husband promised to pay alimony “[as long as wife] performs the conditions of the contract,” he was excused from paying when she breached provisions regarding his visitation rights with the children).

Presumption is that terms are not interdependent

If there is no specific provision in a separation agreement or property settlement, there is a presumption that provisions in the agreement are not interdependent. *Nisbet v. Nisbet*, 102 N.C. App. 232 (1991), citing *Hayes v. Hayes*, [100 N.C. App. 138 \(1990\)](#). This means the burden is on the person claiming a breach by one excused performance by the other to establish that the terms are dependent. *Id.*

The court must look to the language of the agreement to determine whether the parties actually intended the provisions to be interdependent. The court may take evidence of the intent of the parties only if the court determines that the agreement is ambiguous. In *Smith v. Smith*, [225 N.C. 189 \(1945\)](#), the court determined that the husband’s obligation to pay alimony was not dependent on wife’s agreement not to molest or interfere with husband. Similarly, in *Williford v. Williford*, 10 N.C. App. 451 (1971), the court determined that payment of wife’s maintenance and support was entirely independent of husband’s right to visit his children under the agreement. *See also Martin v. Martin, unpublished*, 204 N.C. App. 595 (2010)(clear that parties’ intent was that all provisions were independent, so breach by mother of visitation provisions did not excuse father’s obligation to pay college expenses).

In *Nesbit*, the court of appeals also held that a breach of visitation or custody provisions never excuses a parent’s obligation to pay child support.

Breach Also Must be Substantial

Even if the provisions are dependent, a breach also must be substantial to relieve the other party of contractual obligations. An immaterial breach will not excuse performance. To be substantial and material, the breach must “substantially defeat the purpose of the contract or be characterized as a substantial failure to perform.” *See Long v. Long*, 160 N.C. App. 664 (2003)(fact that party mailed alimony checks rather than directly depositing them as specified by the agreement was not a substantial breach); *Cator v. Cator*, 70 N.C. App. 719 (1984)(husband’s failure to pay alimony when parties were litigating the enforceability of agreement was not a substantial breach). *See also Fletcher v. Fletcher*, 123 N.C. App. 744 (1996)(to relieve performance, breach must “go to the very heart of the agreement”; father’s breaches were not substantial where father failed to inform mother of dental surgery of one son, failed to cancel joint credit card accounts, and failed to pay

mother the full amount of her interest on defendant's pension payments).

Waiver of Breach

The N.C. Supreme Court also has held that a breach that might otherwise excuse performance will not do so if the breach has been waived by the other party. *Wheeler v. Wheeler*, 299 N.C. 633 (1980)(wife only partially complied with visitation provisions but husband continued to pay all alimony over a long period of time, so husband could not assert later that wife's breach relieved him of his obligation to pay support). *Cf. Cator v. Cator*, 70 N.C. App. 719 (1984)(wife did not waive right to object to husband's failure to pay alimony by her earlier acceptance of late payments).