

## What's the Law About Incorporating Separation Agreements?

Incorporating a separation agreement has significant consequences. The contract becomes a court order. Contract remedies are no longer available but the contempt power of the court is. Some provisions become subject to modification, and remarriage and cohabitation will terminate spousal support provisions. Obviously an important decision, parties should think carefully about the pros and cons of incorporation before submitting their contract to the court.

But what if one party wants to incorporate and the other doesn't? When can or should the court refuse to incorporate? Does it matter that the person objecting agreed to incorporation in the contract itself? What if the plaintiff requests incorporation in the divorce complaint and the defendant fails to file an Answer or show up for the hearing? Can the court incorporate?

Our appellate courts have not addressed these questions directly. What we do know is that: 1) a court can incorporate an agreement when both parties consent to incorporation at the time of incorporation; 2) incorporated agreements are consent judgments, see *Walters v. Walters*, 307 NC 381 (1983) ("every court approved separation agreement is ... a court ordered consent judgment."); and 3) a trial court's authority to enter a consent judgment depends on the unqualified consent of both parties at the time the judgment is entered. [Tevepaugh v. Tevepaugh, 135 N.C. App. 489, 492-93 \(1999\)](#).

While we have many appellate decisions addressing the impact of incorporation, we have only one footnote in one opinion addressing the court's authority to incorporate a separation agreement. In *Cavanaugh v. Cavanaugh*, 317 N.C. 652, n.1 (1984), the court stated "[w]e ... note the possibility that a trial judge, in the exercise of his equitable power, may be able to refuse to incorporate a separation agreement into the divorce decree if he finds that incorporation would be inequitable." The court also hinted that perhaps the agreement to incorporate in the contract itself is enough to give the court authority to incorporate, even if one party objects at the time of incorporation, when it stated "[i]f defendant did not desire [the results of incorporation], he was free not to enter into a separation agreement which provided that either party could request that it be made an order of the court by motion filed in the divorce action."

In contrast, in [Rockingham County DSS ex rel. Walker v. Tate, 202 N.C. App. 747 \(2010\)](#), the trial court entered a "consent" child support order based on a statement signed by defendant several months prior to the hearing wherein defendant agreed to 'reinstate' a court order requiring him to pay support. Defendant objected on appeal, arguing that the order was void because he did not consent at the time the trial court entered it, and the court of appeals agreed - despite defendant's written agreement signed months earlier - quoting [Tevepaugh](#):

"The power of the court to sign a consent judgment depends upon the unqualified consent of the

parties thereto, and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement and promulgates it as a judgment. There is no requirement with consent judgments, including consent judgments relating to property, support and custody rights of married persons, that the parties, at the time of the entry of the judgment, actually appear in court and acknowledge to the court their continuing consent to the entry of the consent judgment. The parties' failure, however, to acknowledge their continuing consent to the proposed judgment, before the judge who is to sign the consent judgment, subjects the judgment to being set aside *on the ground the consent of the parties was not subsisting at the time of its entry.*"[emphasis added]

So if an incorporated agreement is a consent judgment, and a consent judgment requires consent at the *time of entry*, then it seems a trial court cannot incorporate a separation agreement if it is clear at the time of incorporation that one party no longer desires incorporation. Why would an agreement to incorporate contained in the contract as in *Cavanaugh* be treated differently than the written agreement signed by defendant in the *Walker* case? While a party may have a breach of contract action against the other for refusing to incorporate after contracting to do so, can a court actually force the entry of a 'consent' judgment as a remedy for breach of contract? If so, there would first need to be a breach of contract action filed and a determination made that the remedy at law is inadequate.

What about incorporating by default? Plaintiff files a complaint seeking absolute divorce and incorporation of separation agreement. Defendant fails to respond and does not appear at the hearing. Can the court incorporate? Certainly not if there is no provision in the separation agreement itself about incorporation, because there is no cause of action in North Carolina law allowing a court to turn a contract into a court order without some kind of consent by the parties. What if there was a provision in the contract agreeing to incorporation? Should the court assume the consent is still present at the time of the hearing? Based on *Walker*, can't a defendant later have the incorporated agreement set aside by showing lack of actual consent at the time of entry?

This is an important topic. Let me know what you think.