



# THE ENFORCER

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## PROPERTY SETTLEMENT AGREEMENTS AND JUDGMENTS OF DIVORCE

It is quite common for divorcing parties to enter into a property settlement agreement which is a separate and distinct document from the judgment of divorce itself. The reasons for this can vary and include the desire to keep the terms of the agreement and/or the information related to their property confidential and out of the public record. When parties execute a separate property settlement agreement, most often it is then merged and incorporated by reference into the judgment of divorce. This means the settlement agreement can be enforced by the divorcing court because it becomes a disposition of marital property by the court.

At times, either intentionally or by mistake, a property settlement agreement may be incorporated but not merged into the judgment. If this is the case, critical questions arise such as what is the legal effect of the settlement agreement and how does a party enforce it?

### Legal Effect and Enforcement

A property settlement agreement that was not merged into a judgment of divorce, for whatever reason, is merely a contract. See *Marshall v. Marshall*, 135 Mich. App. 702, 712-713 (1984). It can only be enforced through traditional contract remedies. When the settlement agreement is made part of the judgment of divorce, a party is able to seek enforcement of the judgment as permitted by MCR 2.614(A)(2)(e) and other family law statutes and rules.

If a party is seeking relief from (as opposed to enforcement of) a settlement agreement, the grounds for such relief are similar whether the settlement agreement is construed as a contract or judgment. A party seeking relief from a judgment must allege a basis under MCR 2.612(C)(1) (See also

*Nederlander v. Nederlander*, 205 Mich. App. 123 (1994)). The bases include: mistake, inadvertence, surprise, or excusable neglect, newly discovered evidence, fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party, the judgment is void, has been satisfied or discharged, it is no longer equitable that the judgment should have prospective application or any other reason justifying relief from the operation of the judgment. These bases are mostly similar to those for which a party may seek relief from a contract such as fraud, mutual mistake and impossibility.

However, for some of these grounds such as fraud, mistake, newly discovered evidence and surprise, relief from the judgment must be sought within one year. See MCL 2.612(C)(2). There is no such limitation on contracts. This is important because in the case of *Nederlander*, the court found that if a party suspects the other party committed fraud during a divorce proceeding, that party must seek redress within one year after entry of the judgment of divorce. *Nederlander*, 205 Mich. App. at 127. A separate cause of action for fraud is not maintainable under MCR 2.612(C)(3). *Id.*

Procedurally, when the settlement agreement is a contract and not part of the judgment of divorce, a party seeking to enforce it must file a complaint for breach. A party seeking to enforce a judgment of divorce may simply file a motion in the divorce action. If a new action must be initiated to seek relief from or enforce a settlement agreement, it is likely to be assigned to a civil judge rather than the family judge from the divorce. Whether that is perceived as good or bad likely depends on the particular parties and attorneys.

A very important consideration in deciding on whether to merge and incorporate a settlement agreement, is that a judgment has a ten year statute of limitations while contract actions are limited to six years. See MCL 600.5809(3); MCL 600.5807; *Gabler v. Woditsch*, 143 Mich. App. 709 (1985).



A judgment can also be renewed to extend the period in which it may be enforced for another ten years. The renewal of a judgment does not require the filing of a new complaint. See MCL 600.5809(3) and *Van Reken v. Darden, Neef & Heitsch*, 259 Mich. App 454 (2003). Contract enforcement cannot be extended except upon agreement or by some action of a party which is then found to have revived the contract.

Confidentiality versus ease of enforceability are important considerations in drafting your judgment. Choosing the wrong path, without prior consultation, may result in a frustrated client.

### Conclusion



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