BORDEN, J., concurring. I agree with the majority opinion that the judgment should be reversed and the case remanded for further proceedings according to law. I reach that result, however, by a somewhat different route from that of the majority. In sum, because this is a family dissolution case, involving an obviously financially sophisticated plaintiff, in which both parties were represented by sophisticated domestic relations attorneys, who reached a settlement of their complicated financial affairs that was approved by the court, I would hold the plaintiff, Brady Dougan, to the terms of the agreement.

I first point out several facts that are not in dispute. First, the provision at issue in the case is, as the dissenting opinion points out, clear and unambiguous in providing for interest to be paid in the event of untimely payment, not from the date on which the payment was due but from the date of the stipulation between the parties. Indeed, in his memorandum of law in the trial court, the plaintiff stated that he "admits that the contract provides what it provides: that the [p]laintiff is required to make a payment of 10 [percent] interest, dated back to June 17, 2005, if the June 16, 2006 payment is late. The [p]laintiff does not argue that the agreement is clear and unambiguous in its terms."[1] Moreover, the plaintiff does not contend in this court that the agreement was ambiguous or that it permitted a construction requiring interest from the date the payment was due, rather than from the date of the agreement. His sole claim here, as it was in the trial court, is that the provision is unenforceable as a penalty.

Second, the plaintiff has never contended, either in the trial court or in this court, that he did not understand that he was required by the agreement to make the payment on June 16, 2006, and that according to the terms of the agreement, a late payment would obligate him to pay interest, not from that due date, but from the date of the agreement. Indeed, in the trial court the plaintiff, in his memorandum of law, stated that he "does not argue that he had a 'good excuse' for failing to pay the required payment on the required day. The [p]laintiff admits that he unwittingly (not willfully) failed to make the required payment of $7,500,000 on June 16, 2006, and instead made the payment on June 28, 2006."

Third, at the parties' dissolution hearing on June 17, 2005, the plaintiff acknowledged in his testimony, designed to persuade the court to approve the agreement as reasonable, that although the agreement had been signed by the parties only the day before, namely, June 16, 2005, "the issues involved in the agreement ha[d] been on the table between [him] and

[the defendant, Tomoko Hamada Dougan] for well over a year." He also acknowledged that he had had an ample opportunity to consider all of the issues involved in the agreement, specifically "including financial issues," that "every agreement by its nature is a compromise in which one gives up something in order to get something else," that he was "familiar with each and every clause" of the agreement, and that he was satisfied that the agreement, taken as a whole, was fair and reasonable. Furthermore, with respect to the specific provision at issue in this appeal, he testified that it was his "intention to secure a letter of credit or some other equivalent type of security *by placing assets into an escrow account so that there will be adequate security for the second installment*."[2] (Emphasis added.) Finally, the defendant testified that the agreement had been reached "after two days of mediation with" an experienced family law practitioner and that the agreement "was one of about three or four prior drafts."

Fourth, as the record discloses, this provision is part of a lengthy, complicated and carefully crafted dissolution agreement, involving great sums of money, as well as matters of child custody and visitation, which was approved by the court after testimony by both parties that they consented and agreed to it. Moreover, it cannot be denied that this provision is highly unusual, calling as it does for retroactive interest if the payment is untimely. The conclusion is inescapable that the parties must have focused at least some of their attention on it.[3]

Fifth, the plaintiff is a highly educated and financially sophisticated person. He is a graduate of the University of Chicago and received a master's of business administration degree from the same university. At the time of the dissolution hearing, he was employed by a well known investment banking firm and had a monthly net income (even after more than $3100 in deductions for 401 [k] accounts) of more than $1 million, and total assets of $77,420,050. Finally, an examination of the trial court record discloses that both parties were represented by sophisticated and experienced domestic relations attorneys of high regard; indeed, the plaintiff was represented by the same attorney who represents him in this appeal.[4]

With this factual background in mind, I turn to what I regard as the appropriate legal principles that govern the defendant's appeal. Those principles persuade me that under the particular circumstances of this case, the agreement should be enforced as negotiated by the parties and as presented to and approved by the court.

I begin by noting my agreement with the general legal principles regarding contractual penalty provisions propounded by the dissenting opinion. If this were a purely commercial case, I would be compelled to agree that the provision at issue constitutes a penalty, rather than a liquidated damages clause, and would be unenforce-

able as a matter of public policy. There are in this case, however, competing public policies that, in my view, outweigh those at work in commercial cases.

"Our cases have recognized that the special concerns that arise in the context of family cases may sometimes justify a departure from the rules that ordinarily apply to other civil disputes. See, e.g., *Billington* v. *Billington*, 220 Conn. 212, 595 A.2d 1377 (1991) (party seeking to open marital judgment on basis of fraud need not establish diligence in attempting to discover fraud); *Monroe* v. *Monroe*, 177 Conn. 173, 182–83, 413 A.2d 819, [cert. denied], 444 U.S. [801], 100 S. Ct. 20, 62 L. Ed. 2d 14 (1979) ('Analogies drawn from commercial litigation fail to respond adequately to the situation of emotional trauma commonly associated with the irretrievable breakdown of a marriage. . . . [L]awyers who represent clients in matrimonial dissolutions have a special responsibility for full and fair disclosure, for a searching dialogue, about all of the facts that materially affect the client's rights and interests.' [Citations omitted.]); see also *Baker* v. *Baker*, 187 Conn. 315, 445 A.2d 912 (1982); *O'Bymachow* v. *O'Bymachow*, 12 Conn. App. 113, 118–19, 529 A.2d 747, cert. denied, 205 Conn. 808, 532 A.2d 76 (1987); *Grayson* v. *Grayson*, 4 Conn. App. 275, 494 A.2d 576 (1985), appeal dismissed, 202 Conn. 221, 520 A.2d 225 (1987)." *Mulholland* v. *Mulholland*, 229 Conn. 643, 650–51, 643 A.2d 246 (1993).

Moreover, our courts have long recognized, as the majority opinion persuasively demonstrates, "our strong policy that the private settlement of the financial affairs of estranged marital partners is a goal that courts should support rather than undermine. *Baker* v. *Baker*, supra, [187 Conn.] 322; *Hayes* v. *Beresford*, 184 Conn. 558, 568, 440 A.2d 224 (1981); *Lavigne* v. *Lavigne*, 3 Conn. App. 423, 426, 488 A.2d 1290 (1985); *Grayson* v. *Grayson*, supra, [4 Conn. App.] 299. That goal requires, in turn, that reasonable settlements have been knowingly agreed upon. *Monroe* v. *Monroe*, supra, [177 Conn.] 184." (Internal quotation marks omitted.) *Billington* v. *Billington*, supra, 220 Conn. 221.

Application of these well established principles of family law leads me to conclude that similar justifications for departing from commercial principles are present in this case. See *Mulholland* v. *Mulholland*, supra, 229 Conn. 651. The provision at issue is clear and unambiguous. The plaintiff admits that he knew what it meant. It was part of a complicated and carefully crafted dissolution agreement, involving millions of dollars, arrived at after long negotiations and mediation by experienced and sophisticated family lawyers, which was approved by the court. And the plaintiff, who wants to avoid the obligation that he knowingly undertook, is a highly educated and financially sophisticated person. Under this unique combination of circumstances, I conclude that the ordinary public policy against enforce-

ment of penalties in a contract must yield to the public policy of enforcing dissolution settlements that are freely and fairly entered into.

I agree with the majority, therefore, that the trial court's judgment should be reversed and the case remanded to the trial court for further proceedings according to law.

[1] Although it might be possible to read this statement as a somewhat backward way of contending that the agreement is *not* clear and unambiguous, it is crystal clear from the entire context of the plaintiff's legal arguments to the trial court that what he meant by this sentence is that he admits that the agreement is clear and unambiguous. In other words, the plaintiff's entire argument in the trial court, as it is in this court, was that, even given that the provision clearly and unambiguously called for interest from the date of the agreement, it was unenforceable as a penalty.

[2] Thus, the dissent's disagreement with the majority over whether the plaintiff had the use of the $7.5 million, for the period from the date of the agreement, is misguided and does not involve this court in fact-finding. It does not require testimony or fact-finding for this court to determine that with respect to the period from June, 2005, to June, 2006, the plaintiff, rather than the defendant, had the benefit of that sum—for example, by way of having either cash or some other assets in an escrow account, on which he, rather than the defendant, would undoubtedly get the interest. Additionally, even if he chose to borrow to make the payment, it meant that he did not have to borrow until the payment date. Thus, no matter how one looks at it, the plaintiff had the use of the money from the date of the agreement to the due date of the payment. Indeed, this recognition is routine in courts' determination of interest. See, e.g., *Niles* v. *Niles*, 15 Conn. App. 718, 721, 546 A.2d 329 (1988) (imposing interest for time period in which plaintiff had "use of the money" to which defendant was entitled).

[3] Indeed, one could almost conclude that the most likely explanation of this provision is that the defendant wanted one lump sum payment of approximately $15 million at the time of the dissolution, whereas the plaintiff wanted to delay payment of at least part of the lump sum, and that the compromise was the provision as drafted: approximately one half of the lump sum would be delayed for one year but interest would run retroactively if the payment were untimely. This conclusion, however, would probably have required some testimony from the negotiating parties, including the mediator, and the plaintiff did not introduce such testimony. Therefore, I cannot base my decision on that possibility.

Nonetheless, the conclusion that the parties must have focused their attention on this highly unusual interest provision also undermines the dissent's interpretation of the plaintiff's testimony regarding the provision. That testimony was that the plaintiff understood that time was of the essence and that in the event of default, "at that point, interest can be imposed." The dissent interprets this as merely an understanding by the plaintiff that interest would be imposed beginning on the date of the breach, not on the date of the agreement. To me, it simply defies common sense to say that the financially sophisticated plaintiff, represented by an experienced domestic relations lawyer, negotiating a financially sophisticated marital dissolution agreement, involving millions of dollars, and testifying that as to the payment in question, time was of the essence, did not know that the interest being imposed "at that point" was the interest called for by the explicit terms of the agreement. Indeed, this inescapable conclusion is buttressed by the plaintiff's explicit concession in the trial court in these postjudgment proceedings that the provision at issue means what it says but is legally unenforceable.

[4] It is disconcerting to me that the same attorney who participated in the extensive negotiations and mediation that resulted in the provision at issue now argues, only approximately two and one-half years later, that it is legally unenforceable. If it is so clear now, as he contends, presumably he may at least have suspected so when it was negotiated and presented to the court as fair and reasonable. This is unseemly, to say the least.