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Divorce and the Third Party: Spousal Support, Private Agreements, and the State

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DIVORCE AND THE THIRD PARTY: SPOUSAL SUPPORT, PRIVATE AGREEMENTS, AND THE STATE

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The tension between the rights of individuals to control the distributional consequences of divorce by private contract and the interests of the state in preserving its role as third party to marriage and divorce has produced an often bewildering complexity in the law surrounding the operation and effect of separation agreements. In this Article Professor Sharp examines the efforts of North Carolina to accommodate these conflicting interests. A greatly diminished emphasis upon fault and a partial blurring of the distinction between incorporated and unincorporated agreements have expanded both the scope and efficacy of private contracts in this area. Contradictory state policies on reconciliation and the continued reluctance of courts to develop standards for fraud, unfairness or undue influence tend toward an opposite effect. Professor Sharp also discusses the relationship between property settlements and separation agreements and the unique effect of the recently repealed privy examination statute in North Carolina.

I. VALIDITY

A. Introduction

It is commonplace to speak of the state as the third party to marriage and, by implication, to divorce as well.[1] In fact, however, the state is a relatively unobtrusive, almost silent, partner in an ongoing marriage. It denominates marriage a status and prescribes the incidents of that status, but otherwise leaves the other partners largely to their own devices. It is only upon the breakdown of marriage that the intrusive nature of this additional partner and the marital incidents it will then impose may be fully realized.

The state need not always be such an obstrusive third party. Owing largely to the rapid growth of no-fault divorce, there exists in all states today a kind of "de facto unilateral divorce."[2] It is possible, therefore, for dissolution

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1. The supreme court of North Carolina has succinctly stated the proposition: "There are three parties to a marriage contract—the husband, the wife, and the State. For this reason marriage is denominated a status, and certain incidents are attached thereto by law which may not be abrogated without the consent of the third party, the State." Ritchie v. White, 255 N.C. 450, 453, 35 S.E.2d 414, 415 (1945). In a much quoted opinion, the Supreme Court of the United States explained: "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature." Maynard v. Hill, 125 U.S. 190, 205 (1888).

2. Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 704. Freed & Foster, *Divorce in the Fifty States: An Outline*, 11 FAM. L.Q. 297, 306 (1977), gives the following breakdown on grounds for divorce in this country: fifteen states have irretrievable breakdown as the sole grounds for divorce; in sixteen more, irretrievable breakdown is an alterna-

of marriage to be only slightly more difficult than entry into marriage was in the first instance, particularly if a couple have no children, no substantial property, and no alimony claims. If, however, there are substantial economic consequences, in the form of spousal or child support or division of property, then the apparent ease with which a decree of divorce may be obtained becomes almost wholly illusory. It is in these circumstances that divorce, at least as far as its distributive consequences are concerned, is often but an anticlimactic end to what has been a traumatic, time-consuming, risky, and expensive process.

Moreover, for reasons that are discussed later in this Article, the divorce process is largely adversarial in nature and is steeped in a legacy of fault.[3] It is controlled in whole or in part by the state, which at a minimum acts as the final arbiter of the economic consequences of divorce. In litigation, where the state exercises maximum control, the pressures of an adversarial system of dispute settlement combine with a judicial fault-based model for determining economic outcomes to reach a result that geometrically compounds the deficiencies of both systems.[4] Parties involved in no-holds-barred domestic litigation are much more apt to be embittered than satisfied, both with the system and with their partners. This reaction may be due in part to unrealistic expectations of what a court can do. It may also be an eminently reasonable response to what a court has done.[5]

Not surprisingly, lawyers and their clients have sought alternatives to court imposed settlements. The most readily available, frequently used, and

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tive to more traditional fault grounds; incompatibility is a ground in seven states; and living separate and apart for the required statutory length of time is a ground for divorce in twenty states.

3. *See* text accompanying notes 13-30 *infra*. The no-fault "revolution" has not yet signaled the demise of fault in the divorce process. Rather in many cases, and particularly in North Carolina, the fault inquiry has simply been refocused: who is entitled to obtain a divorce may no longer be determined by fault; but who gets what from a divorce, including alimony, custody, attorneys' fees, and even property division, often is. Commentators have not been slow to point this out. *See, e.g.*, 2 A. LINDEY, SEPARATION AGREEMENTS AND ANTI-NUPTIAL CONTRACTS § 31, at 31-37 (rev. ed. 1978). Annot., 80 A.L.R.3rd 1116, 1119 (1977). For a somewhat different perspective, dealing with the experience of California, the first state to adopt no-fault grounds, see Weitzman & Dixon, *The Alimony Myth: Does No-Fault Divorce Make a Difference?*, 14 FAM. L.Q. 141 (1980).

4. The fundamental premise of this article is that both systems are largely inappropriate and counterproductive in a domestic law context. In operation, if not by definition, the goal of the adversary process is to pursue the interests of one's client in a rather single-minded fashion, without regard to fairness. But any agreement that fails to achieve a basically fair result becomes unworkable in the long run. It will usually lead to litigation in the future and thereby become self-defeating. In essence, the adversarial approach creates new wounds instead of starting the healing process with the old ones. At its best, as some commentators have noted, it is "a limited view of the lawyer's function in matrimonial matters [which] will not benefit even his own client." Pilpel & Zavin, *Separation Agreements: Their Function and Future*, 18 LAW & CONTEMP. PROB. 33, 36 (1953). *See also* notes 5 & 30 *infra*.

5. Parties involved in fault-based litigation often look to the process to provide them with a kind of vindication—an economic reward to symbolize their freedom from blame. Instead the process usually just adds new and volatile fuel to old fires, particularly when combined with the adversarial system. As one commentator concluded, "[A]greement seems to be universal. . . . that the negative repercussions of divorce are directly related to the existence of the adversary process. The longer. . . [one] is immersed in the guilt-innocence controversy. . . the greater the potential for long-lasting scars to develop." Johnson, *A Special Code of Professional Responsibility in Domestic Relations Statutes?*, 9 FAM. L.Q. 595, 596 (1975).

potentially most salutary, alternative to a judicially imposed resolution is the separation agreement, or combined separation agreement and property settlement. It should be understood, however, that separation agreements are infrequently, if ever, detours by which one avoids altogether the disadvantages of the adversarial-fault system. Indeed, it is the very existence of that system which not only prompts parties to seek a private settlement but conditions and guides the entire negotiating process.[6] As commentators have pointed out, parties always bargain "in the shadow of the law"—in the light of results that the law might impose were agreement not to be reached.[7]

Additionally, the state controls this process of private bargaining in other, more direct ways. It determines the conditions under which the contracts may be executed, rescinded, or enforced. It forbids some types of agreements altogether and draws an often crucial distinction between those it has imposed directly and those it merely has approved.[8] All of this is done in the name of public policy, a policy usually articulated as one that aims at preservation of the integrity of marriage and its essential elements.[9] It is also good policy to promote private settlements of disputes. An obvious conflict between these policies arises as furtherance of one necessarily threatens encroachment upon the other. It is largely the tension between these competing policies, both of considerable validity, that has led to the development of legal standards that are confusing, conflicting, and often "striking for their lack of precision".[10] At the least these standards are dysfunctional in that they provide "a bargaining backdrop clouded by uncertainty."[11] They also create true pitfalls for the unwary lawyer who underestimates the complexity of this area.

This Article will focus on the continuing struggle of one state to develop standards that will accommodate both the interests of the state in marriage dissolution and the interest of the parties in greater freedom to contract privately.[12] The following discussion will indicate that the results thus far are

6. In most states, no-fault divorce legislation, provisions for property division, and the abolition of such traditional defenses as recrimination, condonation, collusion, and connivance have tended greatly to increase the pressures towards private negotiation. *See* Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950; Glendon, *supra* note 2, at 716. This may not be true in North Carolina, however. Since the abolition of the recriminatory defenses in 1978, North Carolina has in effect made unilateral divorce on separation grounds available to any spouse. At the time this article is being written, however, there is no provision in the statutes for equitable division of property. Thus, a supporting spouse seeking a divorce has considerably greater bargaining power. This may force a dependent spouse to negotiate from a position of weakness, but it is just as likely to force both parties into alimony litigation.

7. Mnookin & Kornhauser, *supra* note 6, at 968.

8. *See* text accompanying notes 242-52 *infra*.

9. The interests of a state in its own role and in the policies it seeks to further are quite similar. They are not, however, identical. This article will seek to show that some public policies could in fact be furthered by a dimunition in the role of the state in the dissolution process, whereas others might be better promoted by more participation from the state.

10. Mnookin & Kornhauser, *supra* note 6, at 969.

11. *Id.*

12. The problems faced in making this accomodation are certainly national in scope. Such a focus would be largely impossible because of the great variation in the laws among, and occasionally even within, states in this subject area. The discussion here, therefore, will center largely on the law of North Carolina, although an attempt has been made to identify and distinguish general principles and policies.

mixed. Conflicting policies, even when confronted thoughtfully, have at times produced conflicting results. In other instances, blind adherence to outmoded policies has produced anomalous results. Nonetheless, to some degree a workable compromise has been developed. But the extent to which the parties may determine for themselves the economic consequences of divorce depends entirely on how carefully the intricate rules of the state are understood and followed. At a time when the balance of private contract rights and state policy interests is precariously subject to change, the rules are complex indeed.

B. The Legacy of Fault

Central to an understanding of the policies that underlie a state's intervention into the terms and conditions of marriage dissolution is a recognition of the almost religious significance accorded the institution of marriage.[13] Most of our divorce laws derive from a time in which marriage was identified wholly with the idea of family, and in which family was identified as the nursery of morality and the foundation of social and political values and institutions. That an institution of such critical importance to the state might be dissolved without fault was unthinkable. In a very real sense, divorce was a kind of offense against the state, and an offense implied an offender. The North Carolina Supreme Court has recently reaffirmed, in terms stronger than those that most courts might find appropriate, the importance of fault:

> Nor do we find the notion of fault repugnant to sound public policy . . . . Sound public policy would dictate that the party who violated that binding [marriage] contract should continue to bear its financial burden when he or she can reasonably do so and where that is necessary to prevent a relatively greater economic hardship on the party without fault.[14]

The continuing legacy of fault, shared to varying degrees by most states, clearly has a critical impact on litigated and private divorce settlements. It is rooted analytically in the concept of reciprocal duties in a marriage: that a husband has a duty to support his wife and that she in turn has a duty to render services to him in the home.[15] Although the husband's duty of, and the wife's concomitant right to, support are increasingly vulnerable to attack on equal protection grounds,[16] this duty and right formed and largely continue to

13. Again, although innumerable other instances could be cited, the case of Maynard v. Hill is illustrative. The purity of the institution of marriage must be maintained, said the Supreme Court, for it "is the foundation of the family and of society, without which there would be neither civilization nor progress." 125 U.S. 190, 211 (1888). *See also* HOUGHTON, THE VICTORIAN FRAME OF MIND 341-48 (1957).

14. Williams v. Williams, 299 N.C. 174, 188, 261 S.E.2d 849, 859 (1980). The case is probably the most important statement of policy in this area in several years. Interestingly enough, it is the only case in North Carolina that discusses with apparent favor the concept of rehabilitative alimony.

15. The wife's duty has always been legally unenforceable and therefore largely illusory, except insofar as the consequences of breach were involved. The husband's duty is, as a practical matter, unenforceable as long as the parties live together.

16. The recent Supreme Court decision in Orr v. Orr, 440 U.S. 268 (1979), which declared unconstitutional on equal protection grounds a state statute under which only wives were eligible

form the basic principle upon which many of the essential elements of marriage are based. Most importantly, the need to enforce this duty of support has provided the major policy rationale on which courts have sought to control many aspects of marriage dissolution.[17] The roles imposed upon parties to marriage by this concept of reciprocal duties are one of the major vehicles by which marriage itself is denominated a status.[18]

The concept itself is distinctly feudal in nature, its origins easily traceable in England to the eleventh century and the Norman Conquest.[19] The ultimate effect of the doctrine, in combination with other developments in the common law, was rather simple. Stripped of her rights to own property or to contract in her own name, her economic worth wholly subsumed into the marital unit, a married woman received, as a *quid pro quo*, the right to depend upon her husband for support.[20]

This right to support was never absolute, however. For example, it was, and is, largely unenforceable as long as the parties live together.[21] More significantly, the spouses' covenants were and are dependent, so that if any separation of the parties were occasioned by the wife's breach of her duty, her husband's duty to support her was extinguished. The doctrine of reciprocal duties introduced to the English legal system at a very early time a model of marital relations in which the fault of one party could relieve the other from the performance of his or her duties. Only if the separation of the parties was not the result of fault on the part of the wife, and was therefore (in the logic of the day) the result of serious fault on the part of the husband, would the duty

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to receive alimony, has wholly logical, but not necessary, implications for the continued validity of gender-based support duties. See, for example, the discussion of the recent New York case of Greschler v. Greschler, 71 A.D.2d 322, 422 N.Y.S.2d 718 (1979), at note 62 *infra*, where a statute embodying such a classification was struck down on equal protection grounds. N.C. GEN. STAT. § 14-322, which makes a husband's abandonment of his wife without providing her with adequate support a misdemeanor, also creates a gender specific duty of support and thus would appear to be constitutionally infirm. The same concept of support could of course be embodied in sex neutral classifications, accomplished in most alimony statutes by the use of terms like "supporting" and "dependent" spouse. In most instances the practical effect would be the same—the husband would continue to have the primary duty of support.

17. Were equal protection attacks successfully to undermine this concept, one of the major policy obstacles to greater freedom to contract in separation agreements might be removed. *See* text accompanying notes 62 & 65 *infra*.

18. The observation that marriage is moving from a matter of status to a matter of private contract is familiar. The idea derives from the nineteenth century scholar Sir Henry Maine. One of the hallmarks of a progressive society, he postulated, is that individual roles, initially a function of status, become increasingly a function of private contract. H. MAINE, ANCIENT LAW 170 (14th ed. 1891).

19. Apparently the Normans grafted onto the existing system of law in England their own concept of *capatis dominutio minor*, whereby the wife's legal identity was both literally and figuratively merged into that of her husband's. Though in later years this merger concept gave way in Normandy to the more liberal influences of Roman and civil community property concepts, England remained isolated from such continental developments. Johnston, *Sex and Property: The Common Law Tradition, the Law School Currciulum, and Developments toward Equality*, 47 N.Y.U.L. REV. 1033, 1044 (1972), & Sayre, *A Reconsideration of Husband's Duty to Support and Wife's Duty to Render Services*, 29 VA. L. REV. 857, 858 (1943).

20. Paulsen, *Support Rights and Duties Between Husband and Wife*, 9 VAND. L. REV. 709 (1956).

21. *Id.* at 719. *See also* Comment, *Marital Property: A New Look at Old Inequities*, 39 ALB. L. REV. 52, 54 (1974).

to support survive.[22]

Assuming that the duty of support did survive the separation, it could be enforced in the English system in one of two ways: the wife could pledge the husband's credit to provide herself with "necessaries,"[23] or she could sue in the ecclesiastical courts for a divorce *a mensa et thoro*.[24] If the wife obtained this limited form of divorce she became entitled to alimony—judicial enforcement of her husband's duty to support throughout the remainder of the marriage, presumably until one or the other party died.[25]

In this country the doctrine of reciprocal duties was adopted quite early.[26] Given the absence of ecclesiastical courts here, however, and the availability, albeit on restrictive grounds, of absolute divorce, the concept of alimony underwent a necessary, though theoretically somewhat untenable, transformation. It remained a "statutory substitute for the marital right of support,"[27] despite the received law legacy that the duty of support could not survive the absolute dissolution of a marriage, so that even in states where absolute divorce was possible, alimony, either permanent or pendente lite, was available to a wife. Whether it was actually decreed, and in what amounts, depended almost solely upon the absence of the wife's fault in bringing about the separation of the parties.[28]

This legacy of fault is both powerful and tenacious. Although currently only ten states make marital misconduct an automatic bar to the granting of alimony, fault is still probably the single most relevant factor in setting the

22. Paulsen, *supra* note 20, at 716, & H. CLARK, LAW OF DOMESTIC RELATIONS 184 (1968). The Paulsen article has a particularly good discussion of the manner in which these models of behavior led to the development of the fundamental fault approach to dissolution of marriage.

23. As Clark and many other commentators have noted, this was a woefully inadequate remedy for a *femme couvert*. H. CLARK, *supra* note 22, at 189-192. Merchants were, and are, understandably reluctant to allow such credit transactions, as a husband could legally fail to honor any demand for payment if the wife had been at fault in causing the separation, if he had already provided her with funds for necessaries, or if the items for which his credit were pledged were not in fact "necessaries."

24. H. CLARK, *supra* note 22, at 189-191; Paulsen, *supra* note 20, at 735. The divorce *a mensa et thoro*, at a time when absolute divorce was virtually unknown, was simply a judicially sanctioned separation—an authoritative pronouncement that a party's refusal to live with his or her spouse was not unlawful. *See also* Rheinstein, *Trends in Marriage and Divorce Law of Western Countries*, 18 LAW & CONTEMP. PROB. 3 (1953).

25. 1 W. NELSON, DIVORCE AND ANNULMENT § 14.02 (1945 & rev. ed. 1961). In the very rare instances in which absolute divorce, or *divorce a vincula* was obtained, alimony was not available, because it was originally nothing more than an extension of the duty of support, the duty itself being incident to an existing valid marriage. *See* Vernier & Hurlbut, *The Historical Background of Alimony Law and Its Present Statutory Structure*, 6 LAW & CONTEMP. PROBS. 197, 201 (1939). North Carolina preserved an interesting variation on this rule until 1967. *See* text accompanying note 206 *infra*. For similar reasons, alimony was never available to husbands: there existed no duty of support in their favor from which the duty to pay alimony might derive. *See* Kurtz, *The State Equal Rights Amendments and Their Impact on Domestic Relations Law*, 11 FAM. L.Q. 101, 132 (1977).

26. J. BISHOP, MARRIAGE, DIVORCE AND SEPARATION § 1184 (1891).

27. 2 W. NELSON, *supra* note 25, at § 14.02. Alimony pendente lite, alimony without divorce, and separate maintenance are entirely consistent with the original rationale under which alimony was granted. For a discussion of the difficulties that some commentators have had with the lack of theoretical consistence in permanent alimony awards after divorce, see Kurtz, *supra* note 25.

28. 2 W. NELSON, *supra* note 25, at § 14.02.

level of support after separation or divorce.[29] That the concept of fault has justly received vituperative criticism has not appreciably lessened reliance upon it in determining the distributive consequences upon divorce.[30]

In summary, the concept of reciprocal duties, regardless of the probability of its continuing constitutional validity, is of crucial importance in several respects. First, it continues to provide the theoretical models for marital partners, any deviation from which carries serious economic consequences for the breaching party.[31] Second, it has helped to institutionalize, at a deep and pervasive level within our court systems, the role of fault in marriage dissolution. This in turn has made the privately negotiated settlement a more attractive, not to mention more humane, alternative.[32] Finally, the duty of support and its fault progeny continue to be major considerations in negotiating separation agreements and so continue to form a large portion of the law in whose shadow private settlements must be reached. It is to an examination of this law in North Carolina that we may now turn.

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29. Freed & Foster, *supra* note 2, at 306. Until quite recently, fault was also the overwhelmingly dominant factor in determining whether or not divorce itself would be available and to whom it would be granted. North Carolina is numbered among those ten states that make adultery, the most serious example of marital fault, an absolute bar to receiving alimony. N.C. GEN. STAT. 50-16.6(a) provides that "alimony or alimony pendente lite shall not be payable when adultery is pleaded in bar of demand . . . in an action or cross action, and the issue of adultery is found against the spouse seeking alimony. . . ."

30. Fault bears no necessary, or even likely relationship, to the economic or other contributions of either party to the marriage, nor to the level of economic need of either. Marital fault bears even less relation to custodial considerations, a topic beyond the scope of this article. *See* Paulsen, *Support Rights*, supra note 20, at 727; and Pilpel & Zavin, *Separation Agreements*, *supra* note 4. That alimony awards are largely fault-based only increases the onerous nature of the payments. For a devastating criticism of the psychological and sociological effects of alimony awards, *see* Peele, *Social and Psychological Effects of the Availability and Granting of Alimony on the Spouses*, 6 LAW & CONTEMP. PROBS. 283, 284 (1939). The author aptly concludes that alimony "perpetuates, in most instances, a relationship passionately undesired and in a way that continues and even increases former antagonisms. . . . It easily becomes a sort of legal poultice that draws to a head the underlying domestic poison that the decree is expected to drain away. . . . Animosities that might otherwise have burnt out with the passing of time may be rekindled each time a check is mailed." *Id.* at 283.

31. Paulsen, *supra* note 20, at 709-10.

32. The degree to which separation agreements become a more humane alternative to the adversarial-fault system depends not only on the extent to which that system will allow the parties freedom to contract. It is also dependent on the attorney's technical knowledge, his willingness to be guided by considerations of fairness, and his sensitivities to the pschological difficulties of his clients. To ignore that separation agreements, particularly if there are children involved, become a sort of post-marital code by which the future relationships of the parties will to a great degree be governed, is to defeat one of the major purposes of the agreement. For insightful discussions of the psychological nature of the tasks a lawyer undertakes in domestic matters, see Watson, *The Lawyer as Counselor*, 5 J. FAM. L. 7 (1965); Watson, *Professionalizing the Lawyer's Role as Counselor: Risk-Taking for Rewards*, 1969 LAW AND THE SOCIAL ORDER 17; A. WATSON, PSYCHIATRY FOR LAWYERS (1968); Redmount, *Perception and Strategy in Divorce Counseling*, 34 CONN. B.J. 249 (1960); and Spencer & Zammit, *Mediation-Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents*, 1976 DUKE L.J. 911. As Watson says, this counseling task may be "slighted or ignored, stumbling or skillful, effective or defeating, but it cannot be avoided." Watson, *The Lawyer as Counselor*, 5 J. FAM. L. 7 (1965).

C. *Separation Agreements: History and Validity*

1. Introduction

In order to avoid any unnecessary confusion in the discussion that follows, two distinctions should be made at the outset. The first is that between separation agreements and consent judgments. For reasons that will be explained later, consent judgments have been used with particular frequency in North Carolina,[33] but with one or possibly two exceptions, the two types of contracts are virtually identical.[34] A consent judgment is basically nothing more than a private contract between the parties that has been entered upon the records of, and received the stamp of approval from a court.[35]

A more crucial, and subtle, distinction that must be made is between a separation agreement and a property settlement. In its simplest form, a separation agreement is a contract between a husband and a wife stating that they have agreed to live separate and apart and providing for marital *support* rights.[36] A property settlement, on the other hand, has nothing to do with the support rights of a dependent spouse. It is an agreement that adjusts the rights of the couple in real and personal property. Although these adjustments may involve installment payments to the wife, they are not necessarily "support" payments.[37] Such settlements may be entered into at any time, whether the parties contemplate divorce or separation, and they may divide property in a fashion that a court would be without power to order.

Operationally and analytically separation agreements and property settlements, although often entered into simultaneously, are quite distinct—one deals with property rights and the other with support rights.[38] That the two

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33. See text accompanying discussion at notes 205-09 *infra*.

34. *Id.*

35. 2 R. LEE, NORTH CAROLINA FAMILY LAW § 152, at 217. *See also* Stanley v. Cox, 253 N.C. 620, 632, 117 S.E.2d 826, 834 (1961). N.C. GEN. STAT. § 1A-1 Rule 68.1(a)(1967) provides that: "A judgment by confession may be entered without action at any time in accordance with the procedure prescribed by this rule. Such judgment may be for money due. . . . [S]uch judgment may also be entered for alimony or for support of minor children." As a pratical matter a consent judgment is often entered into after court proceedings have begun and the parties find that they are, after all, able to reach agreement on matters of spousal and child support. A previously negotiated separation agreement may also always be entered as a consent judgment.

36. 2 R. LEE, *supra* note 35, § 187, at 459. Customarily this agreement contains some provision for the support of the dependent spouse, a stipulation by that spouse, usually the wife, that the provision is accepted in fulfillment of all support duties, a waiver of all other rights, and, if there are children, provision for their custody and support. *Id.*

37. 2 A. LINDEY, *supra* note 3, § 31, at 31-69, and 2 R. LEE, *supra* note 35, § 187, at 460, 463. Particularly when there is a lump sum, payable in installments, it is often very difficult to distinguish between property and support provisions. The key lies not in the labels or characterizations of the payments, but in the essential purpose for which they are made. *See* 1 A. LINDEY, *supra* note 3, § 3, at 24 (Supp. 1981) and Clark, *Separation Agreements*, 28 ROCKY MTN. L. REV. (Part I) 149, (Part II) 320, 332 (1955).

38. In general, the major distinctions between a property settlement and a separation agreement, other than those already noted, are as follows: (1) provisions for periodic payments in a separation agreement that is merged in a divorce decree usually may be modified by a court, but payments in a property settlement may be modified only with the consent of the parties; (2) payments made to a wife under a separation agreement will usually qualify as alimony, and thus be deductible to the husband and income to the wife, whereas payments made under a property settlement are not deductible to the husband nor chargeable as income to the wife; (3) a reconcili-

types of agreements are often inextricably confused within a single document, usually with serious and undesirable consequences, should not obscure their essential differences.[39]

2. History

The history of the development and recognition of separation agreements presents an interesting object lesson in the triumph of private law over public policy. In a neat turn of the phrase, it has been noted that through the vehicle of separation agreements, divorce and its economic consequences have become a "semi-bootleg affair" in which the courts play a minimum role.[40] In their origin, however, separation agreements were an almost wholly "bootleg" affair. The same forces of public policy and judicial hostility that at one time prohibited or restricted divorce also prohibited, then severely restricted, the operation and effect of separation agreements.[41]

Apart from judicial hostility to anything that might adversely affect the indissoluble nature of marriage, the major theoretical stumbling block standing in the way of legal recognition of separation agreements was that of the merger of the wife's identity into that of her husband. Above all else a separation agreement is a contract, and obviously one could not contract with one's self.[42] Although the validity of these agreements had long been recognized on the continent, they were wholly void in England until the end of the eighteenth century.[43] At about that time, however, Lord Mansfield undertook an almost single-handed (and minded) campaign to establish the validity of the contracts. His apparent success was undone in the early nineteenth century, again on the familiar grounds that parties who are at law "but one person" may not contract with each other.[44] However, as one commentator explains:

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ation and resumption of cohabitation will rescind the executory portions of a separation agreement but will normally not affect a property settlement; (4) support payments under a separation agreement will not normally survive the remarriage or death of the payee or death of the payor, but payments made under a property settlement will survive these contingencies; and (5) payments made under a separation agreement that qualify as alimony will not be discharged in bankruptcy, but liabilities under a property settlement may be. 1 A. LINDEY, *supra* note 3, § 3, at 3-23 to -24 (Supp. 1981).

39. *See* discussion accompanying notes 264-270 *infra*.

40. Pilpel & Zavin, *supra* note 4, at 33.

41. Many of the same attitudes are also evident in the development of antenuptial contracts, a subject beyond the scope of this Article. Unlike separation agreements, however, antenuptial contracts have long been favored by law. 2 A. LINDEY, *supra* note 3, § 90, at 90-28. The major North Carolina cases treating the subject are McLean v. McLean, 237 N.C. 122, 74 S.E.2d 320 (1953); Turner v. Turner, 242 N.C. 533, 89 S.E.2d 245 (1955); Motley v. Motley, 255 N.C. 190, 120 S.E.2d 422 (1961); Lane v. Scarborough, 284 N.C. 407, 200 S.E.2d 622 (1973); and Harden v. First Union Nat'l Bank, 28 N.C. App. 75, 220 S.E.2d 136 (1975).

42. 1 W. BLACKSTONE, COMMENTARIES *442 (1818): "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage. . . . For this reason, a man cannot grant anything to his wife, or enter into covenant with her, for the grant would be to suppose her separate existence: and to covenant with her, would be only to covenant with himself. . . ."

43. Peaslee, *Separation Agreements Under the English Law*, 15 HARV. L. REV. 638, 641 (1902). The detailed history that is recounted in this quaintly scholarly and thoroughly delightful article is highly recommended.

44. *Id.* at 643-48.

"Notwithstanding many rebuffs from the courts, the conveyancers persisted in advising the use of the tabooed contract. There was practically no divorce obtainable, and this sort of an armistice was the only relief to be had. . . ."[45] Slowly but surely, in England and the United States, the inevitable recognition of a device that continued to be in common use occurred. By 1888, even the "decent regard for the old law" was abandoned, and parties were allowed to contract directly with each other.[46] "[J]udicial sophistry" had won the day.[47]

However, while the "one person" stumbling block had been overcome, a huge reservoir of judicial hostility to separation agreements remained. In the first case that dealt with the issue in North Carolina, the supreme court came to the following conclusion with clear outrage:

> The relation of husband and wife is at the foundation of society . . . . Incident to it are its inseparable . . . characteristics—its oneness—"they shall be no longer twain but one flesh," "to live *together* after God's holy ordinance," . . . . In contravention of this policy, and in disregard of their marriage vows, the parties in this case had "difficulties" and separated; and to avoid the wholesome control of the court, they entered into an agreement by which the property was to be divided between them . . . and [they] were to live *separately*. Such a course, if allowed, would virtually annul our marriage laws, and make the relation of husband and wife a mere trade or bargain, dependent upon their caprice.[48]

The court commented further that although this "evil" had been "fixed upon society" in Europe, and that in England "too much property now depends upon it to disturb it", it was not too late to eradicate the evil before it could take root in North Carolina. Therefore, the court declared "articles of separation" to be contrary to "law and public policy" and incapable of enforcement.[49]

However, this pernicious attempt to contract, which threatened the very foundation of civilized and moral society, continued hard on the heels of the supreme court's disdain. In 1871 the legislature passed what is known as a "Free Trader" statute. In apparent recognition of what must have already been a common practice, the statute provided that any married woman "living separate from her husband . . . under a deed of separation . . . shall be deemed . . . a free trader."[50] "Free trader" status allowed a woman to convey her personal estate and her real estate without the consent of her husband. And by 1905 the legislature had enacted the precursor to N.C. G.S. 52-6, the famous "privy examination" statute.[51]

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45. *Id.* at 651. It was during this period, and for these reasons, that the trustee device was developed; whereby a husband or some party would convey property to a trustee who would reconvey to, or hold in trust for, the wife.

46. *Id.* at 656.

47. *Id.*

48. Collins v. Collins, 62 N.C. (Phil. Eq.) 153, 155-59 (1867).

49. *Id.* at 156-57, 159.

50. Law of February 12, 1872, ch. 193, § 23, 1871 N.C. PUB. LAWS 335-6.

51. Spencer v. Spencer, 37 N.C. App. 481, 486, 246 S.E.2d 805, 809 (1978). The *Spencer* case

Because this privy examination statute, in effect until January 1, 1978, has had an unexpectedly great impact on the judicial treatment of separation agreements in this state,[52] it deserves careful examination. In its final version, not appreciably different from that in effect in 1905, the statute provided:

> No contract between husband and wife made during their coverture shall be valid to affect or change any part of the real estate of the wife, . . . for a longer time than three years next ensuing the making of such contract, nor shall any separation agreement between husband and wife be valid for any purpose, unless such contract or separation agreement is in writing, and is acknowledged before a certifying officer who shall make a private examination of the wife. . . .[53]

Further, it required that the examining officer incorporate into his certificate a statement of his conclusions and findings as to whether the contract was "unreasonable or injurious" to the wife, and continued that the officer's certificate "shall be *conclusive* of the facts therein stated but may be impeached for fraud as other judgments may be."[54]

Though the impact of this statute will be discussed more fully later, it is clear that by 1905 separation agreements had achieved a legal, if unfavored, status. By 1912 the supreme court begrudgingly admitted that it was "constrained to hold that public policy with us is no longer peremptory on this question, and that under certain conditions these deeds are not void as a matter of law."[55] Though this was hardly an enthusiastic endorsement of separation agreements, their validity "under certain conditions" was established without question.[56] Though several North Carolina cases continued, rather

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has a thorough discussion of the history of this statute, which was then before the court on a constitutional attack. The court of appeals explained that ". . . over the years, the legislature has tried to limit the damage of G.S. 52-6 by passing curative statutes. . . . However, like Br'er Rabbit and the Tar Baby, the legislature found itself unable to turn the wretched creature loose." *Id.* at 488 n.2, 246 S.E.2d at 810 n.2. As will become obvious, the creature was wretched indeed as far as its effects upon separation agreements in this state have been concerned.

52. Repealed. Act of May 13, 1977, ch. 375, § 1, 1977 N.C. SESS. LAWS, 1st Sess. 375.

53. N.C. GEN. STAT. § 52-6 (1976). G.S. 52-2 authorizes married persons to contract in regard to real or personal property "in the same manner and with the same effect" as if unmarried. N.C. GEN. STAT. § 52-2 (1976). G.S. 52-10 specifically authorizes married persons or persons about to be married to release or quitclaim rights in the property of the other that they might acquire, or might have acquired, through marriage. G.S. 52-10.1 effective January 1, 1978, now provides that "any married couple is hereby authorized to execute a separation agreement not inconsistent with public policy, which shall be legal, valid and binding in all respects. . . ." N.C. GEN. STAT. § 52-10 (1979). The entire chapter was rewritten in the later part of nineteenth century after the adoption of article X, section 6 of the North Carolina Constitution, which removed the former requirement that a conveyance of land by a wife could not be valid without the written consent of her husband. 2 R. LEE, *supra* note 35, § 204, at 139 (1976 Cum. Supp.).

54. N.C. GEN. STAT. § 52-6(b) (1976) (repealed 1977) (emphasis added).

55. Archbell v. Archbell, 158 N.C. 408, 413, 74 S.E. 327, 329 (1912).

56. The *Archbell* court was not very helpful, however, in describing precisely what constituted the "certain conditions" under which separation agreements might be held valid in this state. Clearly any deed of separation must have been executed in compliance with the privy examination statute. Beyond that, the court did approve some already well established requirements for valid contracts between husband and wife. First, the instruments were "permissible" only "where the separation has already taken place or immediately follows" and agreements for a future separation would be void *Id.* at 414, 74 S.E. at 329. Second, the parties must be "moved to it by adequate reasons" . . . under circumstances of such character as to render it "reasonably neces-

inexplicably as late as 1955, to comment that these contracts were "not favored at law,"[57] no court since *Archbell* has held an otherwise valid separation agreement void on grounds of public policy. Today, of course, it is widely recognized that separation agreements are much favored by law.[58]

The initial judicial hostility that surrounded the development of separation agreements did not, however, dissipate overnight. Presented with a kind of *fait accompli* from the public, courts simply refocused their distrust: since they could no longer forbid the making of these subversive contracts, they would at least carefully restrict their execution, permissible scope, and operation. One of the major vehicles for the imposition of these restrictions was that "will-o'-the-wisp of the law,"[59] public policy.

3. Public Policy

It is obvious that all judicial or legislative attempts to control the substance or operation of separation agreements are to some degree matters of public policy. More specifically, however, two propositions, each aimed at preserving the integrity of marriage, have from the start been identified as paramount issues of policy. They are that agreements will not be enforced if they are made "in contemplation of divorce" or if they attempt to alter the "essential elements" of marriage.[60] The latter proposition brings us again to the duty of support.

As we have already seen the duty of support is one of the most essential incidents of marriage.[61] The rule developed early, therefore, that a husband could not circumvent by private contract an obligation that the laws of the state had imposed upon him. Thus, any separation agreement that purported to relieve a husband of this duty was void.[62] If applied literally, however, this

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sary" to the health or happiness of one or the other parties. *Id.* Third, the agreement would be rescinded upon any resumption of conjugal relations. *Id.* at 416, 74 S.E. at 330. Fourth, upon a divorce the agreement "in so far as it respects the property rights involved, should be respected by the decree." *Id.* at 416, 74 S.E. at 330.

57. *See, e.g.*, Taylor v. Taylor, 197 N.C. 197, 201, 148 S.E. 171, 173 (1929); Brown v. Brown, 205 N.C. 64, 69, 169 S.E. 818, 821 (1933); and Turner v. Turner, 242 N.C. 233, 235, 89 S.E.2d 245, 249 (1955).

58. 2 S. WILLISTON, LAW OF CONTRACTS § 270, at 121 (3d ed. W. Jaeger 1959); 1 W. NELSON, *supra* note 25, § 13.07, at 492; and 2 A. LINDEY, *supra* note 3, § 15, at 15-85. The Uniform Marriage and Divorce Act clearly favors separation agreements. At § 306(a) it states: "To promote amicable settlement of disputes between parties to a marriage attendant upon their separation or the dissolution of their marriage, the parties may enter into a written separation agreement containing provisions for disposition of any property . . . , maintenance of either of them, and support, custody, and visitation of their children." For more complete discussions of the UMDA, see Symposium, 18 S.D. L. REV. 531 (1973), and Note, *Modification of Spousal Support: A Survey of a Confusing Area of the Law*, 17 J. FAM. L. 711 (1978-79).

59. The phrase is from Waelihan v. Hughes, 196 Va. 117, 82 S.E.2d 553 (1954).

60. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CAL. L. REV. 1169, 1259 (1974).

61. See text accompanying notes 15-18 *supra*.

62. 15 S. WILLISTON, *supra* note 58, § 1742, at 71; 6A A. CORBIN, CONTRACTS § 1474, at 618. The statement does, however, deserve some qualification in view of the recent case of Greschler v. Greschler, 71 A.D.2d 322, 422 N.Y.S.2d 718 (1979), in which the court struck down a statute prohibiting agreements wherein a husband attempted to relieve himself of the duty of support, as an impermissible gender classification. The case was rather unusual, however, as was New York's

rule could mean that most separation agreements would violate public policy, since one of their major functions is to dispense with the duty of support in some fashion.

Two related rationales were developed to preclude this result. First, such a contract was not "in derogation of the husband's support obligation; it merely prescribe[d] the manner in which the obligation was to be met."[63] Second, the familiar principle that courts will not inquire into the adequacy of consideration was applied to the contracts.[64] Policy, in brief, accommodated itself to practical necessity and public need. The result was that separation agreements, valid in other respects, which recited a perfunctory consideration for the wife's relinquishment of her support rights, were held not to violate the cardinal principle that the essential incidents of marriage may not be varied.[65] It is difficult to avoid the conclusion that the principle became a matter of form, with little remaining in the way of substance.

Nor has the second major public policy principle—that a contract between a husband and wife reciting their intentions to live separate and apart must not encourage, promote, or be made in consideration of divorce[66]—fared appreciably better. Significantly, this principle is the source of the well-accepted rule that agreements which look to a future separation are void and that the separation must have already occurred or must occur shortly after the agreement is entered into in order for the agreement to be valid.[67] But except for this derivative rule on the necessity for contemporaneous separation, this policy is in most contexts rather meaningless today. By its very nature a separation agreement tends to "promote" divorce, at least in the sense that it decreases the emotional and financial costs of dissolution.[68] Moreover, the line

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embodiment of this standard in statutory form. It is nonetheless a case of clear potential importance. *See* discussion at note 16 *supra*.

63. 2 A. LINDEY, *supra* note 3, § 15, at 15-85. *See also* H. CLARK, LAW OF DOMESTIC RELATIONS § 16.4, at 529 (1968), and 2 R. LEE, *supra* note 35, § 188, at 393. The latter states that it is "not contrary to public policy for a separation agreement, otherwise valid, to provide that the wife release all her rights to support other than as expressly provided for in the agreement." *Id.*

64. 1 W. NELSON, *supra* note 25, at § 13.17. In fact, mutual promises provide consideration for each other in separation agreements, so that it is the husband's promise to provide support in some form that supports the wife's release of her rights. Clark, *supra* note 37, at 152, points out that separation agreements are almost never declared void for lack of consideration, concluding that the requirement is used by courts only as a "convenient excuse for upsetting separation agreements thought to be unfair to wives" and is, therefore, merely "a vestige of the age of chivalry." *See* text accompanying notes 73-86 *infra* for discussion of the fairness requirement.

65. Clark, *supra* note 37, at 152. It is worth pointing out that, as a result of the relative impotency of the policy restriction, any ultimate demise of the concept of the husband's duty of support would have little effect on the law affecting separation agreements.

66. 1 A. LINDEY, *supra* note 3, § 3 (Supp. 1981); 1 W. NELSON, *supra* note 25, at § 13.17. Included within this category of forbidden contracts are what are called "collusive" agreements in which one promise to perform is conditioned upon the other promise to obtain a divorce or to manufacture grounds for divorce; agreements that attempt to relieve the husband of his duty of support or procure any other economic outcome that is thought to be so attractive as to be promotive of divorce; and, occasionally, agreements in which one party promises to assist the other in obtaining a divorce. Clark, *supra* note 37, at 150. *See also* 6A A. CORBIN, *supra* note 62, § 1494, at 614.

67. Clark, *supra* note 37, at 150.

68. This accounts in part, of course, for the initial judicial hostility to the agreements.

between "smart bargains" and "collusive bribes" is a thin one indeed.[69] Occasionally, clear cases of agreements that blatantly violate this principle are presented. For instance, in an older North Carolina case the husband made out notes to his wife that were to become payable only if the wife procured a divorce within six months.[70] By and large, however, judging the validity of separation agreements by their tendencies to promote divorce leaves us with, in Homer Clark's words, "simply an unworkable standard."[71] Apparently, only the most outrageous contracts will be invalidated on that basis.

Because of these developments, both of the policies, while not totally devoid of meaning, have given way to more enlightened judicial and public attitudes about marriage and divorce.[72] As a result, judicial scrutiny has tended to focus not on the forbidden functions of separation agreements but rather on the more appropriate issue of their essential fairness.

4. Fairness

In the great majority of states it is clear that a separation agreement must make provision for the wife's support that is "fair, just and reasonable in view of all the circumstances."[73] Although North Carolina courts have given considerable lip service to the same rule, it is equally clear that no truly substantive requirement of fairness actually exists in this state.[74] No separation agreement has ever been declared void on the grounds of unfairness in a

69. The phrase is from Comment, *Divorce Agreements: Independent Contract or Incorporation in Decree*, U. CHI. L. REV. 138, 142 (1954).

70. Pierce v. Cobb, 161 N.C. 300, 77 S.E. 762 (1913).

71. Clark, *supra* note 37, at 160. For a more detailed discussion of agreements that have been held promotive of divorce, see Clark, *id.* at 158-160, and 1 A. LINDEY, *supra* note 3, § 31 at 31-24 to -32.

72. The availability of unilateral divorce has also virtually eliminated the need for collusive divorces, and many support duty problems are now subsumed by a fairness requirement. *See* discussion that follows in the text.

73. 1 A. LINDEY, *supra* note 3, § 15, at 15-91. The author explains further that the best statement of the rule is that when the agreement is fair on its face, there is a rebuttable presumption of validity. *Id.* § 15, at 15-92 to -93.

74. In Smith v. Smith, 225 N.C. 189, 34 S.E.2d 148 (1945), for instance, the supreme court said that a separation agreement must be "reasonable, just and fair to the wife—having due regard to the condition and circumstances of the parties at the time it was made." *Id.* at 194, 34 S.E.2d at 151. This is the only case since *Archbell* that lists all the requirements for separation agreements in North Carolina. The other requirements are that "(1) A separation must have already taken place, or is to immediately follow [sic] the execution of the deed. (2) The separation agreement must be made for an adequate reason, not for mere mutual volition or caprice, and under circumstances of such character as to render it reasonably necessary for the health or happiness of the parties. . . . (3) [as stated above] [and] (4) in this State, the separation agreement must conform to the statutory requirements, where property rights are involved. . . ." *Id.*

Further, in Bunn v. Bunn, 262 N.C. 67, 136 S.E.2d 240 (1964), the most definitive case in recent history on the operation and effect of separation agreements and property settlements, the supreme court said that a consent judgment cannot be modified without the parties' consent "in the absence of a finding that the agreement was unfair to the wife," or that her consent was obtained by fraud. *Id.* at 69, 136 S.E.2d at 242. In Van Every v. Van Every, 265 N.C. 506, 144 S.E.2d 603 (1965), the court stated, at 512, 144 S.E.2d at 609, that a "separation agreement in which fair and reasonable provision is made for the wife will be upheld. . . ." if otherwise valid and in compliance with the statutory requirements. *See also* Bowles v. Bowles, 237 N.C. 462, 465, 75 S.E.2d 413, 415 (1953).

North Carolina court,[75] and in only one case was the absence of fair provision in an agreement even mentioned.[76] In fact, there was until recently a virtually absolute prohibition against any factual inquiry into the fairness of an agreement: the last sentence of the privy examination statute, that the examiner's certificate "shall be conclusive of the facts therein stated but may be impeached for fraud . . . .",[77] was interpreted quite literally.[78] Since agreements almost always recited a "fair" consideration, further inquiry was foreclosed. This was true despite the fact that the privy examination itself became at an early date nothing more than a "perfunctory ceremony."[79]

Probably as a result of this iron-clad rule, attempts to invalidate essentially unfair agreements were channeled into fraud allegations. There too they were almost always unsuccessful.[80] The ironic result in either case was that the very policy sought to be furthered by the privy examination was undermined by the courts' refusal to look beyond a perfunctory compliance with the terms of the statute. It is rare indeed that a writer in this area complains of too little state intervention.

With the repeal of the privy examination statute, however, there is no reason to continue to regard the "requirement" of fairness as a mere shibboleth.[81] The development of a substantive fairness requirement should be encouraged. Unfortunately, separation agreements are often "negotiated" under conditions of extraordinary stress. This is particularly true in states such as North Carolina where abandonment is a grounds for alimony. The result is often that a party refuses to leave the home until after the execution of a separation agreement.[82] This in turn puts pressure on at least one of the parties to sign *something* quickly, and often only one party (the party seeking to leave) is being represented by counsel. In short, the agreements may frequently be the result of undue influence and overreaching, concepts with which courts deal

75. This point was made in Note, *Separation Agreements In North Carolina*, 2 N.C.L. REV. 192, 195 (1924) and again in 1963 in 2 R. LEE, *supra* note 35, § 190, at 393. The same observation may safely be made about cases arising since that time.

76. In Eubanks, v. Eubanks, 273 N.C. 189, 195, 159 S.E.2d 562, 567 (1968), the court mentioned that the separation agreement was "grossly unfair" to the wife, but the agreement was set aside on the ground that the wife was a minor and could elect to avoid the contract on that basis. The case is fully discussed at note 93 *infra*.

77. *See* note 54 *supra*.

78. The certificate of the officer could be attacked on the grounds of (1) fraud, (2) no appearance before the officer, no examination, or improper certificate, (3) forgery or (4) mental incapacity or infancy; but on the issue of reasonableness or fairness, the certificate was indeed "conclusive." In re Estate of Loftin, 285 N.C. 717, 208 S.E.2d 670 (1974). The list itself might appear to be an expansion of the statutory grounds of fraud, but in fact it is simply the result of the application of normal contract and fraud rules to separation agreements.

79. 2 R. LEE, *supra* note 35, § 190, at 398.

80. *See* text accompanying notes 95-100 *infra*.

81. More recent cases have continued to repeat the requirement. In Cox v. Cox, 36 N.C. App. 573, 576, 245 S.E.2d 94, 96 (1978), the court of appeals, holding that there was no need for a finding of dependency to support a consent judgment, said "[r]ather, a consent judgment should be examined more generally to see if it is fair, if it does not contradict statutory or judicial policy."

82. A valid separation agreement, the terms of which are being performed, may be a bar to alimony, alimony pendente lite, and counsel fees. N.C. GEN. STAT. § 50-16.6 (b). *See also* text accompanying notes 139-141 *infra*.

readily in other contexts, and which they should be even less hesitant to adopt in an area so fraught with the potential for unfair or coercive bargaining.

Nor would the imposition of this review standard, upon a proper showing by the party seeking to have part or all of the agreement set aside on grounds of unfairness, impose any appreciably greater restrictions upon the parties' freedom to contract than is common already in other contexts.[83] The Uniform Marriage and Divorce Act, which generally places the highest value upon freedom to contract, takes just this approach. Section 306(b) of that Act provides:

> In a proceeding for dissolution of marriage or for legal separation, the terms of a separation agreement, except for those providing for the support, custody, and visitation of children, are binding upon the court unless it finds after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motions or on request of the court, that the separation agreement is unconscionable.[84]

Additionally, the Act provides that if the court finds the agreement to be unconscionable, it may either request the parties to submit a revised agreement or it may devise its own orders for property, maintenance, and support.[85]

With the repeal of the privy examination statute and its conclusive effect on findings of reasonableness and fairness, there exists for the first time in this state the opportunity for courts to refuse to become parties to overreaching or unfair separation agreements. As has been noted previously, existing case law already provides the means by which the standard could be imposed. The opportunity for courts to write upon an almost clean slate is rather unique.[86]

5. Fraud, Undue Influence, and Duress

The general standards relating to fraud and marital contracts developed at a time when the husband was presumed to be the dominant party to a marriage, so that courts felt a special duty to be solicitious of the wife's welfare.[87] One manifestation of this attitude was the presumption that a confidential re-

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83. For cases applying the rule that separation agreements are to be governed by the same principles as any other contract, *see* Bowles v. Bowles, 237 N.C. 462, 75 S.E.2d 413 (1953); Lane v. Scarborough, 284 N.C. 407, 200 S.E.2d 622 (1973); and Pope v. Pope, 38 N.C. App. 328, 248 S.E.2d 260 (1978).

84. UNIFORM MARRIAGE AND DIVORCE ACT § 306(b). Regarding this provision, Max Rheinstein has commented that it is "well meant and probably indispensable, but the extent to which a separation agreement will actually be scrutinized by the judge of an overcrowded divorce court on his own motion is obvious." Rheinstein, *Division of Marital Property*, 12 WILL. L.J. 413, 437 (1976).

85. UNIFORM MARRIAGE AND DIVORCE ACT § 306(c). It is also interesting to note that in the analogous area of antenuptial agreements, in which courts have traditionally been no less wary, fairness is at least an *alternative* criteria in determining the validity of such agreements, that is, there must be either substantive fairness or full disclosure at the time the agreement was made. See Haskell, *The Premarital Estate Contract and Social Policy*, 57 N.C.L. REV. 415 (1979).

86. Ironically, cases in states that have a history of a fairness requirement are often so laden with "confusion and inconsistency" that they are perhaps, as Clark suggests, explicable only as "lapses by the courts into moral indignation as a substitute for thought." H. CLARK, *supra* note 63, § 16.2, at 523. North Carolina is at least unburdened by such confusing precedents.

87. As one case delicately summed up the situation, "the special and intimate relation of the marital bond . . . might place in the hands of the husband a weapon to be improperly used for his

lationship existed between a husband and wife until, and sometimes beyond, the time they separated.[88] Because this presumption imposes upon the parties a duty of utmost good faith, an expanded definition of fraud developed in most jurisdictions, allowing separation agreements to be set aside on grounds that would not otherwise suffice to void a contract.[89]

More specifically, it is this confidential relationship that imposes a duty of full disclosure on the dominant party and invites close judicial scrutiny of any transaction between a husband and wife.[90] Determining when this relationship ceases to exist, therefore, is a crucial issue. It is universally held that the presumption that the relationship exists is not applicable when the parties are dealing at arm's length.[91] And, although there is considerable disagreement among the states as to what circumstances will rebut the presumption, Professor Lindey states that the fiduciary obligation does not generally cease until the circumstances of the husband and wife "are such as to preclude the possibility of imposition."[92]

Although North Carolina recognizes most of the same general rules regarding the confidential relationship,[93] courts here clearly have taken a considerably more "hard line" approach, at least when separation agreements are involved. For example, mere separation of the parties will not ordinarily dissolve the confidential relationship. In North Carolina, however, it has been said that even the intention to separate after execution of a separation agreement will dissolve the confidential relationship.[94]

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own advantage." Ducas v. Guggenheimer, 90 Misc. 191, 153 NYS 591, 594 (1915), aff'd. 173 App. Div. 884, 157 NYS 801 (1916).

88. 1 A. LINDEY, *supra* note 3, § 37, at 37-9 to -10; 1 W. NELSON, *supra* note 25, § 13.17, at 498.

89. Separation agreements have, for instance, been set aside when economic necessity forced the wife to execute the contract. 1 A. LINDEY, *supra* note 3, § 31, at 31-10. *See also* Clark, *supra* note 37, at 154.

90. Clark, *supra* note 37, at 155, and 1 A. LINDEY, *supra* note 3, § 3, at 20.

91. Regardless of the relationship, however, Lindey says that the following standards should always be imposed upon a separation agreement: (a) the husband must exercise the utmost good faith in the course of negotiations; (b) he must make a full and frank disclosure of all material facts; (c) the provision for the wife must be fair and reasonable in light of all the circumstances, and (d) the transaction must be free from any fraud, duress, undue influence, or overreaching of any kind. 1 A. LINDEY, *supra* note 3, § 3, at 3-23.

92. 2 *id.* § 37, at 37-10.

93. In a leading case, Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968), the supreme court said that, in order to be valid, a separation agreement must be "untainted by fraud, must be in all respects fair, reasonable and just, and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties." *Id.* at 196, 159 S.E.2d at 567. Surprisingly, *Eubanks* is one of the very few cases that even mentions "full and fair disclosure" standards. It is also an outrageous case on its facts. The husband was eight years older than his minor wife. Shortly after the parties had a child, they separated and the wife, then seventeen and under intensive psychiatric care, was staying with her mother. The husband came to take her to a doctor's appointment and took her then directly from the psychiatrist to his lawyers office, where he pressured her into signing a separation agreement she had never seen before. Under the agreement she waived all her rights as a result of the marriage in return for a "lump sum" of one hundred dollars. The court had an embarassment of riches in deciding upon which ground to use for voiding the contract, but settled upon the right of an infant to disaffirm. *Id.* at 195, 159 S.E.2d at 567.

94. Lee, for instance, states unequivocably that once the husband and wife have separated or even if "they intend to do so immediately following the execution of the separation agreement,

Additionally, in the majority of jurisdictions the wife's representation by counsel is, logically enough, a significant factor tending to rebut any presumption of confidentiality, or inference of fraud or undue influence.[95] In this state, however, representation of a wife by an attorney serves almost conclusively to rebut the presumption, so that any ensuing agreement is virtually immune to attack based on fraud, duress, or undue influence.[96]

Nor has North Carolina adopted any rule concerning the absence of independent counsel for the wife in this context. Several jurisdictions have begun to raise some inference of fraud, unfairness, or overreaching when the weaker party is unrepresented,[97] and in general the lack of independent legal advice is a very important factor in the issue of voluntary execution.[98] In North Carolina, however, when a dependent spouse is unrepresented, the courts have gone no further than adopting the standard contract rule of construction that when there is ambiguity in the contract, it will be construed to resolve any doubts against the party responsible for its drafting.[99]

The reasons for this development, or lack thereof, in North Carolina are not clear, but it is difficult to resist the conclusion that the privy examination

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there exists between them no longer a confidential relationship." 2 R. LEE, *supra* note 35, § 191, at 399. *See also* Brown v. Brown, 205 N.C. 64, 169 S.E. 818 (1933). *But see* the more recent case of Link v. Link, 287 N.C. 181, 179 S.E.2d 697 (1971), discussed at notes 102-107 *infra*. Clearly, moreover, this position does not speak to the opportunities for overreaching that the confidential relationship doctrine seeks to avoid.

95. 2 A. LINDEY, *supra* note 3, § 37, at 37-22.

96. The general rule in North Carolina is stated as follows: "[w]hen the wife employs an attorney and, through him, deals with her husband as an adversary, the confidential relationship between husband and wife no longer exists . . . [and] no presumption arises that the husband has exercised a dominant influence over the wife during such negotiations." Joyner v. Joyner, 264 N.C. 27, 32, 140 S.E.2d 714, 719 (1965). In one case the supreme court went so far as to distinguish, not merely the presence, but the quality of the representation: the "eminence, experience, and character" of the attorney who represented the wife in a property settlement "bear directly on her subsequent attempt to set it aside as fraudulent." Van Every v. Van Every, 265 N.C. 506, 511, 144 S.E.2d 603, 606 (1965).

In another case the wife alleged that she was under sedation when she signed the separation agreement. Her complaint was, to say the least, insufficient in several respects, but the court held that the presence of her attorney would negate incompetency even if she were under sedation. Calhoun v. Calhoun, 7 N.C. App. 509, 511, 172 S.E.2d 894, 896 (1970). And in Fletcher v. Fletcher, a finding of duress was sustained, but the facts in the case were extreme: the wife was not represented by an attorney, the husband had made several threats to kill her if she did not sign, and the door to the certifying officer's office was left open during her examination, so that both the husband and his attorney were in full view of the wife. 23 N.C. App. 207, 210, 208 S.E.2d 524, 527 (1974). *See also* Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640 (1979), in which the court held that the fact that the wife had an attorney negated any duty to disclose on her husband's part.

97. *See, e.g.*, Jensen v. Jensen, 97 Idaho 922, 557 P.2d 200 (1976), in which a separation agreement was set aside when it was oppressive to the husband and he had not been represented by independent counsel; and Gigele v. Gigele, 64 Ill. App. 3rd 136, 380 N.E.2d 1144 (1978), in which an agreement (antenuptial) was set aside because the wife was not informed of her right to independent counsel.

98. 2 A. LINDEY *supra* note 3, § 37, at 37-23.

99. *See, e.g.*, McKnight v. McKnight, 25 N.C. App. 246, 212 S.E.2d 902 (1975), and Krickhan v. Krickhan, 34 N.C. App. 363, 238 S.E.2d 184 (1977). That the wife was not represented by an attorney has clearly made some difference in several cases: Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968); Link v. Link, 278 N.C. 181, 179 S.E.2d 697 (1971), discussed in text accompanying notes 101-106 *infra*; and Soper v. Soper, 29 N.C. App. 95, 223 S.E.2d 560 (1976). But apparently no case has based its holding on the absence of independent counsel.

statute may have again retarded the growth of strict standards regarding fraud and separation agreements. This would be doubly ironic since the statute was intended to protect married women from presumptively dominant husbands and since it specifically allowed for challenges based on fraud.[100] An appeal for fairness, however, is the essence of any claim that an agreement be set aside on the grounds of fraud, undue influence, or duress, and, as noted previously, fairness has never been a viable criteria for judging the validity of separation agreements. It is likely that the conclusive statutory presumption that an agreement was fair has for decades made any allegation of fraud difficult to prove.

One supreme court case, however, suggests what may be a new judicial attitude toward the closely related areas of fraud and fairness. In *Link v. Link* the wife confessed to her husband an adulterous relationship. He immediately moved out of the house. A few days later he presented her with an ultimatum: if she signed over to him her solely owned stocks and debentures, she could keep the children and he would agree to provide support for them; otherwise, he would sue for custody.[101] Without an attorney of her own, and without consideration, the wife made the transfer and later sought to have it set aside. The jury found duress and held that the transfer should be set aside; the court of appeals reversed. The supreme court, in an opinion that may portend a significant and welcome change in this area, reinstated the jury's verdict. First, and most significantly, the court held that "the fact that the transactions here in question occurred after the defendant's departure from the home . . . did not show the previously established confidential relationship between them had terminated so as to free the defendant to deal with the plaintiff as if they were strangers.[102] Though the court did not indicate the conditions under which the confidential relationship would have been terminated, the holding that mere physical separation of the parties did not destroy the relationship, at least in this context, is a significant change from prior law.

Second, the *Link* opinion, following what is clearly the majority approach[103] in other states, looked closely at the individual circumstances of the parties. Given that the husband had a wealth of business experience and was president and manager of a successful closely held corporation and that the wife had no business experience and was under great emotional stress, the court held that the duty of disclosure was especially great.[104]

Finally, the court distinguished this case from previous fraud or duress cases involving separation agreements:[105]

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100. See note 77 *supra*.

101. Link v. Link, 278 N.C. 181, 179 S.E.2d 697 (1971).

102. *Id.* at 193, 179 S.E.2d at 704.

103. See cases and authorities cited by the court in *Link*, 278 N.C. at 194, 179 S.E.2d at 705.

104. *Id.* at 193, 179 S.E.2d at 704.

105. Joyner v. Joyner, 264 N.C. 27, 140 S.E.2d 714 (1965) and Jones v. Jones, 261 N.C. 612, 135 S.E.2d 554 (1964) were similar types of cases. In *Joyner*, however, the wife was represented by an attorney, and this was decisive. In *Jones* the husband had threatened not to provide for the wife and children, and the supreme court held that his duty to support the children could have been enforced by law, so that there was no duress. *Id.* at 613, 135 S.E.2d at 555.

> An announcement by a husband, to whom the wife has confessed her adultery, that he intends to separate from her and to institute legal proceedings to obtain the sole custody of their children would not, *per se*, constitute duress when the transaction induced by such statement of intent was the execution of a separation and custody arrangement. [citations omitted] The situation is completely different, however, when the threat to take the children from the wife is for the purpose of coercing her into transferring, without consideration, her individual property to the husband, the proposal being to leave the children in her custody if she make such transfer.[106]

It would be wrong to conclude from this that the distinction which the court is drawing is between a transfer of property induced by duress and the execution of a separation agreement induced by duress. The real distinction lies not in the type of transaction or even in the lawfulness of the threat, but rather in the *motive* that underlies the threat. "[A] threat to institute legal proceedings . . . which might be justifiable, *per se*, becomes wrongful within the meaning of this rule if made with the *corrupt intent to coerce a transaction grossly unfair to the victim* and not related to the subject of such proceedings."[107]

The principles adopted in *Link* are of great importance within the context of marital contracts. If judicial scrutiny may now focus not on the legality of the threat but on the end which that threat seeks to accomplish, then it is possible that many fundamentally unfair separation agreements (often induced by, for instance, threats to sue for custody) would be subject to challenge on grounds of duress. And beyond this, the court's holding that a mere separation of the parties does not, without more, destroy the confidential relationship between husband and wife, is quite significant. In each instance a marked and welcome change in North Carolina law is evident.

In summary, there is clearly reason to hope that North Carolina courts, unfettered at last from the prohibitionary restraints of the conclusive effect of the privy examination, can begin to develop consistent, coherent, and equitable standards for judging the fairness and freedom from fraud of separation agreements. For too long the paradoxical effect of that statute was to provide a kind of judicial immunity to agreements that were unfair, smacked of overreaching or duress, or, for whatever reasons, were unconscionable.

6. Reconciliation

One of the more interesting examples of the tensions that may be produced by competing state policies is reflected in the rules regarding the effect of reconciliation between the parties on an executory separation agreement.[108]

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106. Link v. Link, 278 N.C. 181, 195, 179 S.E.2d 697, 705 (1971).

107. *Id.* at 194, 179 S.E.2d at 705 (emphasis added).

108. Executed provisions of a separation agreement will not be affected by a resumption of marital relations. For an interesting application of this rule in North Carolina, *see* Potts v. Potts, 24 N.C. App. 673, 211 S.E.2d 815 (1975), in which the court of appeals held that when a wife collected a lump sum alimony payment, later reconciled with her husband, then separated again and sued for alimony, the reconciliation had not rescinded the prior alimony waiver.

The general rule, from which there is no dissent, is that "voluntary resumption of cohabitation . . . terminates all executory provisions in a bargain for separation."[109] The policies that underlie this rule are also relatively clear. Once a reconciliation has occurred, the essential incidents of the marriage relationship may be in no way controlled or affected by private contract.[110] Of course, it is also a major policy of all states to encourage reconciliations.

The problem lies, however, not in the statement or application of the general rules or policies but rather in determining precisely what conduct will constitute a reconciliation.[111] It is at this point that apparently consistent state policies may, and in North Carolina emphatically do, conflict.[112] The crucial issue boils down to whether "isolated acts of sexual intercourse" between the parties will amount to a reconciliation. The issue is hardly a frivolous one, especially in a jurisdiction such as North Carolina, where a separation agreement has been impossible to void because of unfairness and almost as difficult to void on fraud grounds. Under these circumstances, a spouse may seek to entice his or her partner into sexual relations solely in order to rescind their agreement.

It is because of the potentially drastic, and unintended, results that may follow upon sexual relations after the execution of an agreement that the normal judicial attitude is one of caution and restraint. The majority of jurisdictions require a "voluntary resumption of marital cohabitation in the fullest sense . . . [including] living together as husband and wife [and] having sexual relations: and the general rule is that isolated acts of sexual intercourse, without more, are insufficient to establish that a reconciliation has occurred."[113] Clearly, this is as it should be. As Professor Wadlington has noted, in a fine

109. 15 S. WILLISTON, *supra* note 58, § 1743, at 76-77. *See also* 1 A. LINDEY, *supra* note 3, § 15, at 15-133. The converse of the rule is also true: so long as an agreement remains executory, it is revocable by the parties, either expressly or by implication.

110. It is also true that living separate and apart is an essential part of the consideration supporting the contract, and if the consideration fails, the contract is void and unenforceable. 1 A. LINDEY, supra note 3, § 7, at 7-4; and 2 R. LEE, *supra* note 35, § 200. It is for this reason that a property settlement is not normally affected by a resumption of marital relations: it deals with property and not support rights, so that living apart furnishes no part of the consideration for the agreement. *See* note 38 *supra* and 2 R. LEE, *supra* note 35, at 422. The parties may always elect to rescind the unexecuted provisions of a property settlement after a reconciliation.

111. Parties may revoke the unexecuted provisions of a separation agreement expressly, but with reconciliation the revocation always occurs by implication through their conduct. That a court may draw implications from their conduct that does not at all accord with their actual intentions is precisely the problem.

112. North Carolina does follow the general rules. In a major case, Jones v. Lewis, 243 N.C. 259, 261, 90 S.E.2d 547, 549 (1955), the supreme court said that: "It is well established in this jurisdiction that where a husband and wife enter into a separation agreement and thereafter become reconciled and renew their marital relations, the agreement is terminated for every purpose in so far as it remains executory . . . Even so, a reconciliation and resumption of marital relations by the parties . . . would not revoke or invalidate a duly executed deed of conveyance in a property settlement between parties. *See also In re* Estate of Adamee, 291 N.C. 386, 391, 230 S.E.2d 541, 545 (1976), where the court stated that ". . . a separation agreement between husband and wife is terminated for every purpose insofar as it remains executory upon their resumption of the marital relations"; Hutchins v. Hutchins, 260 N.C. 628, 133 S.E.2d 459 (1963); Reynolds v. Reynolds, 210 N.C. 554, 187 S.E. 768 (1936); Murphy v. Murphy, 295 N.C. 390, 245 S.E.2d 693 (1978); and Campbell v. Campbell, 234 N.C. 188, 66 S.E.2d 672 (1951).

113. Clark, *supra* note 37, at 170. Lindey says that "if the parties have engaged in sexual acts,

example of understatement, if "one of the purposes of the separation requirement is to foster reconciliations, severe limitations on sexual contacts between the parties would seem counterproductive."[114]

The North Carolina rule on what constitutes a reconciliation has developed in a fashion that is somewhat confusing and has produced a result that is virtually byzantine. In one of the earlier major cases, the supreme court resoundingly endorsed the rule that sexual intercourse would void an agreement: were the rule otherwise, the court said, a separation agreement would "degenerate into a mere cloak or device by means of which the husband would escape the responsibilities imposed by the marital status and yet be free to partake of such privileges as he chose to enjoy."[115] In clear indignation, the court continued: "Manifestly, it is not to be assumed that the law would protect the integrity of the agreement, and yet thereby sanction and approve, for all practical purposes, illicit intercourse and promiscuous assignation."[116]

In 1932 this result was not surprising, and indeed was the conclusion of the majority of jurisdictions. Change came slowly, however. Less understandable was the continued espousal of this view in dictum in a 1955 decision.[117] Twenty years later an enlightened retrenchment from this position was signaled by the court of appeals in *Newton v. Williams*. In *Newton* both parties stipulated that since the time of the execution of the agreement they had frequently engaged in sexual intercourse, spent nights together, and stayed in the same house.[118] The wife, however, testified that at no time had she entertained any intention to resume a full marital relationship. Without commenting upon the substantive issue, the court of appeals reversed a summary judgment for the wife on the grounds that there was conflicting evidence.[119]

Two years later, the court of appeals confronted the matter head on. In *Cooke v. Cooke*, a wife counterclaimed, in her husband's suit for divorce, for alimony and support due under a separation agreement.[120] In defense the husband countered that the agreement was void because the parties had at-

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the circumstances must be such to support the inference that normal family life has been resumed." 1 A. LINDEY, § 8, at 8-17.

114. Wadlington, *Sexual Relations after Separation or Divorce: The New Morality and the Old and New Divorce Laws*, 63 VA. L. REV. 249, 259 (1977).

115. State v. Gossett, 203 N.C. 641, 644, 166 S.E. 754, 755 (1932). The facts of the case were that the husband was indicted for non-support of his wife. As a defense he alleged a duly executed separation agreement with which he had continued to comply. This was countered with evidence from the wife that her husband had continued to visit her after their separation, and that they had had sexual intercourse on several occasions. Affirming a guilty verdict by the trial court, the supreme court held that the separation agreement had been rescinded by such conduct and was therefore not a defense to the nonsupport charge.

116. *Id.*

117. In Jones v. Lewis, a 1955 case, the issue was not directly presented, but the court apparently treated a wife's allegation that her husband had spent a single night with her several months after the separation agreement was executed, as a sufficient allegation of reconciliation. 243 N.C. 259, 90 S.E.2d 547 (1955).

118. 25 N.C. App. 527, 214 S.E.2d 285 (1975). The wife in this case sued for specific performance under a separation agreement which called for the quitclaim of properties, and the husband defended on the ground that the agreement had been rescinded by a reconciliation.

119. *Id.* at 531-32, 214 S.E.2d at 287-88.

120. 34 N.C. App. 124, 237 S.E.2d 323, *cert. denied*, 293 N.C. 592, 241 S.E.2d 513 (1977).

tempted reconciliation and had engaged in sexual intercourse at least twice since the execution of the agreement. In affirming the judgment below for the wife, the court of appeals found that "the averments in plaintiff's affidavit are not sufficient to raise the defense of reconciliation."[121] The court, frustrated in its efforts to find a precise definition of "reconciliation" in North Carolina cases, relied upon holdings from other jurisdictions that a finding of reconciliation must be based upon "more than mere causal acts of sexual intercourse."[122] The court concluded that the sexual contact between the parties constituted "only a temporary resumption of marital relations on a trial basis without the intent to resume a full marital relationship, or to repudiate the separation agreement."[123]

This victory for the modern approach was short-lived. A 1978 case, *Murphy v. Murphy*, presented the following facts.[124] A husband and wife separated, executed a separation agreement in 1972, and, by the admissions of both, had sexual intercourse "several" times between the time of the execution of the agreement and the husband's suit for divorce. They had not, however, ceased at any time to live separate and apart. The wife sought to have the agreement set aside on the grounds that the parties had "reconciled." The jury below was instructed that " 'to become reconciled and renew their marital relationship' " meant more than intercourse, and "that there must be a mutual intent to resume cohabitation" and found for the husband. The court of appeals affirmed, and the wife appealed. The supreme court precisely stated the issue: ". . . whether a husband and wife who, after having executed a separation agreement and established separate abodes, continue to engage in sexual intercourse from time to time thereby rescind the agreement."[125]

The supreme court recognized that the court of appeals, here and in earlier cases, had enunciated and applied the majority rule. However, dipping into its archival past, it went on to resurrect the rule it had adopted in 1932.[126] The majority rule, it said emphatically, "is not the law in North Carolina. The rule in this State was clearly enunciated . . . in the case of *State v. Gossett*. . . ."[127] Despite the passage of forty-six years, the court continued, it was "still constrained to hold that sexual intercourse between a husband and wife after the execution of a separation agreement avoids the contract."

It is impossible, and useless, to speculate about what prompted the supreme court to rule as it did in *Murphy*. Certainly it would have been difficult for the court to have implied an intent to reconcile and resume marital relations from isolated acts of sexual intercourse. An *attempt* to reconcile could well be implied, but hardly a fully formed intent.[128] The result of the

121. *Id.* at 126, 237 S.E.2d at 324.
122. *Id.* 237 S.E.2d at 325.
123. *Id.* at 127, 237 S.E.2d at 325.
124. 34 N.C. App. 677, 239 S.E.2d 597 (1977).
125. Murphy v. Murphy, 295 N.C. 390, 394, 245 S.E.2d 693, 696 (1978).
126. See text accompanying notes 115-116 *supra*.
127. Murphy v. Murphy, 295 N.C. 390, 395, 245 S.E.2d 693, 697 (1978).
128. *Id.* at 397, 245 S.E.2d at 698, (Exum, J., dissenting).

holding is that parties (or at least one party) will be penalized for trying to reconcile if he or she is unsuccessful in that attempt. The conclusion that this result tends to inhibit efforts to reconcile seems inescapable.[129]

Ironically, the *Murphy* case leaves North Carolina in the unique position of being the only state to embrace what is in effect an "either/or" standard for what constitutes a reconciliation. The other half of this question is supplied by a 1976 supreme court case, *In re Estate of Adamee*, in which the parties had resumed living in the same house, due to the husband's poor health, but had at no time engaged in intimate relations.[130] In holding that the separation agreement was void, the supreme court said:

> We hold that when separated spouses who have executed a separation agreement resume living together in the home which they occupied before the separation, they hold themselves out as man and wife "in the ordinary acceptation of the descriptive phrase." Irrespective of whether they have resumed sexual relations, in contemplation of law, their action amounts to a resumption of marital cohabitation which rescinded their separation agreement insofar as it had not been executed.[131]

The *Adamee* case is clearly a sensible result. As the court explained, separation "means cessation of cohabitation, and cohabitation means living together as man and wife, though not necessarily implying sexual relations."[132] When juxtaposed with the result in *Murphy*, however, the conclusion is unavoidable: either sexual relations *or* the resumption of marital cohabitation will void a separation agreement in North Carolina. As noted previously, this result is unique.

The court of appeals has had considerable difficulty adjusting to the *Murphy* decision. For example, in *Hand v. Hand*, a 1980 case, the court of appeals decided a case in which a husband had been cited with contempt for failure to make alimony payments in accord with a separation agreement.[133] He contended that he was under no obligation to make the payments, alleging that the parties had abrogated their prior agreement by resuming cohabitation for a brief period following the signing of the agreement. The wife admitted that

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129. At the most basic and practical level, the *Murphy* holding means that North Carolina attorneys must continue in their fairly barbaric warnings to their clients to keep away from the other spouse at all costs. Understandably, such warnings leave parties quite suspicious of what might in fact be a genuine attempt to effect a reconciliation by the other spouse.

130. *In re* Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976). In *Adamee* a couple executed a separation agreement, and a consent judgment based on it was entered in December, 1973. In January of 1974 the wife moved back into the marital home and lived with her husband until his death a short time later. Evidence as to how fully the marital relationship was resumed was conflicting, but there was no question that the parties had resumed cohabitation. The husband's heirs at law, who contended that the wife was barred by the separation agreement from administering the estate of the deceased, said there was no intent to resume a marital relationship and that the petitioner wife had simply moved back in to care for a dying man. The wife insisted that the couple had resumed their marital relationship, but it was clear that the parties had not resumed sexual relations, nor had they even slept in the same room.

131. *Id.* at 392-93, 230 S.E.2d at 546.

132. *Id.* at 392, 230 S.E.2d at 546.

133. 46 N.C. App. 82, 264 S.E.2d 597 (1980).

they had resumed living together but denied that any act of sexual intercourse had occurred.[134] In affirming the judgment of the trial court for the wife, the court of appeals relied on *In re Estate of Adamee*.[135] The court, though recognizing that there was language in *Adamee* that "would indicate that the actual intention of the parties to resume their marital cohabitation is not relevant to determining a resumption of the marital relationship," concluded that the above language was limited to situations in which evidence concerning resumption of cohabitation was undisputed.[136] The court characterized the evidence in the case before it as "conflicting" and, without mention of *Murphy*, concluded that "we believe that our statement in *Newton v. Williams* . . . that '[t]he issue of the parties' mutual intent is an essential element in deciding whether the parties were reconciled and resumed cohabitation' is still the rule where the evidence is conflicting."[137]

The logic of the *Hand* case is somewhat strained, and whether it can provide the means for parties to obtain partial relief from the punitive effect of *Murphy* remains to be seen. However, in view of the categorical disapproval in *Murphy* of both the logic and result of *Newton v. Williams*, it is difficult to ascertain any hint of vitality remaining in that case. The *Hand* decision may best be viewed as a valiant, if abberant, attempt to pry open the door closed by *Murphy*.[138]

In summary, the result of North Carolina's attempts to balance its legitimate interest in preserving the integrity of marriage and the parties' interest in freedom to make their own settlements is mixed. Clearly, the older judicial hostility to the very functions of separation agreements has largely disappeared. Moreover, with the repeal of the privy examination statute, the way is at least cleared for North Carolina to develop standards to judge the substance of the contracts. Development of the standards, particularly in the areas of fairness and fraud, should be strongly encouraged.

On the other hand, the principle that single acts of intercourse will constitute a reconciliation and therefore rescind a valid separation agreement should be given serious reconsideration. Neither the interest of the state in preserving marriage nor the interests of the parties in relying upon their contract is well served by the present rule.

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134. The evidence of both husband and wife showed clearly that they had in fact shared the same house for a time after their original separation. The husband testified, however, that they had engaged in sexual relations, whereas the wife denied any such relations and any intent to resume the marital relationship. 46 N.C. App. at 84-85, 264 S.E.2d at 598.

135. See text accompanying notes 130-132 *supra*.

136. 46 N.C. App. at 86-87, 264 S.E.2d at 599. In *Adamee*, the supreme court did view the case "as presenting a question of law arising upon undisputed facts." 291 N.C. 386, 393, 230 S.E.2d 541, 546-67 (1976). It is nonetheless unclear whether that decision was intended to be limited to factual situations susceptible to being characterized as "undisputed."

137. 46 N.C. App. at 87, 264 S.E.2d at 599. For a discussion of *Newton*, see text accompanying notes 118-119 *supra*. It should be noted, however, that *Newton* dealt with a situation in which there was conflicting evidence as to whether a resumption of the marital relation had occurred, but wherein both parties admitted frequent sexual intercourse.

138. *Murphy*, it bears repeating, also dealt specifically with the effect of resuming sexual relations after a separation agreement. 295 N.C. 390, 394, 245 S.E.2d 693, 696 (1978).

II. EFFECT

A. *Introduction*

The principles and policies that determine the initial validity of a separation agreement are quite different from those that determine the operation and effect of an agreement. Moreover, a preliminary distinction must be drawn between the pre-divorce and post-divorce effects of separation agreements. As a general rule, problems encountered prior to divorce are considerably less complex.

B. *Pre-Divorce Effect*

In the first instance, it is clear that a separation agreement, in effect, "legalizes" the separation of the parties and thus becomes a bar to divorce on the grounds of desertion, abandonment, or nonsupport.[139] From the time the agreement is signed, the parties' separation is presumed to have occurred by mutual consent, and prior marital misconduct of either party will no longer be grounds for divorce.[140]

Whether a separation agreement is also a bar to alimony or alimony pendente lite, when they are otherwise available, depends upon the agreement itself. A true separation agreement deals primarily with the right of support, and usually contains a "general release," as well as waivers of support, alimony, and alimony pendente lite. If these provisions are included and being complied with, the agreement will be a bar to any award of alimony, alimony pendente lite, separate maintenance, or counsel fees.[141]

This general rule was a source of considerable confusion and inconsistency in North Carolina case law until the controversy was settled by legislation in 1967.[142] G.S. 50-16.6 now provides that "Alimony, alimony pendente lite and counsel fees may be barred by an express provision of a valid separation agreement so long as the agreement is being performed."[143] In brief, so long as the agreement is being performed, its provisions, although subject to modification by the parties, are binding.[144]

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139. Clark, *supra* note 37, at 320; 2 A. LINDEY, *supra* note 3, § 31. The rule in North Carolina is the same: "Either an action for a divorce *a mensa et thoro*, an action for alimony without divorce . . . or a valid separation agreement may constitute a legalized separation which thereafter will permit either of the parties to obtain an absolute divorce on the ground on one year's separation." Harrington v. Harrington, 286 N.C. 260, 264, 210 S.E.2d 190, 192 (1974).

140. Richardson v. Richardson, 257 N.C. 705, 127 S.E.2d 525 (1962); Edmisten v. Edmisten, 265 N.C. 488, 144 S.E.2d 404 (1965) (per curiam).

141. 2 A. LINDEY, *supra* note 3, § 36, at 36-3 to -4; Paulsen, *supra* note 20, at 721; and Clark, *supra* note 37, at 322.

142. *See* 2 R. LEE, *supra* note 35, § 152, at 214, for a discussion of this issue.

143. In most other states, of course, this rule was originally based on the assumption that the separation agreement had already provided for a fair and reasonable amount for support of the dependent spouse. *See* Clark, *supra* note 37, at 322.

144. Kiger v. Kiger, 258 N.C. 126, 129, 128 S.E.2d 235, 237 (1962). "The provisions of a valid separation agreement, including a consent judgment based thereon, cannot be ignored or set aside by the court without the consent of the parties." *See also* Van Every v. Van Every, 265 N.C. 506, 144 S.E.2d 603 (1965).

The effect of adultery, particularly adultery on the part of the wife, after the execution of a separation agreement has also been the subject of some controversy. There is no doubt, of course, that sexual intercourse prior to the entry of a decree of final divorce with one other than one's spouse is adultery.[145] Although a separation agreement does not insulate one's conduct from that label, it is reasonably clear that adulterous conduct will not affect the support provisions of a separation agreement, absent a specific provision to that effect. Although adultery might well be a statutory bar to alimony, the support provisions of a separation agreement are contractual in nature and so are not affected by such post-execution behavior.[146] The rule with regard to post-divorce extramarital sexual conduct is the same, again, absent a clause in the separation agreement to the contrary.[147]

The "clause to the contrary"—a dum casta provision—is a rare species indeed.[148] In that the clause seeks to impose chastity on a spouse as a condition for support, it is an anachronism. But the rise in the number of unmarried, cohabiting couples in this country has clearly led to an increase in interest in such provisions.[149]

There apparently has been no attempt to use a dum casta provision in North Carolina. In one case a husband argued that, under a separation agreement provision that obligated him to pay support to his wife for "so long as she continues to remain single", he was relieved from the duty to make payments because she was now living with another man.[150] The court of appeals appreciated that the argument was ingenious but held that "single" plainly meant, and was intended to mean, "unmarried" and that the husband could not discontinue his payments.[151] Moreover, as another case makes clear, there can be no other result with court-ordered alimony, since the entire issue is statutory, and there is no statute that would allow a court "to modify an award

145. Therefore, such conduct may be grounds for divorce on the basis of adultery. Wadlington, *supra* note 114, at 261; 2 R. LEE, *supra* note 35, § 196, at 497.

146. 1 A. LINDEY, *supra* note 3, § 15, at 15-115; Wadlington, *The New Morality, supra* note 114, at 149; 15 S. WILLISTON, *supra* note 58, § 1742, at 73.

147. 2 A. LINDEY, *supra* note 3, § 31, at 31-107. North Carolina is one of fewer than 10 states where adultery constitutes an absolute bar to alimony. Freed & Foster, *Divorce in the Fifty States, supra* note 2, at 306. *See*, N.C. GEN. STAT. § 50-16.6(a) (1976). As of 1977, thirty-two states listed adultery as a grounds for divorce. Raphael, Frank, & Wilder, *Divorce in America: The Erosion of Fault*, 81 DICK. L. REV., 719, 729 (1977).

148. Wadlington, *supra* note 114, at 265.

149. The full phrase is *dum sola et casta vixerit* ("while she lives unmarried and chaste"). It was at one time apparently quite common in England, though its use has been extremely rare in this country. *See* Wadlington, *supra* note 114, at 265 n.66. Wadlington goes on to suggest that such a clause would today be open to serious constitutional challenges. *Id.* at 271.

150. A relatively famous recent case is O'Conner Bros. Abalone Co. v. Brando, 40 Cal. App. 3rd 90, 114 Cal. Rptr. 773 (1974), in which a settlement agreement contained the standard clause that payments should cease upon the remarriage or death of the wife. It then continued with the clause: "For purposes of this Agreement, 'remarriage' shall include, without limitation, Plaintiff's appearing to maintain a marital relationship with any person, or any ceremonial marriage entered into by Plaintiff even though the same may later be annulled. . . ." *Id.* at 93, 134 Ca. Rptr. at 774. For a thorough discussion of this case and of the problems with drafting and enforcing such a clause, see Wadlington, *supra* note 114.

151. Hall v. Hall, 35 N.C. App. 664, 242 S.E.2d 170, *cert. denied*, 295 N.C. 260, 245 S.E.2d 777 (1978).

of alimony solely because of post-marital fornication."[152] The court in that case went on to note that the "changed circumstances" of *G.S.* 50-16.9(a) "has no relevance to the post-marital conduct of either party," but rather looks only to their financial needs.[153]

Finally, in *Riddle v. Riddle*, an ex-husband who had ceased making payments under an unadopted separation agreement raised as a defense in a suit brought by his ex-wife the fact that his ex-wife was living with another man as though they were husband and wife.[154] The court of appeals made short shrift of this argument: "Under the agreement, plaintiff's relations with other people, short of marriage, do not offer defendant any defense to the enforcement of its provisions."[155]

Nearly all separation agreements contain what is known as a non-molestation clause, which consists of mutual promises that neither party will in any way molest, disturb, malign, or interfere with the other, that each is free to contract without the consent of the other, and that each can conduct his or her own life without interference, as though they were unmarried.[156] The efficacy of these clauses is unclear. Though generally they are intended to grant a kind of permission to the establishment of sexual relations with third parties, it is doubtful that they have this effect.[157]

In *Riddle v. Riddle*, the separation agreement provided that each shall "go his or her way, and each live his or her personal life unmolested, unhampered, and unrestricted by the other. . . ."[158] The husband in that case attempted to use his wife's cohabitation with another man as a defense to his cessation of alimony payments.[159] The court of appeals arguably relied, at least in part, on the nonmolestation provision as a counter to the husband's defense.[160] Certainly it went to the trouble to restate the clause as part of its conclusion that, under the agreement, nothing short of marriage by the plaintiff would relieve defendant of his duty to pay.[161]

Furthermore, it is clear that nonmolestation and support covenants are independent of one another in North Carolina. Thus, a breach of the former does not constitute a defense to nonpayment under a separation agreement, whether it is standing alone or embodied in a judgment or decree. In the leading case, the defendant ex-husband stopped making support payments

152. Stallings v. Stallings, 36 N.C. App. 643, 644, 244 S.E.2d 494, 495 (1978).

153. *Id.* at 645, 244 S.E.2d at 495.

154. 32 N.C. App. 83, 230 S.E.2d 809 (1977). *See also* discussion at notes 252-54, *infra*.

155. *Id.* at 88, 230 S.E.2d at 812.

156. The origin of the clause goes back to ecclesiastical courts, which would grant a decree for the restitution of conjugal rights when one spouse abandoned the other. The effect of the decree was really to establish guilt in the abandonment. The clause, in original form, contained mutual promises that neither party would compel or attempt to compel the other to resume cohabitation, and was intended as a bar to the decree, which might otherwise restore conjugal relations. 2 A. LINDEY, *supra* note 3, § 9, at 9-2 to -3.

157. Wadlington, *supra* note 114, at 260.

158. 32 N.C. App. 83, 88, 230 S.E.2d 809, 812 (1977).

159. *Id.* at 87-88, 230 S.E.2d at 812.

160. *Id.* at 88, 230 S.E.2d at 812.

161. *Id.*

shortly after he was divorced from his wife. When she sued, he alleged as a defense that his obligation to pay had been understood by the parties to be contingent upon his ex-wife's faithful compliance with a nonmolestation clause.[162] The plaintiff, he alleged, had "wilfully, maliciously and with evil intent and purpose" breached this covenant by spreading gossip about him.[163] The supreme court, however, held that the covenants were independent of one another and that defendant was not in any way relieved of his duty to pay.[164] This is also quite clearly the majority rule.[165] The remedy for a breach of a nonmolestation clause lies, if at all, in a suit for damages under the contract.[166]

If the breach of the separation agreement is material, as when, for instance, a supporting spouse stops making support payments as called for in the agreement, the payee spouse generally has an election of remedies;[167] he or she may either sue on the contract or rescind and sue for statutory or common law support.[168] If an election to rescind is made, arrears that accrued prior to the date of election may still be recovered.

The problems that occur prior to the entry of a final divorce decree generally are not complex. The doctrine of election of remedies provides a powerful corrective in the event of a material breach. It is only after the divorce decree is entered that the major difficulties arise, because at that point the agreement and the rights that arise under it become a kind of Cheshire cat: now you see it, now you don't. Finding a reliable way of predicting and controlling the ultimate relationship between the decree and the agreement is the aim of the next section of this Article.

C. Incorporation and Merger

1. Introduction

An almost impenetrable complex of problems surrounds the ultimate relationship between a separation agreement and a final divorce decree. It is

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162. Smith v. Smith, 225 N.C. 189, 34 S.E.2d 148 (1945).

163. *Id.* at 191-92, 34 S.E.2d at 150. The clause read: "That they shall hereafter live separate and apart from each other and independently of each other and each party hereto shall . . . go his or her own way, without direction, molestation or control of the other party, and that the parties hereto further agree that they will not in any wise hereafter interfere with the other in any manner whatsoever and will refrain from molesting one another in any manner or speaking disparagingly of one another." *Id.* at 190, 34 S.E.2d at 149.

164. *Id.* at 198, 34 S.E.2d at 154.

165. Clark, *supra* note 37, at 165, 173; 1 A. LINDEY, *supra* note 3, § 9, at 61 (Supp. 1981); 2 R. LEE, *supra* note 35, § 197, at 413.

166. Clark, *supra* note 37, at 344; and 1 A. LINDEY, *supra* note 3, § 25, at 25-3.

167. See 1 A. LINDEY, *supra* note 3, § 25 at 25-9 to -11, for a discussion of what constitutes a material breach. It is at least clear that continued defaults in payments by the supporting spouse constitute a material breach. A single default, however, if accompanied by facts indicating intention not to perform in the future may also be material. *See also* Stanley v. Stanley, 226 N.C. 129, 37 S.E.2d 118 (1946).

168. 1 A. LINDEY, *supra* note 3, § 25, at 25-5; Clark, *supra* note 37, at 344. Most agreements contain an election of remedies clause. Even in the absence of such a clause, however, it is reasonably clear that the decision to sue for statutory support is in fact an election to rescind the contract.

rightly said that a divorce decree may ignore, approve, incorporate, or merge a separation agreement. But since there is no agreement on what these terms mean and no agreement on what is necessary to produce any of those results, the statement is hardly enlightening.[169]

Moreover, consequences of supreme importance turn upon the status of the agreement after the decree: whether the court has the power to modify support provisions in the future, the remedies that are and are not available for enforcement in the event of breach, and the status of the agreement if its validity is subsequently attacked.[170] There is, therefore, a compelling need to clarify the principles that govern the relationship between agreement and decree.[171]

Two preliminary points need to be made at the outset. First, no agreement of any kind between the parties can serve to abridge or limit in any fashion a court's inherent and statutory authority to provide for the custody and support of children.[172] Therefore, none of the discussion that follows has any necessary application to issues of child custody, support, or visitation.[173] Second, difficulties that arise in this context pertain only to *support* provisions of decrees, consent judgments, or separation agreements. Property divisions are treated quite differently.[174] A division of property may well take the form of installment payments to a dependent spouse, and alimony may be paid in a lump sum or by installments. Therefore, determining whether a payment is essentially a property settlement or is a payment in lieu of support is an extremely important and often complex task.

2. Contract or Decree—The General Problem

Although the majority of states hold that courts are in no way obligated to accept an agreement that the parties have negotiated between themselves, courts as a practical matter generally do accept the agreement as controlling, so long as it is fair on its face and there is no indication of fraud, duress, or undue influence.[175] Moreover, the agreement itself may, and usually does, purport to prescribe what its relationship with the decree will be; that is, it states that the contract "shall survive" or be "merged and incorporated into"

169. 2 A. LINDEY, *supra* note 3, § 31, at 31-80 to -82. The leading case in North Carolina on election of remedies is Wilson v. Wilson, 261 N.C. 40, 134 S.E.2d 240 (1964). It follows the majority rule.

170. 2 A. LINDEY, *supra* note 3, § 31, at 31-88.

171. It is undoubtedly this compelling need that led the author of one piece to conclude, quite accurately it is believed, that writers in this area have "created an illusion of greater certainty" than actually exists, with the result that a veritable "flood of conflicting case law" has been produced. Comment, *supra* note 69, at 138.

172. 1 A. LINDEY, *supra* note 3, § 14, at 14-32; Mnookin & Kornhauser, *supra* note 6, at 954-55.

173. The major North Carolina case dealing with this issue is Fuchs v. Fuchs, 260 N.C. 638, 133 S.E.2d 487 (1963).

174. 2 A. LINDEY, *supra* note 3, § 31, at 31-69; Clark, *supra* note 37, at 340. See text accompanying notes 264-270 for a further discussion.

175. Clark, *supra* note 37, at 327; C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 904 (1976); and 2 W. NELSON, *supra* note 25, § 16.08, at 401.

the decree. These attempts at self determination may have little impact, however, because the terms used to describe the intended relationship between the contract and the decree are often used with great imprecision or without any real understanding of what they mean. But even when accurate language has been used, the decree itself may be so phrased as to override the "relationship" clause in the agreement, although leaving intact the other provisions worked out between the parties.

The majority of commentators describe the ensuing relationship between the agreement and the decree as one in which any one of three different results may be produced depending both upon the language of the agreement and the language of the decree.[176] First, contract rights may survive the decree. An agreement, or provision thereof, that is not introduced to the court and is not contradicted by any provision in the decree is, after divorce, just what it was before—a private contract, and enforceable only as such. It is not subject to future modification by the court, and is normally not subject to enforcement by contempt.[177] Second, the agreement may be introduced to the court for the purpose of having the court "approve," "ratify," or "incorporate" the agreement. It seems fairly clear that a decree that merely ratifies or approves the separation agreement, without more, does not extinguish the contract rights and liabilities of the parties. Here too the parties are basically left with only a contract, albeit one that has received a judicial imprimature of sorts. Court approval, however, will normally have some res judicata effect as to the fairness of the agreement or the absence of fraud.[178] Finally, the agreement may be introduced to the court for the purpose of having the contract rights extinguished and replaced by provisions in the court's decree. Merger is the simplest way to refer to this consequence.[179] Support provisions thus merged become subject to modification by the court and enforceable by contempt.[180]

A conceptually more simple approach than the above tripartite analysis is to describe the relationship between the agreement and the decree solely in terms of merger consequences: either a merger results, or it does not.[181] Neither analysis, however, avoids the difficult problem of determining the ap-

176. This basic three part analysis is presented in W. WADLINGTON & M. PAULSEN, DOMESTIC RELATIONS, CASES AND MATERIAL 560 (1978).

177. *Id. See also* 2 A. LINDEY, *supra* note 3, § 31, at 31-80.

178. W. WADLINGTON & M. PAULSEN, *supra* note 176, at 560.

179. According to Williston, merger occurs when "an obligation arising under a contract is reduced to judgment . . . [and] the original obligation is by operation of law extinguished and merged in the new obligation." 15 S. WILLISTON, *supra* note 58, § 1874A, at 637 (3d ed. Jaeger 1972). It has been pointed out that it is technically not a proper application of the classic merger doctrine, since the support obligation is based, not on a contract obligation, but on the duty of support. Note, *Control of Post-Divorce Level of Support by Prior Agreement*, 63 HARV. L. REV. 337, 339 (1949). Moreover, the term is often used with great imprecision.

180. Wadlington, *supra* note 114, at 272-73.

181. 2 A. LINDEY, *supra* note 3, § 31, at 31-87. It should be noted again that it is only the obligation to pay money that is merged. The general rule is that when the obligation is a promise to pay money, a decree or judgment ordering the payment of money merges the obligation in the decree or judgment; thus an independent action cannot be brought later on the obligation. If the obligation or decree requires something other than the payment of money, however, the obligation is not merged in the decree. *See* RESTATEMENT OF CONTRACTS § 450(1)(f), Comment at 537.

propriate category into which an agreement will fall. In any case, the real interest of the parties lies not in defining what may occur after the fact, but rather in determining how to create the particular result they desire.

Unfortunately, what remains somewhat unclear under any of these approachs is precisely what is necessary to accomplish, or in some instances, to avoid, a merger. No small part of the confusion is caused by the often indiscriminate use of the term "incorporation" by courts, counsel, and commentators. The term is sometimes used as a synonym for merger, and sometimes as a description of the "approval" result.[182] Consistent uses of the terms "incorporation" and "merger" would go far in clearing up some of the confusion that has surrounded this area.

Various factors aid in determining whether a merger has occurred or not. Clark lists three major considerations: "(a) the intent of the parties as shown by the agreement; (b) the extent to which, and the method by which the agreement is set forth in the decree; and (c) whether the decree specifically orders performance of the agreement."[183] On the other hand, it seems that the widespread confusion in this area has led courts to adopt what might be called a more technical approach: that notwithstanding statements about the importance of the intent of the parties as shown in their agreement, it is the language used in the decree and the manner in which the agreement is set forth therein that appears to be most determinative.[184] If, for example, a court specifically orders certain provisions of the agreement to be performed by the parties, those provisions will in all probability be held to be merged in the decree, even if there is a specific provision in the agreement against merger.[185] If, on the other hand, a decree simply incorporates the agreement by reference, without specifically setting forth the provisions and ordering that they be performed, a finding of no merger is probable even if the agreement had provided for merger in the decree.[186] In the increasingly rare instances in which a decree orders an alimony payment in an amount less than that called for in the agreement, there are mixed results. Some courts hold that a merger has occurred, regardless of the intent of the parties as expressed in the agreement. Others hold that the contract rights for the difference between the amount granted in the decree and the amount provided for in the agreement do survive.[187]

3. Consequences of Merger

Generally the issue of whether contract rights have survived or have been

182. Several commentators conclude that "incorporation" works a merger. 1 W. NELSON, *supra* note 25, § 13.51, at 535; Clark, *supra* note 37, at 331; and Comment, *supra* note 69, at 146. C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 915 (1976) conclude: "If the agreement was expressly incorporated in the decree, it is generally deemed merged in it, and hence loses its separate vitality." Lindey, on the other hand, says that only in a minority of states does incorporation work a merger. 2 A. LINDEY, *supra* note 3, § 31, at 31-84.

183. Clark, *supra* note 37, at 333.

184. Certainly this has been the case in North Carolina. See discussion at notes 222-23 *infra*.

185. 2 A. LINDEY, *supra* note 3, § 31, at 31-85; Comment, *supra* note 69, at 152.

186. Comment, *supra* note 69, at 146. There is, of course, authority to the contrary.

187. For a discussion of the cases, see Note, *supra* note 179, at 338.

merged in the decree arises in one of two contexts—a party seeks either modification of the support provisions of the decree or enforcement of those provisions through contempt.[188] By most estimates, the modification issue is the most troublesome and probably the most confusing.[189] The general rule is that support provisions that have been merged (or unfortunately, in the language of many courts, "incorporated") into the decree may be modified by a court at a later time, provided the usual statutory requirement of a showing of changed conditions is met.[190]

The major theory on which modification is allowed is that through merger the duty to pay is no longer contractual in nature but has become an order of the court.[191] Under this theory a court merely modifies its own decree. It does not purport to amend the contract between the parties, and indeed it would be without power to do so.[192] This in turn leads again to the issue of contract survival: if the court has only modified its own support decree, do the contract rights survive? Clearly the merger theory itself is sufficient to deal with this issue in the majority of cases, since merger generally works a total extinguishment of contract rights. However, when a jurisdiction bases its power to modify on a different theory, contract rights may survive.[193] Contract rights also survive when a court modifies a support agreement but expressly states that the modification is without prejudice to the rights of the parties under the contract. Neither result is common, however.[194] Although many interesting contract theories have been advanced to urge courts to modify unmerged provisions, judicial reluctance to deviate from the principle that only the parties may modify their own contract has prevailed thus far.[195]

Finally, it should be noted that there can be no modification of the support provisions of what is called an "integrated" settlement. The term

188. As noted previously, the distinction is also important when there are subsequent attacks on the validity of the agreement or decree. If the agreement is merged into the decree, subsequent collateral attack on it will not be permitted, since the court is deemed to have passed on its validity via merger. The issue thus becomes res judicata. 2 A. LINDEY, *supra*, note 3, § 31, at 31-93. Mere approval of the contract, without merger, may also have this effect.

189. See generally Note, *Modification of Spousal Support: A Survey of a Confusing Area of the Law*, 17 J. FAM. L. 711 (1978-79).

190. The power of a court to modify a support decree is normally statutory. Forty-six jurisdictions apparently do provide for this power to modify. Note, *supra* note 189, at 719 n.33. In two others there is no statutory provision for modification, but courts nonetheless allow it on the theory that alimony is not a "final judgment." *Id.* N.C. GEN. STAT. § 50-16.9(a) provides that: "An order of a court of this State for alimony or alimony pendente lite, whether contested or entered by consent, may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." The statute is fairly typical, except for the "or anyone interested" provision.

A decree awarding support is res judicata only as to conditions or circumstances existing at the time of the decree. Note, *supra* note 189, at 722. This Article will not attempt to deal with what conditions and changes constitute an appropriate showing of changed circumstances.

191. There are at least three other theories also used to support a court's power to modify support provisions. For a discussion of these, see Note, *supra* note 189, at 723; Annot., 61 A.L.R.3d 520, 534 (1975).

192. 2 A. LINDEY, *supra* note 3, § 31, at 31-62.

193. Clark, *supra* note 37, at 336; and note 191 *supra*.

194. *Id.* at 338. It is generally thought that such a result would be unfair to the payor.

195. *See* Comment, *supra* note 69, at 155-57.

originated with California courts but is now generally used to refer to any agreement in which the support and property division provisions are so structured as to constitute reciprocal consideration for each other.[196] Because modification of the one would result in a modification of the other, and because courts are without power to modify property settlements, the support provisions of the agreement become immune to judicial change. Stated differently, unless the payments to the dependent spouse are made in consideration for the release of support rights, and not in consideration for the transfer of property or for the release of property rights, they will not be susceptible to modification.

What determines whether a combined property settlement/separation agreement is an "integrated" document is difficult to state in general terms. The first cases apparently based their conclusions on a specific recital in the agreement that the promises were made as reciprocal consideration for one another.[197] Later cases have taken a considerably more flexible approach. Lindey suggests that no single factor should be controlling in determining separability, but that the agreement should be considered as a whole, including the language of the parties, the purpose of the agreement, the circumstances under which it was made, and the nature and value of the property involved.[198]

Whether contempt powers are available to enforce support provisions of an agreement or decree is the other major issue that arises. It is generally held that alimony is not a debt in the normal sense, so that enforcement of alimony through contempt does not violate state and federal prohibitions against imprisonment for debt.[199] Alimony is usually defined as a court-ordered provision for the support of a dependent spouse. Therefore, a support provision of a separation agreement that has been fully merged in a divorce decree is enforceable by contempt in the great majority of jurisdictions.[200]

The general rule is that nonmerged provisions of a separation agreement or property settlement may not be enforced by contempt. Specific performance to enforce nonmerged support provisions, however, has long been available as a remedy in some states, and has recently become available in North Carolina.[201] Contract remedies for the enforcement of support provisions of nonmerged separation agreement are notoriously ineffective.[202] At a minimum they involve a multiplicity of suits and difficulties with execution. In addition, because the underlying obligation to support is the same whether it

196. 2 A. LINDEY, *supra* note 3, § 31, at 31-72.

197. Clark, *supra* note 37, at 339.

198. 2 A. LINDEY, *supra* note 3, § 31, at 31-73. It may be noted that a reduced alimony amount coupled with a generous property settlement is a strong indication that the provisions were made as consideration for each other.

199. 2 W. NELSON, *supra* note 25, § 16.03, at 389.

200. *Id.* at 387-88; and Clark, *supra* note 37, at 332. Alimony is not a money judgment, but is rather "a command to pay and perform a moral and social obligation." 2 W. NELSON, *supra* note 25, § 16.03, at 390.

201. See discussion accompanying text at notes 241-245 *infra*.

202. Clark, *supra* note 37, at 183.

arises out of contract or decree, courts have become increasingly inclined to depart from the inflexibility of the spirit, if not of the letter of the general rule in this area, and grant specific performance of a separation agreement. Once a decree ordering a supporting spouse specifically to perform the terms of a contract is violated, the contempt power is available, albeit through a sort of back door approach.[203] The provisions of a property settlement that call for the transfer of interests in land may be enforced through specific performance like any other contract.[204]

D. Integration/Merger Problems in North Carolina

1. Introduction

North Carolina has had no less difficulty than most states in developing a reliable and predictable method for parties to control the ultimate relationship between a separation agreement and a divorce decree. This is undoubtedly due in part to a certain judicial resistance, particularly evident when the relevant principles in this area were first formulated, to the idea of private control of the incidents of divorce. It is also caused by the difficulties of reconciling two seemingly inconsistent interests: the interest in preserving traditional rules of contract, even when the contract focused on support, and the interests of the state in controlling or enforcing support duties. Here too the consequences of merger, or "incorporation" or "adoption," (North Carolina courts tend to use the latter two terms to refer to merger results) are relatively clear, but the methods and reasoning by which the results are accomplished have not always been either clear or consistent.

Before proceeding further several peculiarities of North Carolina statutory history should be explained. Prior to 1967 alimony could not be awarded as an incident to an absolute divorce.[205] Permanent alimony, however, could be awarded incident to a divorce from bed and board or to an action for alimony without divorce, so long as statutory grounds were present. This position reflected an interesting fidelity to the original concept of alimony as a replacement for the husband's duty of support.[206] Of course, that duty did not survive an absolute divorce. In any case, it was not until 1967 that alimony could be ordered in a decree of absolute divorce, be it pursuant to a separation agreement or otherwise.[207] To circumvent this rather quaint rule, parties made extensive use of consent judgments to embody their private agreements on support. The consent judgment had a life independent of any decree of divorce. As long as it was entered "before the commencement of the proceeding for absolute divorce,"[208] an alimony or support agreement between the

203. *Id.*

204. *Id.*

205. 2 R. LEE, *supra* note 35, § 191, at 486 (Cum. Supp. 1979).

206. See text accompanying note 25 *supra*.

207. 2 R. LEE, *supra* note 35, § 191, at 486 (1979). N.C. GEN. STAT. § 50-16.8 (b)(1) now reads that payment of alimony may be ordered in an action for divorce "either absolute or from bed and board."

208. 2 R. LEE, *supra* note 35, § 191, at 401 n.81. See also Merritt v. Merritt, 237 N.C. 271, 74

parties, entered as a consent judgment, would survive a decree of absolute divorce. Now, of course, the separation agreement itself may be embodied, adopted, approved, or merged in a divorce decree without being first embodied in a consent judgment. The rules are the same in either case.

The result is that cases before 1967 that deal with the merger/incorporation problem are speaking either to consent judgments or to separation agreements incident to actions for divorce from bed and board or for alimony without divorce. Consent judgments are still more frequently used in North Carolina than in most other states largely because of this unusual historical development. It bears repeating, however, that a consent judgment is basically little more than a separation agreement embodied in a decree.[209] The ultimate effect was that consent judgments *substituted* for divorce decrees insofar as the consequences of the relationship between the decree and the private agreement were concerned, so that the language of consent judgments became the decisive factor in determining what contract rights survived or were extinguished by the judgment.

The following sections examine North Carolina's attempt to resolve the major merger issues. The terminology used by the courts in discussing this problem is important to note. They have made virtually no use of the term "merger," and prior to 1964 there was very little use of the term "incorporation." Rather the distinction appeared to be that between "mere approval" and "adoption."[210] Although the supreme court apparently tried mightily to lay down a simple and coherent "either-it-is-or-it-isn't" rule for incorporation/merger, its best efforts fell upon many deaf ears, and, perhaps as a result, the court itself has begun to retrench on its original position.

2. "Adoption" of Decrees in North Carolina

Bunn v. Bunn, decided in 1961, is still the leading case on the issue of merger.[211] The issue in *Bunn* was whether a consent judgment which "ordered, adjudged and decreed" an alimony payment could be modified. In a lengthy opinion, Chief Justice Sharp painstakingly distinguished two types of consent judgments in North Carolina. In the first variety, the "court merely approves or sanctions the payments which the husband has agreed to make for

S.E.2d 529 (1953); and Stanley v. Stanley, 226 N.C. 129, 37 S.E.2d 118 (1946). The quoted language is from the pre-1955 amendment of G.S. 50-11. In 1955 the language was changed to read that "a decree of absolute divorce shall not impair or destroy the right of a spouse to receive alimony . . . provided for such spouse under any judgment or decree of a court rendered *before or at* the time of the rendering of the judgment for absolute divorce." N.C. GEN. STAT. § 50-11(c) (1976) (emphasis added.)

209. *See* Bunn v. Bunn, 262 N.C. 67, 136 S.E.2d 240 (1964).

210. A consistent use of these terms would, of course, greatly simplify the issues here. Unfortunately courts have begun to make considerable use of the term "incorporation" to mean adoption or merger, with confusing results. *See, e.g.*, Mitchell v. Mitchell, 270 N.C. 253, 256, 154 S.E.2d 71, 73 (1967); Williford v. Williford, 10 N.C. App. 451, 179 S.E.2d 114 (1971); Riddle v. Riddle, 32 N.C. App. 83, 85, 230 S.E.2d 809, 811 (1977); and Baugh v. Baugh, 44 N.C. App. 50, 51, 260 S.E.2d 161, 162 (1979). Much of this undoubtedly stems from the results in Levitch v. Levitch, 294 N.C. 437, 241 S.E.2d 506 (1978), discussed in text accompanying notes 224-234 *infra*.

211. 262 N.C. 67, 69, 136 S.E.2d 240, 242 (1964).

the wife's support and sets them out in a judgment against him. Such a judgment constitutes nothing more than a contract between the parties made with the approval of the court."[212] Further, since "the court itself does not in such case order the payments, the amount specified therein is not technically alimony."[213] Such a contract-judgment, in the court's opinion,

> [was] enforceable only as an ordinary contract. It may not be enforced by contempt proceedings and, insofar as it fixes the amount of support for the wife, it cannot be changed or set aside except with the consent of both parties in the absence of a finding that the agreement was unfair to the wife or that her consent was obtained by fraud or mutual mistake.[214]

In the second type of consent judgment, on the other hand, the court "adopts the agreement of the parties as its own determination of their respective rights and obligations and orders the husband to pay the specified amounts as alimony."[215] Moreover, the court continued:

> A judgment of the second type, being an order of the court, may be modified by the court at any time changed conditions make a modification right and proper. The fact that the parties have agreed and consented to the amount of the alimony decreed by the court does not take away its power to modify the award or to enforce it by attachment for contempt should the husband wilfully fail to pay it.[216]

When the issue is whether the consent judgment may be modified or enforced by the contempt power of the court, "the question for the court in each case is whether the provision for the wife contained therein rests only upon contract or is an adjudication of the court. If it rests on both, it is no less a decree of the court." Then, restating in the interests of clarity, the court went on to note that any judgment that awards true alimony,[217] "notwithstanding it was entered by the consent of the parties, is enforceable by contempt proceedings, . . ."[218] Finally, the court noted, "if the judgment can be enforced by contempt, it may be modified and vice versa."[219]

The *Bunn* decision marked no change in North Carolina law in this area.[220] Rather it was a praiseworthy attempt to restate definitively the ex-

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212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 69, 136 S.E.2d at 243.

217. Alimony, in its technical sense, has been defined as "an allowance made for the support of the wife out of the estate of the husband by *order* of court in an appropriate proceeding. . . ." Stanley v. Stanley, 226 N.C. 129, 133, 37 S.E.2d 118, 120 (1946) (emphasis added).

218. Bunn v. Bunn, 262 N.C. 67, 70, 136 S.E.2d 240, 243 (1964), *But see* text accompanying notes at 250-51 *infra*. In view of Moore v. Moore, 297 N.C. 14, 252 S.E.2d 735 (1979), the statement needs some explanation. It is still, however, literally correct.

219. *But see* text accompanying notes 250-51 *infra*. In view of Moore v. Moore, 297 N.C. 14, 252 S.E.2d 735 (1979), the statement needs some explanation. It is still, however, literally correct.

220. For example, in Stanley v. Stanley, 226 N.C. 129, 37 S.E.2d 118 (1946) the wife's attempt to enforce by contempt a consent judgment, which had not specifically ordered her husband to pay her support money, was refused. In the absence of such an order, the court said, this was "an extrajudicial transaction, and although . . . relating to the support of the wife, had no more sanc-

isting status of the law. Its basic point is that while parties are largely free to exclude the state from their private settlements, they are thereafter to be remitted solely to the rights and duties undertaken in their contracts. Only if the court were an active third party in determining distributive consequences would the power of the state be available to enforce provisions by contempt or to modify them.[221]

There are, however, problems with the "either/or" result reached by *Bunn*. First, the distinction the court draws largely ignores that even an order by a court that parties perform certain duties is often little more than a rubber stamp of a private agreement. In the great majority of cases that result in "adopted" agreements, a court has formally, but not substantively, taken an active role in determining support consequences. Second, this analysis fails to recognize that support duties, whether embodied in a decree or agreement, have the same origin in law. That the duty be fulfilled is of no less compelling interest to the state in either case.[222]

Moreover, the conclusion was apparently drawn from these cases, and particularly from *Bunn* itself, that a support provision in a separation agreement could not be considered to have been adopted by the court unless the decree or judgment *specifically* "ordered, adjudged and decreed" that the supporting spouse make the payments.[223] Clearly this was a reliable, if overly rigid, approach to the problem, and undoubtedly it remains true today that a

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tion for its enforcement than any other civil contract." *Id.* at 133, 37 S.E.2d at 120. In Stancil v. Stancil the court had stated that ". . . although a judgment may be entered by consent, based on a written agreement, if such judgment orders and decrees that the husband shall pay certain sums as alimony for the support of his wife. . ." contempt powers shall be available for enforcement. 255 N.C. 507, 509, 121 S.E.2d 882, 884 (1961). And in Holden v. Holden, an extreme example of insistence upon precise language, the supreme court held that a consent judgment, which had ordered, adjudged and decreed "that the parties have agreed that husband will pay," could not be enforced by contempt, since the decree did not specifically order the payments to be made. 245 N.C. 1, 6, 95 S.E.2d 118, 124 (1956).

221. Clearly the availability of the courts power here is a double-edged sword. Whatever sense of security a party may have in knowing contempt remedies are possible must be balanced against the lack of certainty that modification possibilities create.

222. The growing tendency to allow specific performance as a remedy for nonmerged support provisions is an implicit recognition of the state's interest in having *all* support obligations performed. Specific performance in this context also obviates the problem discussed in the preceeding note. A party may in fact be protected against modification and still have the threat of contempt as a remedy.

223. *See, e.g.*, Sayland v. Sayland, 267 N.C. 378, 148 S.E.2d 218 (1966); Elmore v. Elmore, 4 N.C. App. 192, 166 S.E.2d 506 (1969); Seaborn v. Seaborn, 32 N.C. App. 556, 233 S.E.2d 67 (1977). In each instance the fact that the court below had "ordered, adjudged and decreed" the provision for support was conclusive. On the other hand, in Shankle v. Shankle, 26 N.C. App. 565, 216 S.E.2d 915 (1975), a Nevada decree had "ratified, approved and confirmed" a separation agreement and ordered the parties to do "each and every act" required by it; but the court here, apparently applying its own law, held it had no power to modify the decree. And in Williford v. Williford, 10 N.C. App. 451, 179 S.E.2d 114 (1971), alimony was ordered "incorporated" into the decree, which then recited the provision verbatim. The court held, however, that the lower court "did not adopt the agreement of the parties as its own determination, but merely approved or sanctioned the payments. . . ." *Id.* at 454, 179 S.E.2d at 116. In an apparent excess of caution, one consent judgment "ordered, adjudged and decreed" alimony, then went on to state: " 'This Order is more than a simple Consent Order and upon proper cause shown, the Court shall subject the parties to such penalties as may be required by the Court in case of contempt.' " Whitesides v. Whitesides, 271 N.C. 560, 561, 157 S.E.2d 82, 83 (1967).

decree of the court, which specifically orders the supporting spouse to make payments to the dependent spouse, will result in an "adoption."[224] A 1978 case, however, makes it clear that this is not the *only* means by which an adoption of the agreement may occur.

In *Levitch v. Levitch*, a 1973 divorce decree ordered, adjudged and decreed "that the Separation Agreement heretofore entered into by the parties . . . be . . . incorporated by reference in this Judgment and shall survive this Judgment."[225] In a decision whose result, if not logical, is laudable, the supreme court held that "the incorporation language here . . . appears sufficiently compelling to indicate an intent on the part of the court to order payment of the alimony," and that the decree should therefore be enforceable through contempt.[226] In so holding the court relied on language of an earlier case, *Mitchell v. Mitchell*, that when the agreement "with reference to the wife's support is incorporated in the judgment, [the parties'] . . . contract is superceded by the court's decree. The obligations imposed are those of the judgment, which is enforceable as such."[227] *Mitchell*, however, did not involve a merger issue. Rather, it dealt with a consent judgment that had ordered, adjudged and decreed that "[p]laintiff shall pay to the defendant the sum . . . .",[228] with no mention of the term "alimony." In that case, the supreme court, although noting that the judgment was not worded with proper care, held that it was nonetheless an order to pay alimony and therefore enforceable by contempt. In other words, *Mitchell* did not involve the kind of "incorporating language found in *Levitch*, but rather dealt with the issue of whether there was an order to pay alimony.[229]

Further, the defendant in *Levitch* argued that because the separation agreement itself provided that it was to be "incorporated in any decree of absolute divorce . . . without merging therein," the agreement should be interpreted as having been approved, not adopted. In response, the court looked not merely to the language used in the decree, but to the *intent* of the rendering court.[230] The court then concluded that the lower court had incorporated the agreement on its own, without reference to the "incorporated but not merged" provision of the separation agreement.[231]

While it is somewhat difficult to assess *Levitch*, the case is clearly of great significance. In a marked change from prior case law, it holds that a decree

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224. Warnings to counsel to word their judgments with care were frequent occurrences after *Bunn*. *See, e.g.*, Mitchell v. Mitchell, 270 N.C. 253, 258, 154 S.E.2d 71, 75 (1967); Williford v. Williford, 10 N.C. App. 529, 531, 179 S.E.2d 113, 114 (1971), *cert. denied*, 278 N.C. 301, 180 S.E.2d 177 (1971). The threshold requirements for use of contempt power in *Bunn*, it might be noted, are substantially identical to those suggested by Clark, *supra* note 37, at 333.

225. 294 N.C. 437, 439, 241 S.E.2d 506, 507 (1978).

226. *Id.*

227. *Id.* at 438-39, 241 S.E.2d at 507 (quoting Mitchell v. Mitchell, 270 N.C. 253, 256, 154 S.E.2d 71, 73 (1967)).

228. Mitchell v. Mitchell, 270 N.C. 253, 254, 154 S.E.2d 71, 72 (1967).

229. *Id.* at 256, 154 S.E.2d at 74.

230. Levitch v. Levitch, 294 N.C. 437, 439, 241 S.E.2d 506, 507 (1978).

231. *Id.*

incorporating by reference the provisions of a separation agreement can work an "adoption" of the support provisions, despite the absence of an actual order that the support payments be made.[232] This change is wholly appropriate and probably more accurately reflects the intent of a court that "incorporates" the provisions of a separation agreement.[233] As noted previously, the earlier insistence that a decree specifically order, adjudge and decree that certain payments be made was an overly technical and formalistic solution to a very complex issue.

Unfortunately, *Levitch* was an inappropriate vehicle by which to introduce this change to North Carolina law. Adoption through incorporation should not be accomplished in opposition to the express intent of the parties. More importantly, the case has been interpreted to draw a distinction between a consent judgment and a separation agreement that probably should not be drawn.[234] Regrettably, the extremely brief opinion is susceptible to this misinterpretation.[235] It would be unrealistic, however, to conclude that any distinction has been drawn between separation agreements and consent judgments insofar as either may be adopted through incorporation. The more logical conclusion, and the one consistent with prior law, is that a court may, if it so intends, adopt either kind of agreement by incorporation within its decree.

3. Enforcement

The traditional rule is that a support obligation resting only in contract may not be enforced by contempt. As the supreme court explained in *Bunn v. Bunn*,[236] if a court does not specifically order the payments, "alimony" in a technical sense does not exist, and thus the nonmerged agreement is "enforceable only as an ordinary contract."[237] The rule was stated more fully by the

232. Note, also, that the separation agreement expressed a contrary intent.

233. In this case, however, it is not quite clear why the supreme court thought the lower court had intended to merge the agreement into the decree. The higher court simply concluded that "the court found that the agreement '. . . shall survive this action and should be incorporated by reference herein. . .' and specifically ordered that it be incorporated by reference with no mention of any reason for the incorporation other than its determination that the agreement would survive the judgment. In the face of such unequivocal language, we cannot hold that a mere proviso in the agreement should overcome the express intent of the court to adopt the alimony provisions into its order." *Id.* at 440, 241 S.E.2d at 508.

234. For instance, the court states that "[a]lthough the intent of the parties is controlling in the interpretation of consent judgments, . . . the decree in the instant case does not appear to have been obtained by consent." Levitch v. Levitch, 294 N.C. 437, 439, 241 S.E.2d 506, 507-08 (1978). The apparent distinction is lacking in meaning, however, since the court's *decree* could just as easily have incorporated a consent judgment. *See* Bunn v. Bunn, 262 N.C. 67, 136 S.E.2d 240 (1964).

For the proposition quoted above the court cited to Yount v. Lowe, 288 N.C. 90, 215 S.E.2d 563 (1975), which simply restates the general proposition that consent judgments, being nothing more than contracts between private parties, are to be interpreted according to standard rules of construction, including ascertainment of the intent of the parties.

235. *See Survey of Developments in North Carolina Law, 1978—Family Law*, 57 N.C.L. REV. 827, 1093 (1979).

236. 262 N.C. 67, 136 S.E.2d 240 (1964).

237. *Id.* at 69, 136 S.E.2d at 242. *See also* Stanley v. Stanley, 226 N.C. 129, 133, 37 S.E.2d 118, 121 (1946), in which the court explained that a contrary result would violate the constitutional prohibition against imprisonment for debt.

court of appeals in a case in which enforcement was sought of a New York decree ordering specific performance under a separation agreement. The court of appeals held that the New York judgment, though entitled to recognition here, was not entitled to specific performance:[238]

> The enforcement of support payments provided in an extra-judicial separation agreement is accomplished as in the case of any other civil contract, i.e., through an action for breach of the contract seeking a judgment for sums due. Such an action, sounding in contract, is not enforceable by execution in *personam* in the form of imprisonment for civil contempt for noncompliance, by reason of the constitutional prohibition against imprisonment for debt.[239]

One year later, *Moore v. Moore* presented the supreme court with the same issue: "whether an action for specific performance will lie to enforce alimony provisions of a separation agreement, which has not been made part of a divorce decree."[240] In a decision at least as surprising as that in *Levitch*, the supreme court held that the plaintiff wife was entitled to a decree of specific performance.[241]

The court first distinguished the *Bunn* line of cases on the ground that plaintiff here had only sought a decree of specific performance ordering defendant to comply with the alimony provisions of the separation agreement, and did not seek direct enforcement of the agreement through the use of the contempt power. Then it repeated the standard that a separation agreement is "generally subject to the same rules of law with respect to its enforcement as any other contract," including specific performance when there is no adequate remedy at law.[242] An adequate remedy, moreover, " 'is not a partial remedy. It is a full and complete remedy, . . . It is not enough that there is some remedy at law; it must be as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity.' "[243] Noting further that the adequacy of the legal remedy must be evaluated in a *relative* way, that is, relative to the type of contract and the relations of the parties, the court concluded that plaintiff's legal remedy here involved a multiplicity of suits and "unusual and extreme hardship."[244] Added to this was the egregious fact that there was "a deliberate pattern of conduct by defendant to defeat plaintiff's rights under their separation agreement."[245]

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238. Sainz v. Sainz, 36 N.C. App. 744, 245 S.E.2d 372 (1978).

239. *Id.* at 747, 245 S.E.2d at 374.

240. Moore v. Moore, 297 N.C. 14, 252 S.E.2d 735, 736 (1979).

241. *Id.* at 18, 252 S.E.2d at 739.

242. *Id.* at 16, 252 S.E.2d at 737.

243. *Id.* at 16, 252 S.E.2d at 738, (quoting Sumner v. Staton, 151 N.C. 198, 201, 65 S.E.2d 902, 904 (1909)).

244. Moore v. Moore, 297 N.C. 14, 17-18, 252 S.E.2d 735, 738 (1979).

245. *Id.* at 18, 252 S.E.2d at 738-39. The defendant husband, whose alimony payments were $250.00 per month, made $20,000.00 annually. As a matter of course, he immediately endorsed his paychecks over to his second wife who deposited them in her own account. His house was owned jointly with his second wife, and all other property, including cars and boat trailer, were in the second wife's name. His affairs were, in other words, structured so that plaintiff had been unable either to garnish his wages or execute successfully against his property. Her judgment for

The case is one of great importance. However, while it marks a significant and sensible change in North Carolina law, caution is in order. Clearly *Moore* does not stand for the proposition that specific performance will always be available to enforce separation agreements not adopted by a decree. The result in the case would probably have been different had the defendant not deliberately violated the provisions of the separation agreement. But, grounded as it is in standard contract principles, the case obviously does stand for the proposition that upon a proper showing of inadequacy of remedies at law, a separation agreement may be enforced by a decree of specific performance. North Carolina has thus joined a growing number of states that have reached this rather liberal, but wholly sensible, result.[246] Since the support provisions of a separation agreement speak directly to the all important duty of support, the result should not be otherwise.[247]

Several additional observations about *Moore* are warranted. First, its result does not run afoul of the prohibition against imprisonment for debt.[248] By taking one step back from the direct application of the contempt power, that difficulty is at least arguably obviated. Furthermore, by basing its conclusion solely on the ground that plaintiff's remedy at law was inadequate, the court neatly avoided any suggestion that its order—that defendant specifically perform the separation agreement—was a direct order to pay alimony. Any other result would have been impossible, since *G.S.* 50-16 allows an award of alimony only in an action for alimony without divorce, absolute divorce, or divorce from bed and board.[249] More importantly, the court also avoided any suggestion that it might have the power to modify the support provisions of the agreement in the future.

In *Bunn v. Bunn*, it should be recalled, the supreme court said "[i]f the judgment can be enforced by contempt, it may be modified and vice versa."[250] There is no reason to conclude that *Moore* has changed this long-standing rule—that the defendant there could move for a modification in the amount of alimony he had obligated himself to pay under the separation agreement. As noted previously, however, this would be an extremely unlikely result. A *Moore*-type defendant would be held in contempt not for his failure to live up

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nearly $5,000.00 in arrears was, as is not uncommon, virtually worthless. *Id.* at 14-15, 252 S.E.2d at 736-37.

246. *See, e.g.*, Strasner v. Strasner, 232 Ark. 478, 338 S.W.2d 679 (1960); Burke v. Burke, 32 Del. Ch. 320, 86 A.2d 51 (1952); Hagen v. Viney, 124 Fla. 747, 169 So. 391 (1936); Lorant v. Lorant, 366 Mass. 380, 318 N.E.2d 830 (1974); Zouck v. Zouck, 204 Mo. 285, 104 A.2d 573 (1954).

247. Although the context was quite different, Mitchell v. Mitchell, 270 N.C. 253, 154 S.E.2d 71 (1967) provides a more than adequate rationale for the result in *Moore*. In *Mitchell* it was said that: "The court would demean itself if it entered a decree providing that the husband support and maintain the wife upon terms which he himself had suggested (and to which he gave his written consent), then allowed him to get an absolute divorce upon the strength of that decree, and—upon his wilful failure to comply with its terms—announced that it was powerless to enforce its judgment by contempt proceedings." *Id.* at 258, 154 S.E.2d at 74-75.

248. The decision itself does not even mention this as a consideration, despite the fact that it formed the basis for the court of appeals' decision. *See* Moore v. Moore, 38 N.C. App. 700, 248 S.E.2d 761 (1978).

249. N.C. GEN. STAT. § 50-16.1 (1976).

250. Bunn v. Bunn, 262 N.C. 67, 70, 136 S.E.2d 240, 243 (1964).

to the terms of the support provisions of a separation agreement, but rather for his failure to obey a court's order that he do so. The difference is not merely one of semantics: the result in *Moore* does not transform a support provision in a separation agreement into an order for technical alimony.[251] There is, therefore, no reason to conclude that *Moore* has in any way affected the standards for modification of alimony. It has, however, made "mere approval" of separation agreements or consent judgments a much more attractive option.

Finally, one last question merits attention: Does *Moore* also mean that injunctive relief, enjoining a defendant from breaching the terms of an "unadopted" separation agreement, is available? In *Riddle v. Riddle*, a 1977 case, the court of appeals denied just such a motion for injunctive relief on the ground that, since plaintiff's obvious purpose in seeking such was "to be able to enforce the support provisions of the separation agreement by contempt proceedings," plaintiff had an adequate remedy at law.[252] In addition, the court implied that allowing injunctive relief would violate constitutional prohibitions against imprisonment for debt.[253] Presumably, if a plaintiff could meet the standards for injunctive relief, however, which are very similar to those for specific performance, there should no longer be any reason why that relief should not be available.[254]

4. Support and Property Settlements

The issue of enforceability does lead to the difficulties encountered in distinguishing a support settlement agreement from a property settlement, since that problem usually arises when one party seeks to modify a money payment called for under an agreement. A brief review of modification principles is, therefore, in order.

It is firmly established, of course, that a spousal support agreement, whether entered by consent or by decree, which is not adopted by the court, or "incorporated" *a la Levitch*, is neither enforceable by contempt nor subject to

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251. See note 237 *supra*.

252. 32 N.C. App. 83, 87, 230 S.E.2d 809, 812 (1977).

253. *Id.* The constitutional prohibition against imprisonment for debt is not directly mentioned in *Riddle*. The court did rely on *Stanley* for its holding, however, and *Stanley's* result is based directly on that prohibition. *See supra*, note 220. Moreover, in Sainz v. Sainz, the court of appeals discussed the prohibition against imprisonment for debt and stated that, based on such reasoning, it had recently denied injunctive relief in *Riddle*. Sainz v. Sainz, 36 N.C. App. 744, 747, 245 S.E.2d 372, 376 (1978).

254. N.C. GEN. STAT. § 1A-1, Rule 65(b) (1969) states that a temporary restraining order, which is the functional equivalent of a preliminary injunction, Lambe v. Smith, 11 N.C. App. 580, 181 S.E.2d 783 (1971), may be granted "if it clearly appears . . . that immediate and irreparable injury, loss, or damage will result to the applicant. . . ."

In an interesting older case, Boone v. Boone, 217 N.C. 722, 9 S.E.2d 383 (1940), the supreme court held that plaintiff wife was entitled to both injunctive relief and specific performance to prevent her husband from violating an oral provision of their separation agreement. He had promised not to sue for divorce on the grounds of adultery and not to institute an action for alienation of affections against a third party (who joined in the suit with wife here as plaintiff). The supreme court found that specific performance was necessary in order to prevent irreparable harm and that the plaintiff was *thus* entitled to injunctive relief. *Id.* at 729-30, 9 S.E.2d at 387-88.

modification by the court.[255] Similarly, a property settlement is not subject to modification except by agreement between the parties.[256] The parties may modify their agreements either expressly, so long as the modification is supported by consideration, or impliedly, under estoppel or detrimental reliance principles.[257] In addition, as discussed previously, there are two conditions imposed by G.S. 50-16.9(a) that must be met for a court to be able to modify a money payment.[258] That there must be an "order" is relatively clear. The order itself, however, must be one that commands the payment of technical alimony. Once these conditions are met, G.S. 50-16.9(a) provides that the order may be "modified or vacated at any time, upon motion in the cause and a showing of changed circumstances . . ."

Determining what is technical alimony, however, is not always an easy task. In essence, alimony is nothing more than "a substitute for the common law obligation of the husband to support the wife."[259] And regardless of the labels used, if a money payment to a dependent spouse is determined to be part of a property settlement, or reciprocal consideration therefor, it will not be alimony, and thus not be subject to modification.[260] Moreover, given that property settlements and separation agreements are often inextricably combined into a single instrument, the problem is one that is frequently encountered.[261] This is particularly true in North Carolina where courts, until recently, have not had the power to make property distributions incident to divorce. Thus, if there was to be a property division, it had to be accomplished though private negotiations between the parties.[262]

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255. Van Every v. Van Every, 265 N.C. 506, 512, 144 S.E.2d 603, 607 (1965) ("A valid separation agreement cannot be set aside or ignored without the consent of both parties."); Kiger v. Kiger, 258 N.C. 126, 129, 128 S.E.2d 235, 237 (1962) ("The provisions of a valid separation agreement . . . cannot be ignored or set aside by the court without the consent of the parties."); McKaughn v. McKaughn, 29 N.C. App., 702, 705, 225 S.E.2d 616, 618 (1976) (court is without power to modify a separation agreement except "(1) to provide for adequate support for minor children, and (2) with the mutual consent of the parties thereto where rights of third parties have not intervened.").

256. Bunn v. Bunn, 262 N.C. 67, 70, 136 S.E.2d 240, 243 (1964); and Holsomback v. Holsomback, 273 N.C. 728, 161 S.E.2d 99 (1968).

257. Wheeler v. Wheeler, 40 N.C. App. 54, 252 S.E.2d 106 (1979) (consideration and estoppel), *rev'd*, 299 N.C. 633, 263 S.E.2d 763 (1980) (waiver); and Beverly v. Beverly, 43 N.C. App. 60, 257 S.E.2d 682 (1979). For cases dealing with estoppel principles insofar as they relate to separation agreements and consent judgments, *see* Howland v. Stitzer, 236 N.C. 230, 72 S.E.2d 583, *cert. denied*, 345 U.S. 935 (1952); Pulley v. Pulley, 255 N.C. 423, 121 S.E.2d 876 (1961), *cert. denied*, 371 U.S. 22 (1962); Broughton v. Broughton, 22 N.C. App. 233, 206 S.E.2d 302 (1974); Hamilton v. Hamilton, 296 N.C. 574, 251 S.E.2d 441 (1979); and Shankle v. Shankle, 26 N.C. App. 565, 216 S.E.2d 915 (1975).

258. In order for a court to have the power to modify a support provision in a judgment under N.C. GEN. STAT. § 50-16.9(a) (1976) there must be an "order" of the court, and the order must be one to pay alimony. These requirements are discussed in more detail in White v. White, 296 N.C. 661, 662, 252 S.E.2d 698, 701 (1979); and Jones v. Jones, 42 N.C. App. 467, 256 S.E.2d 474 (1979).

259. 2 R. LEE, *supra* note 35, § 135, at 148.

260. 2 A. LINDEY, *supra* note 3, § 31, at 31-72.

261. The effect of combining the two essentially different kinds of agreements into one instrument has been said to connote "not only complete and permanent cessation of marital relations, but a full and final settlement of all property rights of every kind and character." Bost v. Bost, 234 N.C. 554, 557, 67 S.E.2d 745, 747 (1951).

262. N.C. GEN. STAT. § 50-16.7 (1976) states that "Alimony . . . shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property or any inter-

The best starting point for a discussion of North Carolina law on this issue is again *Bunn v. Bunn*. "Needless to say," the court in *Bunn* observed, "a judgment which purports to be a *complete* settlement of all property and marital rights between the parties and which does not award alimony within the accepted definition of that term is not subject to modification even though it adjudges that the wife recover a specific money judgment."[263] Although it was not an issue in the case, the supreme court went on to state the general rule in this area:

> However, an agreement for the division of property rights and an order for the payment of alimony may be included as separable provisions in a consent judgment. In such event the division of property would be beyond the power of the court to change, but the order for future installments of alimony would be subject to modification in a proper case. . . . However, if the support provision and the division of property constitute a reciprocal consideration so that the entire agreement would be destroyed by a modification of the support provision, they are not separable and may not be changed without the consent of both parties.[264]

It is easy enough, of course, to indicate within the agreement that the support and property divisions are separable. In one case, the agreement contained the following model clause:

> The provisions for the support, maintenance and alimony of wife are independent of any division or agreement for division of property between the parties, and shall not for any purposes be deemed to be a part of or merged in or integrated with a property settlement of the parties.[265]

It is equally easy to indicate that they are not independent provisions.[266] Un-

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est therein, or a security interest in or possession of real property." For a criticism of this extremely limited power to affect property, *see* Marshall, *Proposed Reforms in North Carolina Divorce Law*, 8 N.C. CENT. L.J. 35 (1967).

Although North Carolina is listed in two well-researched articles as a "modified common law property state" it should more accurately be classified as one of the few (six) remaining strict common law property states, where title alone determines division of property upon divorce. See Erickson, *Spousal Support Toward the Realization of Education Goals: How the Law Can Insure Reciprocity*, 1978 WIS. L. REV. 947; and Freed & Foster, *supra* note 2, at 307-08. As a practical matter, possession of, or a security interest in, the marital home is awarded only incident to child support. Moreover, attempts by trial courts to decree lump-sum alimony have been consistently struck down on the rationale that such sums are in reality attempts to divide property. See, e.g., Taylor v. Taylor, 46 N.C. App. 438, 265 S.E.2d 626 (1980); Taylor v. Taylor, 26 N.C. App. 592, 216 S.E.2d 737 (1975); Schloss v. Schloss, 273 N.C. 266, 160 S.E.2d 5 (1968). The remaining common law states are Florida, Mississippi, Pennsylvania, Virginia, and West Virginia.

263. Bunn v. Bunn, 262 N.C. 67, 70, 136 S.E.2d 240, 243 (1964).

264. *Id.*

265. Britt v. Britt, 36 N.C. App. 705, 711, 245 S.E.2d 381, 385 (1978). Merely using two separate headings within the agreement aids in making this distinction.

266. In Robuck v. Robuck, 20 N.C. App. 374, 375-78, 201 S.E.2d 557, 559-61 (1974), a separation agreement, drawn in Tennessee, provided for $100,000.00 in a lump sum to be paid to the wife and further provided that this sum "is not and shall not be construed to be payments of alimony . . . [but is rather the share] in an equitable distribution of the property accumulated by the parties during the tenure of their marriage." The court of appeals held that the agreement was clearly a property settlement and so did not constitute a bar to the wife's cross claim for alimony in her husband's suit for divorce.

fortunately these clear-cut distinctions are frequently not made.

An important and recent supreme court case has provided excellent guidance for the bench and the bar on this issue. In *White v. White* a separation agreement between the parties was "adopted" in a consent judgment, which ordered, adjudged, and decreed the husband to pay permanent alimony to his wife in the sum of $100.00 per week until her death or remarriage, pay her $1,000.00 in lump sum, and convey to her his half interest in the marital home.[267] The couple were later divorced, and in 1976 the wife sought an increase in alimony on the grounds of changed circumstances. The lower court held, however, that the property and support provisions of the judgment were not separable and thus the "alimony" was not subject to modification. The supreme court repeated the standard rule that periodic support payments made to a dependent spouse, even though denominated alimony, "may not be alimony within the meaning of the statute and thus modifiable if they and other provisions for a property division between the parties constitute reciprocal consideration for each other."[268]

In these circumstances, the answer always lies in the intentions of the parties, but the parties here gave no clear indication of what their intentions were. The court, therefore, went on to hold that further evidentiary hearings on the circumstances of the parties at the time they entered into the contract would be necessary and remanded for that purpose. It did, however, set out certain guidelines for the hearing below and held that when the intent of the parties is not clearly expressed, there should be a presumption "that provisions in a separation agreement or consent judgment made a part of the court's order are separable and that provisions for support payments therein are subject to modification upon an appropriate showing of changed circumstances."[269] Further, the court noted, the presumption imposes upon the party opposing modification the burden of proof on the issue, a burden that may be met only by a preponderance of the evidence.[270]

In summary, unlike the situation with regard to "adoption," or merger, enforceability and modification, the rules concerning integration of a property settlement and separation agreement in North Carolina are rather straightforward. Given the necessity for private settlement of property rights and the

267. 296 N.C. 661, 664, 252 S.E.2d 698, 700 (1979).

268. *Id.* at 666, 252 S.E.2d at 701.

269. *Id.* at 672, 252 S.E.2d at 704.

270. *Id.* In a court of appeals case shortly after this, it was held, based upon *White*, that a payment denominated "support and alimony" was in fact reciprocal consideration for property transfers and therefore it was proper to deny the wife's motion for an increase in payments, on the ground that they were not subject to modification. Jones v. Jones, 42 N.C. App. 467, 256 S.E.2d 474 (1979). The court found the following factors to be of significance in reaching this conclusion: (1) that there was no finding that the wife was a dependent spouse, (2) no finding that grounds for alimony had existed, (3) that the "alimony" payments were contingent upon the wife's leaving the house and conveying her half to her husband, (4) that the payments were limited to 32 months duration and (5) that the wife agreed to convey half interest in another piece of property without further consideration. *Id.* at 471, 256 S.E.2d at 476. The court further said, "[W]e note that the plaintiff alleged in his complaint that the defendant had committed adultery. The defendant did not answer the complaint and then agreed to the consent judgment." *Id.*, 256 S.E.2d at 477.

frequency with which the two types of agreements are combined into one instrument, it is essential that attorneys and clients understand the consequences of the form of their agreements. Although, through *Bunn* and *White*, a presumption exists that the two are separable, there is no good reason for relying upon that presumption if the parties intend for the two agreements to be independent of one another.

III. CONCLUSION

North Carolina's attempts to protect its third party interest in marriage dissolution and at the same time encourage private settlement of divorce incidents have been only partially successful. Given the conflicts that exist not only between the interests of the parties and those of the state, but also often between inconsistent policies of the state as well, this mixed result is hardly surprising. Several observations may be made, however.

First, it is clear that in North Carolina, as in most states, the initial judicial hostility that surrounded the development of separation agreements has largely disappeared. Judicial scrutiny has shifted focus from the function to the substance of the agreements. Unfortunately, development of substantive standards of fairness and freedom from fraud and duress has hardly begun in North Carolina. With the repeal of the privy examination statute, however, and the strong indication of a new attitude toward duress and the confidential relationship,[271] there is every reason to hope that equitable and sensible standards may yet evolve. Balancing the interests of the state and of private parties does not always require a lesser degree of state involvement.

Second, neither the state nor the parties are well served by the current status of the law on reconciliation. The principle that any isolated act of intercourse between the spouses constitutes a reconciliation is, in all likelihood, contrary to the intent of the parties. It is certainly counterproductive of the state's interest in encouraging reconciliations.

Third, a new and more liberal attitude is obvious in the areas of merger and its consequences, as seen in the cases of *Moore v. Moore* and *Levitch v. Levitch*.[272] The cumulative effect of those cases is to lessen the differences between the consequences of "mere approval" and "adoption" of agreements by decrees, and to expand the methods by which adoption may be accomplished. It should be repeated, however, that adoption through incorporation should not be accomplished contrary to intentions expressed in the agreement. The interests of the state are sufficiently served by the existing rules regarding adoption and approval. Within those limits, parties should be able to make informed choices with the knowledge that courts will respect those choices.

Finally, it should be emphasized that informed choices are possible. As is true in most states, North Carolina law on separation agreements is complex. It is inconsistent in some ways and contains several traps for the unwary, but it

271. Link v. Link, 278 N.C. 181, 179 S.E.2d 697 (1971), discussed at notes 101-107 *supra*.
272. *Levitch* is discussed at notes 225-35 *supra*, and *Moore* at notes 240-49 *supra*.

is not impenetrable. A thorough understanding of the law, both as to validity and enforcement of agreements, is the only real means by which many of the worst features of the fault-adversarial system may be avoided. Successful negotiation of separation agreements, like successful litigation, partakes both of a science and an art. Private settlement, however, is a considerably more humane alternative.