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Sally Burnett Sharp

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SEMANTICS AS JURISPRUDENCE: THE ELEVATION OF FORM OVER SUBSTANCE IN THE TREATMENT OF SEPARATION AGREEMENTS IN NORTH CAROLINA

SALLY BURNETT SHARP*

Marital settlement agreements are the vehicle by which the distributional consequences of the overwhelming majority of divorces in this country are concluded. Surprisingly, in virtually every state, marital settlement agreements have given rise to a confusing, and sometimes impenetrable, body of case law. Partly responsible for this confusion is the tension that exists between the movement toward greater freedom of contract and the traditional public policy interest that states retain in regulating some of the incidents of divorce. Like the great majority of states, North Carolina domestic law was characterized for decades by some degree of inconsistency and confusion. Nevertheless, a conscientious effort to analyze and integrate the major principles governing settlement agreements could yield reliable conclusions. In this Article Professor Sharp asserts that unfortunately this is no longer the case; several developments within the past decade have reduced the law of marital settlement agreements to a conglomeration of irreconcilable, confusing, and unworkable principles. The Article traces the origin of these developments in the previous decade in order to demonstrate the extent and consequences of the present state of confusion in the law governing settlement agreements. The Article focuses on the relationship between settlement agreements and final divorce decrees, and upon the effect of reconciliation of the parties on a settlement agreement. The Article concludes that the law regarding marital settlement agreements in North Carolina has produced results that are bewilderingly complex and fundamentally unsound, and suggests corrective steps for judicial and legislative consideration.

I. INTRODUCTION

Private ordering of the consequences of divorce has, for many years, received virtually unanimous approval from commentators, practitioners, parties, and the judiciary.¹ Separation or marital settlement² agreements are, quite cor-

* Professor of Law, University of North Carolina at Chapel Hill. Research for this project was supported by a grant from the North Carolina Law Center. I would particularly like to thank my research assistants, Joan Mitchell and Christine Wichers, for their tireless, meticulous, and superb work in the completion of this Article.

1. See, e.g., UNIF. MARRIAGE AND DIVORCE ACT § 306, 9A U.L.A. 216 (1987); H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 755 (2d ed. 1988); Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). But see

rectly, said to minimize the psychological and economic costs of divorce, to create better prospects for post-divorce cooperation between the parties, to lessen the impact of divorce upon children, and to promote judicial economy.³ It is hardly surprising, therefore, to find that these agreements are the vehicle by which the distributional consequences of the overwhelming majority of divorces in this country are concluded.⁴ What is surprising is that, in virtually every state, marital settlement agreements have given rise to a body of case law that is at best confusing, and at times nothing less than impenetrable.⁵ The consequences of this confusion and complexity are serious indeed: property divisions that, through a technicality or misused term of art, turn out to be modifiable alimony, the lack of contempt as an enforcement remedy, the ease with which an agreement may (or may not) be set aside, nonapplicability of *res judicata* standards, and confusion with regard to the effects of reconciliation.⁶

Part of this confusion derives from the simple fact that the law governing

Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984) (the author accurately notes that a disparity of resources affects the settlement process no less than the litigation process).

2. The variation in the labels attached to such agreements is a forewarning of the confusion that pervades much of this area of the law. Legislative and judicial attempts to distinguish among consent judgments, property settlements, and separation agreements are more fully described in Sharp, *Divorce and the Third Party: Spousal Support, Private Agreements and the State*, 59 N.C.L. REV. 819 (1981). Professor Homer Clark continues to prefer the comprehensive use of the term "separation agreement" to include any agreement "which settles whatever issues may arise in the course of a divorce case, including those relating to alimony, to a division of property, to child support and to child custody." H. CLARK, *supra* note 1, at 756. The term is also used in a comprehensive sense in the UNIF. MARRIAGE AND DIVORCE ACT § 306, *supra* note 1, at 216. For a variety of reasons (notably tax and bankruptcy consequences) technical distinctions between "property settlements" and "separation agreements" remain significant in many instances. Such distinctions in the divorce context, however, in which child support may be a "trade-off" for alimony, or when a property division may be structured as alimony, may be functionally meaningless. As Professor Clark has noted, treating separation and property agreements "as giving rise to different kinds of agreement obscures these relationships and produces no benefits of either clarity or efficiency." H. CLARK, *supra* note 1, at 756 (footnote omitted). In an attempt to obviate this kind of confusion, one commentator has suggested use of the term "divorce settlement agreement" to describe comprehensive documents that deal with both support and property rights. See Brogan, *Divorce Settlement Agreements: The Problem of Merger or Incorporation and the Status of the Agreement in Relation to the Decree*, 67 NEB. L. REV. 235, 239 (1988). Because North Carolina courts have begun to draw important, highly technical, although somewhat unrealistic, distinctions between "separation" and "property" agreements, I am inclined to agree with Professor Brogan's suggestion that "divorce settlement agreement" is a more comprehensive and less confusing term. For further discussion of this issue, see *infra* notes 146-48 and accompanying text.

3. See H. CLARK, *supra* note 1, at 755; Sharp, *Modification of Agreement-Based Custody Decrees: Unitary or Dual Standard?*, 68 VA. L. REV. 1263 (1982).

4. Professor Clark notes that ninety percent of all divorces are uncontested and estimates, quite conservatively in my opinion, that well over fifty percent of these are disposed of by separation agreements. H. CLARK, *supra* note 1, at 755. Others estimate that roughly ninety percent of all divorces are concluded by agreement or default. Hansen, *The Role and Rights of Children in Divorce Actions*, 6 J. FAM. L. 1, 2 (1966).

5. This confusion reaches the level of bewilderment in some instances. The West Virginia Supreme Court of Appeals once candidly admitted that "[o]ur law is replete with interesting rules which can be manipulated in such a way as to permit a court to arrive at any desired result." *In re Estate of Hereford*, 250 S.E.2d 45, 49 (W. Va. 1978). As this Article will attempt to demonstrate, the same statement could be made with regard to this area of North Carolina law. See also Comment, *Divorce Agreements: Independent Contract or Incorporation in Decree*, 20 U. CHI. L. REV. 138, 138 (1952) (The author points to the "flood of conflicting case law" in this area).

6. See Brogan, *supra* note 2; see also *infra* notes 92-95 and accompanying text (explaining recent North Carolina developments in this area).

marital settlement agreements is immensely complex. Much of that complexity in turn derives from sources that are both historical and ideological. Both in England and in the United States, "articles of separation" were the focus of immense judicial hostility for much of the nineteenth and well into the twentieth century.⁷ As the Supreme Court of North Carolina once noted with some distaste, such agreements "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."⁸

A rather begrudging judicial recognition of the validity of such agreements was accompanied by the development of an ideological, and formidable, body of public policy restrictions that was carefully designed to govern the execution and to limit the substance of separation agreements.⁹ By at least the middle of this century, however, most of these restrictions had begun to undergo a wholesale process of erosion. This was in part an accommodation to the realities of modern divorce statistics and the increasing liberalization of divorce laws.¹⁰ It was also a response to the mounting demands from writers in this area for greater freedom to contract.¹¹ It is now the policy of almost all states that, subject to judicial approval, parties may contract with regard to virtually all

7. For a more detailed discussion of the historical treatment of separation agreements, see Sharp, *supra* note 2, at 827-29. For an excellent, and wholly entertaining discussion of the history of such agreements in England, see Peaslee, *Separation Agreements Under the English Law*, 15 HARV. L. REV. 638 (1902). At common law, of course, such agreements were wholly void: "By marriage, the husband and wife are one person in law For this reason, a man cannot grant any thing to his wife, or enter into covenant with her: . . . for the grant would be to suppose her separate existence" 1 W. BLACKSTONE, COMMENTARIES *442.

8. *Collins v. Collins*, 62 N.C. (Phil. Eq.) 113, 116 (1867).

9. The major public policy restrictions were that such agreements would be void if made "in contemplation of divorce" (because this would tend to "encourage" divorce) or if they attempted to alter the "essential elements" (that is, the duty of support) of marriage. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169, 1259 (1974). As noted in an earlier article, such restrictions basically

centered on the state's interest in maintaining . . . the hierarchical relationship of the parties to marriage, with the result that limitations on interspousal freedom to contract became identified with perpetuation of inequality between the sexes. It therefore followed that the movement toward greater equality between the sexes was accompanied by demands for decreased state intervention in the regulation of marriage and divorce.

Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1400-01 (1984) (footnotes omitted).

10. Sharp, *supra* note 9, at 1401-02; see also H. CLARK, *supra* note 1, at 756-57; 2 R. LEE, NORTH CAROLINA FAMILY LAW § 188, at 466-70 (4th ed. 1980). In 1985, the last year for which complete statistics are available, there were approximately 1,190,000 divorces in the United States. U.S. DEP'T OF HEALTH AND HUMAN SERVS., VITAL STATISTICS OF THE UNITED STATES 3 table 2-3 (1985).

11. There has been a remarkably large number of academic voices raised in support of greater, and sometimes unlimited, freedom to contract in this area. See, e.g., L. WEITZMAN, THE MARRIAGE CONTRACT 338 (1981); Klarman, *Marital Agreements in Contemplation of Divorce*, 10 U. MICH. J.L. REF. 397 (1977); Krauskopf & Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558 (1974); Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204 (1982); Comment, *Marriage as Contract: Towards a Functional Redefinition of the Marital Status*, 9 COLUM. J.L. & SOC. PROBS. 607 (1973). The common theme underlying such articles echoes Sir Henry Maines's assertion that the "movement of the progressive society has . . . been a movement from *Status to Contract*." H. MAINE, ANCIENT LAW 165 (1970). For a more detailed critique of this freedom to contract position, see Sharp, *supra* note 9, at 1401-05.

issues¹² incident to divorce, so long as those agreements, or at least the process by which they are concluded, are basically just and reasonable, and are largely free from fraud, duress, undue influence, and other varieties of what Professor Arthur Leff called "bargaining naughtiness."¹³

Considerable tension remains, however, between the movement toward greater freedom of contract and the traditional, and not unreasonable, public policy interest that states retain in regulating some of the incidents of divorce. Most frequently this state interest manifests itself in the form of some requirement that settlement agreements must be submitted to the court for judicial approval,¹⁴ and in the application of standards designed to ensure that agreements are arrived at fairly or, less often, that their results are substantively fair.¹⁵

It is this tension—between treating settlement agreements as "any other

12. Issues relating to children are, of course, excepted from the general rule. See *Hudson v. Hudson*, 299 N.C. 465, 470, 263 S.E.2d 719, 722 (1980); *Fuchs v. Fuchs*, 260 N.C. 635, 639, 133 S.E.2d 487, 491 (1963); *Story v. Story*, 221 N.C. 114, 116, 19 S.E.2d 136, 137 (1942); 2 R. LEE, *supra* note 10, § 189 (all stating strongly the proposition that parties may not, by agreement, withdraw children from protection of the courts). See also H. CLARK, *supra* note 1, at 772 ("It is axiomatic that the courts have an obligation in divorce litigation to place the highest importance upon the welfare of the children of the marriage."). As a practical matter, however, courts rarely exercise their inherent power to enter orders affecting children that differ from terms arrived at by agreement between the parties. See I. A. LINDEY & L. PARLEY, *LINDEY ON SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS* § 14.01-46-47 (1989); Sharp, *supra* note 3, at 1264; Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 818-19 (1985).

13. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 539 (1967).

14. See UNIF. MARRIAGE AND DIVORCE ACT *supra* note 1, § 306(b) (the court must approve agreements found to be not unconscionable); H. FOSTER, JR. & R. BROWN, *CONTEMPORARY MATRIMONIAL LAW ISSUES: A GUIDE TO DIVORCE ECONOMICS & PRACTICE* 689-90 (1985). Most states employ terms such as "fairness," "equity," "reasonable," or "not unconscionable" as the standard for judicial review. See, e.g., ALASKA STAT. § 25.24.230(a)(2) (1983) (agreement must not be "grossly unfair, unjust or inequitable"); ARIZ. REV. STAT. ANN. § 25-317 (1976) (agreement is binding unless the court finds that it is unfair); COLO. REV. STAT. § 14-10-112(2) (1987) (court must find agreement is not unconscionable); CONN. GEN. STAT. ANN. § 46b-66 (West 1986) (court must determine if the agreement is "fair and equitable under all the circumstances"); HAW. REV. STAT. § 572-22 (Supp. 1989) ("agreement shall be subject to approval by the court"); ILL. ANN. STAT. ch. 40, para. 502(b) (Smith-Hurd Supp. 1990) (court must find agreement is not unconscionable); IND. CODE ANN. § 31-1-11.5-10(b) (Burns 1987) (court approval required before agreement will be incorporated into decree); KAN. STAT. ANN. § 60-1610b(3) (1983) (the court must find the agreement to be "valid, just and equitable" before incorporation); KY. REV. STAT. ANN. § 403.180(2) (Michie/Bobbs-Merrill 1984) (court must find agreement is not unconscionable); MASS. ANN. LAWS ch. 208, § 1A (Law. Co-op. Supp. 1990) (court must approve the agreement or it becomes "null and void"); MINN. STAT. ANN. § 518.552(5) (West Supp. 1990) (court must make finding that the agreement is "fair and equitable"); MO. REV. STAT. § 452.325(2) (1986) (agreement binding unless court finds it unconscionable); MONT. CODE ANN. § 40-4-201(2) (1989) (agreement binding unless court finds it unconscionable); NEB. REV. STAT. § 42-366(2) (1988) (agreement binding unless court finds it unconscionable); N.Y. DOM. REL. LAW § 236(B)(3) (McKinney 1986) (maintenance terms of agreement must be "fair and reasonable" and "not unconscionable"); OR. REV. STAT. § 107.025(2)(b) (1989) (court must find the agreement "to be just and equitable"); WASH. REV. CODE ANN. § 26.09.070(3) (Supp. 1990) (contract must not be "unfair at the time of its execution"); W. VA. CODE § 48-2-16(a) (1986) (court must find the agreement "fair and reasonable" and not obtained by "unconscionable conduct"); WIS. STAT. ANN. § 767.255(11) (West 1981) ("no such agreement shall be binding where the terms of the agreement are inequitable as to either party"). See also Sharp, *supra* note 9, at 1408 n.37, for a discussion of how the confidential relationship between husband and wife operates as a vehicle for imposing fairness in transactions between the spouses in several other states.

15. See Sharp, *supra* note 9, at 1440-50, for a discussion of the distinction between procedural and substantive fairness.

bargained-for exchange between parties who are presumably on equal footing' ”¹⁶ and treating them as special kinds of contracts, deserving of and requiring “utmost concern” in the form of judicial scrutiny for unfairness or overreaching¹⁷—that has been partially responsible for the development of an “irreconcilable” body of case law in this area.¹⁸ In addition, the requirement of judicial review, without regard to whether such review is perfunctory or exacting, has aided in the creation of what has aptly been described as “undoubtedly the single most confused area of divorce procedure”¹⁹—the ultimate relationship between the agreement and the subsequent decree. Stated differently, the manner in which a final divorce decree treats the agreement of the parties usually will be the decisive factor in determining what provisions of the agreement, if any, are subject to modification, what provisions are enforceable by contempt, the applicability of *res judicata* standards, and the survival of any contract rights.²⁰

Any attempt to summarize the great variation of principles in this area of the law necessarily requires oversimplification. With that caveat in mind, it is nonetheless possible to distinguish three major approaches regarding the relationship between agreements and decrees.²¹ The first, and the most simple, possibility is that the contract may be merged into the decree. Merger extinguishes all contract rights and obligations, which then become part of the decree. Technical alimony provisions thus merged become subject to subsequent modification and are enforceable by contempt.²² The second, and by far the most confusing, result occurs when the agreement is in some fashion “incorporated” into the divorce decree, but retains its validity as a contract.²³ This may result in the

16. *Hill v. Hill*, 94 N.C. App. 474, 480, 380 S.E.2d 540, 545 (1989) (quoting *Knight v. Knight*, 76 N.C. App. 395, 398, 333 S.E.2d 331, 333 (1985)).

17. *Johnson v. Johnson*, 67 N.C. App. 250, 255, 313 S.E.2d 162, 165 (1984).

18. Brogan, *supra* note 2, at 242. Professor Brogan amply demonstrates this point by a detailed discussion of the largely quixotic development of the law in this area in several states, notably Pennsylvania, West Virginia, Idaho, Arkansas, Missouri, and Montana. *Id.* at 249-63, 265-71.

19. I. ELLMAN, P. KURTZ, & A. STANTON, *FAMILY LAW* 730 (1986).

20. Custody and child support are modifiable in all states, either by specific statutory provisions or by common law. See H. CLARK, *supra* note 1, at 724, 836; discussion *supra* at note 12. Property divisions, on the other hand, are nonmodifiable. See *infra* note 102 and accompanying text. Thus, the only real issues of modification involve payments labeled as alimony. For a general discussion of other effects see Brogan, *supra* note 2.

21. Brogan, *supra* note 2, at 244; Sharp, *supra* note 2, at 849. Within these three major approaches, however, there are innumerable permutations. It appears, moreover, that it is rarely the case that all three options exist within a single jurisdiction.

22. See *Flynn v. Flynn*, 42 Cal. 2d 55, 58, 265 P.2d 865, 866 (1954) (“Merger is the substitution of rights and duties under the judgment or the decree for those under the agreement . . .”); RESTATEMENT (SECOND) OF JUDGMENTS § 18 comment a (1982); H. CLARK, *supra* note 1, at 776; Brogan, *supra* note 2, at 245; Sharp, *supra* note 2, at 849. It should be noted that it is only the obligation to pay money that is technically merged, so that no independent action can be brought on the underlying contractual obligation. RESTATEMENT OF CONTRACTS § 450(1)(f) comment, at 537. An order to convey property, on the other hand, is not merged into the decree. *Id.* It is nonetheless enforceable, as an order of the court, by contempt, but the underlying obligation is not merged. H. CLARK, *supra* note 1, at 777; Brogan, *supra* note 2, at 243 n.31. For a discussion of the distinction between technical alimony and installment payments labeled “alimony,” see *infra* notes 166-73 and accompanying text.

23. Brogan, *supra* note 2, at 245; Sharp, *supra* note 2, at 849. The use of the very terms “incorporate” or “incorporate by reference” has given rise to massive confusion. In many states, “incorpo-

creation of a true hybrid contract *and* decree, the consequences of which vary from state to state and consistently frustrate any attempt at explication.²⁴ Finally, the agreement may simply be presented to the court for its approval or "ratification."²⁵ The ensuing decree does not set forth, incorporate, or merge the terms of the agreement, which therefore retains its validity as a contract, albeit one that has received a judicial imprimatur that it is fair and reasonable or not unconscionable.²⁶

This brief summary, it must be emphasized, does not begin adequately to describe the extent of the complexity or confusion that exists *within* the law of most states. Despite the development of uniformity among the states with respect to other areas of domestic law,²⁷ the law of settlement agreements clearly remains balkanized. To the degree that the function of the law of contracts and of divorce is to provide certainty as to the rights and obligations of parties, the law governing the relationship between decrees and agreements would appear to frustrate that purpose at almost every turn. In almost equal measure, moreover, the law controlling the operation and effect of settlement agreements prior to entry of a divorce decree has also produced considerable inconsistency and confusion, both with regard to the effect of a reconciliation between the parties,²⁸ and with the applicable standards that must be met if one party seeks to have the agreement set aside or voided.²⁹

For decades the law of North Carolina more or less tracked the processes

ration" creates a "merger" result. *See, e.g.,* *Levitch v. Levitch*, 294 N.C. 437, 439-40, 241 S.E.2d 506, 507-08 (1978); H. CLARK, *supra* note 1, at 778; Comment, *Divorce Agreements: Independent Contract or Incorporation in Decree*, 20 U. CHI. L. REV. 138, 146 (1952). In others, it does not. *See, e.g.,* *Murphy v. Murphy*, 467 A.2d 129, 132 (Del. Fam. Ct. 1983); *Oehme v. Oehme*, 10 Kan. App. 2d 73, 691 P.2d 1325, 1327 (1984); *Mendelson v. Mendelson*, 75 Md. App. 486, 498, 541 A.2d 1331, 1337 (1988). Professor Clark suggests that incorporation by reference, or any other option which does not set forth the full text of the agreement, should not be deemed to create a merger. H. CLARK, *supra* note 1, at 779. Lindey and Parley, on the other hand, suggest that an agreement may be either incorporated and merged or incorporated but not merged. II A. LINDEY & L. PARLEY, *supra* note 12, § 31.07 (Supp. 1989).

24. Brogan, *supra* note 2, at 245. The best attempt to explain this "incorporation without merger" position is found in 1 VALUATION AND DISTRIBUTION OF MARITAL PROPERTY § 4.02, at 35-36 (J. McCahey ed. 1990). *See also* cases summarized in II A. LINDEY & L. PARLEY, *supra* note 12, § 28.05 (Supp. 1989) (discussing case law on this issue in various states); 2 R. LEE, *supra* note 10, at 482-90 (discussing North Carolina law as it had developed prior to 1980).

25. 1 VALUATION AND DISTRIBUTION OF MARITAL PROPERTY, *supra* note 24, § 4.02, at 33-36; Brogan, *supra* note 2, at 245; Sharp, *supra* note 2, at 849.

26. Sharp, *supra* note 2, at 849. Even somewhat perfunctory judicial approval may nonetheless have significant *res judicata* effects. *See, e.g.,* *Jones v. Jones*, 140 So. 2d 318 (Fla. Dist. Ct. App.), *cert. denied*, 146 So. 2d 753 (Fla. 1962); *Sasmore v. Mois*, 154 A.2d 126 (D.C. 1959); *Whitney v. Heublein*, 145 Conn. 154, 139 A.2d 605 (1958).

27. The previous two decades, of course, have been witness not only to the growing "constitutionalization" of domestic law, but to the widespread adoption of numerous uniform acts. In addition, the federal government has recently begun to take a much more active role in issues involving child custody and child support. The 1984 Child Support Enforcement Amendments to Title IV of the Social Security Act, 42 U.S.C. §§ 654-67 (1988), the Family Support Act of 1988, 42 U.S.C. § 667 (1988), and the Federal Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (1988) are excellent examples of this growing federal involvement.

28. *See* H. CLARK, *supra* note 1, at 438-41; I A. LINDEY & L. PARLEY, *supra* note 12, § 9.05. This issue has become particularly troublesome in North Carolina. *See infra* notes 272-77 and accompanying text.

29. *See* Sharp, *supra* note 9, at 1411.

set forth above. There was some inconsistency,³⁰ considerable confusion, especially with regard to the relationship between agreements and decrees,³¹ and a few well-settled rules.³² And although North Carolina domestic law has always contained some highly unique legislative provisions and judicial principles,³³ a conscientious effort to analyze and integrate the major principles governing settlement agreements could yield largely reliable, if not particularly satisfying, conclusions.³⁴ The judiciary and the practicing domestic bar might have found the going difficult, but not impossible. Unfortunately, such is no longer the case.

Within the past decade several developments—notably the passage of equitable distribution, a line of decisions from the court of appeals, and a single case from the supreme court—have reduced the law of settlement agreements to a conglomeration of irreconcilable, confusing, and often unworkable principles. The extent and significance of these developments, from both a public policy and a practical standpoint, cannot be overestimated. There are no true villains in this sad piece of what approaches analytical rubble, but there are a multitude of victims: trial court judges who state in open court that appellate opinions are so irreconcilable as to be meaningless for precedential value;³⁵ expert domestic lawyers so confounded by the state of the law that they often draft thirty- to forty-page agreements, not to provide for contingencies that might occur in the lives of their clients, but rather to provide for contingencies that might occur with the law; appellate judges who lack both the time and resources to attempt to untie the various Gordian knots that entangle this area of the law; and clients who are bewildered by the complexity of the documents they sign and all too often dismayed by the consequences thereof.

At a different level, the most significant victim, and innocent bystander, of this process is the current state and role of public policy in North Carolina. The continuing dialectic between the interests of the state in retaining some control over the incidents or processes of divorce and the interests of the parties in private ordering of their dissolution consequences appears to have gone awry in North Carolina. Quite simply, the settlement agreement process now seems to be largely unguided by meaningful principles of public policy or judicial re-

30. See, e.g., *supra* notes 16-17 and accompanying text, for an indication of the difficulty North Carolina courts have had in determining whether or not a "contract between husband and wife falls within a special classification." *Tripp v. Tripp*, 266 N.C. 378, 379, 146 S.E.2d 507, 508 (1966).

31. This was especially true for a time regarding the issue of whether "incorporation by reference" resulted in merger. See *Sharp, supra* note 2, at 857-58; discussion *infra* at text accompanying notes 58-59.

32. See, e.g., *Jones v. Lewis*, 243 N.C. 259, 261, 90 S.E.2d 547, 549 (1955) (repeating the general and established rule that reconciliation voids the executory portions of a property division). Unfortunately, the continued validity of this principle—along with a great many others—has been greatly undermined. See *infra* notes 278-79 and accompanying text.

33. See, e.g., discussion of the reconciliation rules *infra* note 235 and accompanying text. For a discussion of that unique creature of North Carolina law, the privy exam statute, see *Sharp, supra* note 2, at 828, 833. See also *infra* note 50, for a brief summary of the effect of this statute on judicial review in North Carolina.

34. See, e.g., this author's earlier attempt to analyze these major principles in *Sharp, supra* note 2.

35. The anecdote is hearsay but was repeated frequently and earnestly to the author by many members of the domestic bar at its 1990 Annual Meeting.

view.³⁶ To some extent, much of this confusion can be traced to the enactment of the Equitable Distribution of Property Act—a statutory scheme that introduced entirely new concepts into a state in which title alone long had controlled the distribution of property upon divorce.³⁷ To a surprising extent much of this process can be traced to a rather simple, but nonetheless profound, confusion surrounding the meaning of the terms “separation agreement” and “property settlement.”³⁸

This Article attempts to trace the origin of these developments in the previous decade, to demonstrate the extent, and consequences, of the present state of confusion in the law governing settlement agreements, and to suggest corrective, or at least ameliorative, steps that might be appropriate for judicial and legislative consideration. It will focus upon the relationship between settlement agreements and final divorce decrees, and upon the effect of reconciliation of the parties on a settlement agreement—both areas in which a profound, and unnecessary, confusion between the terms “separation agreement” and “property settlement agreement” has produced extraordinarily unfortunate results.

This Article is premised upon three major assumptions. The first assumption is that settlement agreements are fundamentally different from other kinds of contracts. They deal with issues of custody, support, and distribution of wealth that have consequences of immense significance, not only to the parties involved, but to the state as well.³⁹ The second assumption is that precisely because of the distinctive nature of such contracts, the state has a very real interest in, at a minimum, imposing a mechanism—judicial approval or review—through which it can ensure, first, that such agreements are, within broad parameters, fair and reasonable,⁴⁰ and second, that they are thus accorded res judi-

36. With the repeal of the privy examination statute, discussed *infra*, at note 50, there are only two relevant statutory provisions regarding contracts between husbands and wives. N.C. GEN. STAT. § 52-10.1 (1984) (“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 . . .”) (emphasis added); *id.* § 50-20(d) (1987) (“Before, during or after marriage the parties may by written agreement . . . provide for distribution of the *marital property* in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties.”) (emphasis added). The italicized portions of the statutes do tend to confirm the highly technical distinctions between “property” and “separation” agreements currently being drawn by courts. See *infra* notes 111-13 and accompanying text.

37. N.C. GEN. STAT. §§ 50-20, 50-21 (1987). For a further discussion of the Equitable Distribution of Property Act, see *infra* notes 115-18 and accompanying text.

38. See *supra* note 2; *infra* notes 45, 111-18 and accompanying texts. Passage of the Equitable Distribution of Property Act has contributed greatly to the confusion surrounding, and importance of, these terms.

39. For a more detailed discussion of this proposition, see Sharp, *supra* note 9, at 1405-06. The “feminization of poverty” has become, of course, an almost hackneyed expression, but the phenomenon and its relationship to divorce are nonetheless quite real. See, e.g., L. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985); Espenshade, *The Economic Consequences of Divorce*, 41 J. MARRIAGE & FAM. COUNSELING 615 (1979); Hoffman, *Marital Instability and the Economic Status of Women*, 14 DEMOGRAPHY 67, 69 (1977) (all documenting the rather drastic decline in the economic status of women and children after divorce). In North Carolina the Administrative Office of the Courts estimated in 1986 that over forty percent of families headed by women subsisted at a level below the federal poverty guidelines. 10 N.C.B.A. FAM. F. 1 (Aug. 1989).

40. This is roughly the standard for judicial review used in virtually all other states. See *supra* note 14. Requiring some mechanism for judicial review does not, of course, ensure the effectiveness

cata effect.⁴¹ The final assumption is that a public policy that allows parties great freedom to determine the distributional consequences of divorce through private agreement is by no means inconsistent with a policy that recognizes the legitimate state interest in imposing some limits on this freedom to contract.⁴²

II. AGREEMENT AND DECREE

A. The Traditional Rules

Like most states, North Carolina has had a difficult time accommodating the interests of the parties in private ordering of the incidents of divorce and the policy interests of the state in imposing some limits on freedom to contract.⁴³ That tension has long been reflected in the development of two almost wholly irreconcilable judicial attitudes toward settlement agreements—one asserting and one denying that such agreements should be treated like “any other contract.”⁴⁴ Much of that same tension, however, has also been reflected in the development of the law governing the relationship between settlement, or separation agreements,⁴⁵ and subsequent divorce decrees. As in the majority of states, in North Carolina three major consequences depend upon this ultimate

or efficiency of such review. See Sharp, *supra* note 9, at 1409. It is, however, a first step toward a process of meaningful judicial approval, and a necessary step for the attachment of res judicata consequences to an agreement. See *infra* notes 123-24 and accompanying text.

41. See *infra* notes 202-13 and accompanying text for a more thorough explanation of the relationship between judicial review (and fact finding) and the application, through res judicata principles, of changed circumstances standards to modification of child custody and support decrees.

42. At a minimum, judicial approval should seek to ensure that the procedures through which a settlement agreement is concluded are free from fraud, undue influence, or duress. As explained in more detail, *infra* note 50, these principles are sadly underdeveloped in North Carolina domestic law. See also Note, *Duties of Fairness Between Separating Spouses: North Carolina Continues to Find that all is Fair in Love and Divorce*, 67 N.C.L. REV. 1397 (1989) (containing a detailed summary of North Carolina law in this area, particularly since passage of the Equitable Distribution of Property Act in 1983).

43. No longer, of course, does the state consider itself a true partner to the marriage contract. *But see* Ritchie v. White, 225 N.C. 450, 35 S.E.2d 414 (1945), where the supreme court observed that: “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.” *Id.* at 453, 35 S.E.2d at 415. Although this is probably still an accurate statement of the power of the state to control the incidents of divorce, our courts recently have consented to an almost unparalleled freedom to contract. See *infra* notes 92-93 and accompanying text.

44. See *supra* notes 16-17 and accompanying text; see also McIntosh v. McIntosh, 74 N.C. App. 554, 556, 328 S.E.2d 600, 602 (1985) (courts throw a “cloak of protection” around transactions between husband and wife to ensure that they are “fair and reasonable”); McDowell v. McDowell, 61 N.C. App. 700, 705, 301 S.E.2d 729, 732 (1983) (“However, as courts do not make contracts, we are not permitted to inquire into whether the contract was good or bad, wise or foolish.”).

45. The term “separation agreement” has been employed most frequently by North Carolina courts in the broad sense. Technically, however, such an agreement deals only with marital support rights, Sharp, *supra* note 2, at 826, and is thus too narrow a term to encompass agreements that deal with support and property rights. Lee, for example, emphasizes that there is a

recognized legal distinction between a true separation agreement and a true property settlement A true property settlement is a division and allotment of property and property interests between the parties; it says nothing about support or alimony for the wife, custody or support of children, or the right to live separate and apart.

2 R. LEE, *supra* note 10, at 460; see also Stanley v. Cox, 253 N.C. 620, 629, 117 S.E.2d 826, 832 (1961) (discussing same distinction between a property settlement and separation agreement). For a

relationship between the decree and agreement or, stated differently, upon the nature of the final consent judgment:⁴⁶ whether spousal support provisions were modifiable, whether contempt would be available for enforcement of support provisions, and what *res judicata* consequences attached to the agreement provisions that were modifiable.

In 1964 the North Carolina Supreme Court attempted, with some success and considerable coherence, to explain the status of the law in this area in the seminal case of *Bunn v. Bunn*.⁴⁷ The court began with the simple proposition that there were two types of consent judgments available to parties in North Carolina. In the first, the court "merely approves or sanctions the payments which the husband has agreed to make for 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."⁴⁸ Because they were not court-ordered, spousal payments could not constitute technical alimony.⁴⁹ This Type I consent judgment, the court concluded, "may not be enforced by contempt proceedings," and the alimony provisions thereof could not 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."⁵⁰

detailed explanation of how critical this distinction has become, see *supra* note 2 and accompanying text and *infra* notes 111-13 and accompanying text.

46. In North Carolina, prior to 1967, permanent alimony could not be awarded incident to an absolute divorce; therefore, consent judgments were the exclusive instruments for embodying the agreements of the parties. 2 R. LEE, *supra* note 10, at 188. In 1967 N.C. GEN. STAT. § 50-16.8(b)(1) was amended to allow permanent alimony to be awarded in an action for divorce, "either absolute or from bed and board." Act of July 6, 1967, ch. 1152, 1967 N.C. Sess. Laws 1769. Thus, prior to the amendment, agreements including alimony had to be entered as consent judgments prior to any decree of final divorce. Since 1967, of course, courts have been free to adopt or approve settlement agreements in the divorce decree itself, but the consent judgment device and terminology have survived. The rules pertaining to agreements embodied in some form either in divorce decrees or in consent judgments, however, were, and have remained, the same. For a more detailed discussion of this somewhat unusual domestic law history, see Sharp, *supra* note 2, at 854.

47. 262 N.C. 67, 136 S.E.2d 240 (1964), *overruled in part by* *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983). This was undoubtedly the single most significant case in North Carolina domestic law for nearly two decades. *But see infra* text accompanying note 89.

48. *Bunn*, 262 N.C. at 69, 136 S.E.2d at 242. The opinion obviously predates the amendment to N.C. GEN. STAT. § 50-16.8, discussed *supra* at note 46, so that it speaks solely in terms of "consent judgments."

49. *Bunn*, 262 N.C. at 69, 136 S.E.2d at 242.

50. *Id.* The last clause of the quoted material in the text is somewhat misleading because consent judgments or settlement agreements have virtually never been set aside for unfairness in North Carolina. This was owing in part to the existence of the infamous privity examination statute, in effect from 1905 until its repeal in January of 1978. Act of May 13, 1977, ch. 375, § 1, 1977 N.C. Sess. Laws 375. For a detailed history of this statute, see *Spencer v. Spencer*, 37 N.C. App. 481, 486, 246 S.E.2d 805, 809 (1978), *cert. denied*, 441 U.S. 958 (1979). Before its repeal, N.C. GEN. STAT. § 52-6(a) (1976) stated that "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." The statute also required that such officer make findings as to whether the contract was "unreasonable or injurious to the wife," and that the ultimate certification "be conclusive of the facts therein stated but may be impeached for fraud." *Id.* § 52-6(b). Thus, this statute, which was designed to protect wives, had the ironic effect of virtually immunizing agreements from attack for unfairness, duress, and overreaching, once the certification was complete. Moreover, because the statute in effect delegated the task of review of settlement agreements to magistrates, judicial review of such contracts was unnecessary and thus perfunctory at best. Unfortunately, this practice continued after the repeal of North Carolina Gen-

By contrast, in the Type II consent judgment 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."⁵¹ Such a judgment, as "an order of the court, may be modified by the court at any time changed conditions make a modification right and proper."⁵² The court then concluded that when issues of modifiability of support or enforcement by contempt arise, "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."⁵³

The *Bunn* court thus set forth a relatively simple "either/or" approach to agreements and subsequent decrees. Either an agreement was "adopted" by the trial court, in which case its support provisions would be both modifiable and enforceable by contempt, or the agreement was "merely approved," in which case alimony would be nonmodifiable and the agreement enforceable only as an "ordinary contract."⁵⁴ It is important to note, however, that by 1979 these "ordinary contract" remedies for Type I consent judgments were held to include decrees for specific performance.⁵⁵ As a result, the Type I consent judgments could also be enforced by contempt order, but only after an order for specific performance had been obtained. The fundamental duality of the *Bunn* approach nonetheless remained intact.

Statement of these principles, however, turned out to be considerably easier than application and two major problems arose, with frustrating regularity, for almost twenty years after the *Bunn* decision. The first of these problems involved the means by which an agreement would, or would not, be merged into a decree. Both prior to and for some years after *Bunn*, appellate courts employed

eral Statutes § 50-6. For an excellent discussion of these issues, see *Avriett v. Avriett*, 88 N.C. App. 506, 509-11, 363 S.E.2d 875, 878-80, *aff'd per curiam*, 322 N.C. 468, 368 S.E.2d 377 (1988).

51. *Bunn*, 262 N.C. at 69, 136 S.E.2d at 242. It is important to note that the statutory definition of technical alimony under N.C. GEN. STAT. § 50-16.8 (1987) requires a court order. The significance of this first requirement for technical alimony is discussed in more detail *infra*, at note 167 and accompanying text. The distinction between provisions called "alimony" and technical alimony is well recognized elsewhere. See Annotation, *Divorce: Power of Courts to Modify Decree for Alimony or Support of Spouse Which Was Based on Agreement of Parties*, 61 A.L.R.3d 520, 528-29 (1975); *supra* note 46.

52. *Bunn*, 262 N.C. at 69, 136 S.E.2d at 242; see also *Cavanaugh v. Cavanaugh*, 317 N.C. 652, 659, 347 S.E.2d 19, 24 (1986) (By incorporating a separation agreement into the judgment, the "trial judge made that agreement an order of the court subject to modification based on changed circumstances.").

53. *Bunn*, 262 N.C. at 70, 136 S.E.2d at 243.

54. *Id.* at 69, 136 S.E.2d at 242. This approach thus largely avoided the confusion and complexity of the second option, discussed *supra* at text accompanying note 23, wherein a hybrid contract and decree could exist simultaneously. *But see infra* notes 88-89 and accompanying text.

55. *Moore v. Moore*, 297 N.C. 14, 252 S.E.2d 735 (1979), is the leading case. It required that a plaintiff seeking specific performance of an alimony agreement demonstrate that there was no "adequate remedy at law." *Id.* at 16, 252 S.E.2d at 737. The multiplicity of suits that plaintiff had brought, plus "a deliberate pattern of conduct by defendant to defeat plaintiff's rights under their separation agreement" amply demonstrated the inadequacy of plaintiff wife's contract remedies. *Id.* at 18, 252 S.E.2d at 738-39. See also *Haynes v. Haynes*, 45 N.C. App. 376, 383, 263 S.E.2d 783, 787 (1980) (failure to comply with decree of specific performance might be punishable by contempt); Note, *Enforcement of Contractual Separation Agreements by Specific Performance—Moore v. Moore*, 16 WAKE FOREST L. REV. 117 (1980) (considering whether an order of specific performance subjects a spouse to contempt).

a highly technical interpretation of the "adoption" procedure. Unless the court order specifically "ordered, adjudged and decreed" the precise terms of the underlying settlement agreement, no merger would occur.⁵⁶ For years no variation from this rigid approach was allowed. Thus, in one case in which the court ordered, adjudged, and decreed that "the parties have agreed that the plaintiff shall pay," the supreme court held that, because the decree had not specifically ordered the husband to pay, enforcement by contempt order was unavailable.⁵⁷

Apparently the supreme court soon wearied of such an elevation of form over substance, and in 1978 in a somewhat abrupt, but wholly sensible change of course, it expanded the "adoption" procedure to include agreements which were "incorporated by reference" into consent judgments.⁵⁸ Thus, support provisions of agreements would be considered merged, and therefore modifiable and enforceable by contempt, if they were either "ordered, adjudged, and decreed" or "incorporated by reference" into the decree.⁵⁹

The second problem that courts confronted after *Bunn* created and continues to create⁶⁰ even greater confusion. As the *Bunn* court fully recognized, support or pure "separation" agreements are likely, at a practical if not also at an analytical level, to be inextricably linked with provisions for a division of property.⁶¹ It is also quite common for parties to structure property division as alimony for tax or other purposes.⁶² The *Bunn* court therefore grafted onto its

56. See, e.g., *Stanley v. Stanley*, 226 N.C. 129, 133-34, 37 S.E.2d 118, 120-21 (1946).

57. *Holden v. Holden*, 245 N.C. 1, 3, 9, 95 S.E.2d 118, 120, 124 (1956).

58. *Levitch v. Levitch*, 294 N.C. 437, 439-40, 241 S.E.2d 506, 507-08 (1978), *overruled by* *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983). For a more expanded treatment of this development, see Sharp, *supra* note 2, at 857-58. The increased flexibility for the creation of merged agreements allowed by *Levitch* was partially a response to numerous cases in which the parties, and the trial court, had clearly intended to merge the agreement but had omitted the "magic words" *Bunn* seemed to require. See, e.g., *Williford v. Williford*, 10 N.C. App. 451, 179 S.E.2d 114, *cert. denied*, 278 N.C. 301, 180 S.E.2d 178 (1971).

59. It should be noted that the intent of the rendering court with regard to merger, as evidenced by its use of the appropriate language, was paramount. Any expression of intent of the parties deemed to be contrary to the intent of the court was irrelevant. The agreement in *Levitch*, for instance, specifically provided that it "shall survive this Judgment." *Levitch*, 249 N.C. at 438, 241 S.E.2d at 507. The supreme court held that, notwithstanding such language, the contract was merged into the decree. *Id.* at 440, 241 S.E.2d at 508. Confusion persisted in this area of the law, however, and it was not uncommon for agreements to provide both that the contract be "incorporated" in the decree and that alimony be nonmodifiable—a result that is, of course, impossible because, after *Levitch*, incorporation worked a merger of the agreement into the decree so that alimony was modifiable, regardless of any contrary intention expressed in the agreement. See, e.g., *Acosta v. Clark*, 70 N.C. App. 111, 114-15, 318 S.E.2d 551, 554 (1984). This continuing confusion probably, in part, led the supreme court to its misguided attempt to "clarify" this area of the law in *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983). See *infra* notes 80-91 and accompanying text. In many states, however, parties can provide for nonmodifiable alimony by agreement subsequently merged into a decree. See, e.g., *In re Marriage of Smiley*, 53 Cal. App. 3d 228, 233, 125 Cal. Rptr. 717, 721 (1975); *Schwartz v. Schwartz*, 256 Ga. 102, 344 S.E.2d 423 (1986).

60. See *infra* notes 164-68 and accompanying text.

61. See H. CLARK, *supra* note 1, at 594, 777. Professor Clark correctly observes that the "task of making a rational distinction between the two [separation and property agreements] becomes difficult, indeed impossible." *Id.* at 594.

62. Installment payments, regardless of the label attached thereto, so intertwined with a property division as to be a part thereof, do not meet the second prong of the definition of alimony. The first prong, it will be recalled, is that there be a court order. See *supra* note 51. The second is that the payments be made for the support of the dependent spouse. See *Stanley v. Stanley*, 226 N.C. 129, 133, 37 S.E.2d 118, 120 (1946); *infra* text accompanying notes 171-73.

"either/or" rule the common,⁶³ and common sense, proviso that "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."⁶⁴ The court explained that although property and support provisions might be separable portions of a judgment,⁶⁵ "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."⁶⁶

The court's *quid pro quo* analysis on this point is both clear and correct: because property divisions are not modifiable,⁶⁷ installment payments made in full or partial consideration for such property division provisions are similarly not modifiable, regardless of whether the payments are adopted by a court order. Allowing modification of payments labeled alimony in such an "integrated"⁶⁸ agreement would, in effect, allow one party the benefit of the bargain while po-

63. See, e.g., *Hartsfield v. Hartsfield*, 384 So. 2d 1097, 1098-99 (Ala. Civ. App. 1980), *cert. denied*, 384 So. 2d 1100 (Ala. 1980) (alimony "in gross" nonmodifiable even upon wife's remarriage); *States v. States*, 124 Ariz. 189, 191, 603 P.2d 81, 83 (1979) (monthly payments to wife constituted part of property settlement and so were nonmodifiable); *Steines v. Steines*, 538 P.2d 491, 493 (Colo. Ct. App. 1975) (monthly payments nonmodifiable because inseparable from property division); *Bockoven v. Bockoven*, 444 So. 2d 30, 31-32 (Fla. Dist. Ct. App. 1983) (provision for "support and maintenance" of wife in fact part of property division and thus nonmodifiable); *Kiffer v. Kiffer*, 410 N.W.2d 454, 457 (Minn. Ct. App. 1987) (alimony award actually part of nonmodifiable property settlement). See also cases collected in Annotation, *supra* note 51, at 590 (noting that "the rule has been developed that where an agreement's provisions for support are an integral and inseparable part of the property settlement, . . . a decree based on that agreement cannot be modified with respect to support").

64. *Bunn v. Bunn*, 262 N.C. 67, 70, 136 S.E.2d 240, 243 (1964), *overruled in part* by *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983). Language in an agreement setting forth the parties' intention that it constitute a "complete" or "final" settlement of their property and marital (or support) rights has frequently been held to be strong evidence that the agreement was integrated. See Annotation, *supra* note 51, at 602-12.

65. *Bunn*, 262 N.C. at 70, 136 S.E.2d at 243. The court continued to state the general rule that if the provisions were severable, "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." *Id.*

66. *Id.*

67. See 1 VALUATION AND DISTRIBUTION OF MARITAL PROPERTY, *supra* note 24, § 4.02, at 38 ("The general rule is that the property division provisions of a court order based on a separation agreement are not judicially modifiable. . ."). The author goes on to note certain limited exceptions to this rule, such as statutes that may provide for modification of home occupancy awards or that may provide for modification in order to permit division of military pensions. *Id.* Otherwise it is clear that property divisions are uniformly held to be nonmodifiable. See *Holsomback v. Holsomback*, 273 N.C. 728, 732, 161 S.E.2d 99, 102 (1968); *Kiger v. Kiger*, 258 N.C. 126, 129, 128 S.E.2d 235, 237 (1962); *King v. King*, 225 N.C. 639, 640, 35 S.E.2d 893, 894 (1945); *Cobb v. Cobb*, 54 N.C. App. 230, 232, 282 S.E.2d 591, 592 (1981), *cert. denied*, 304 N.C. 724, 288 S.E.2d 509 (1982) (all standing squarely for the proposition that property divisions are nonmodifiable). But see *infra* notes 100-03 and accompanying text, for what might be interpreted as a startling reversal of this long-standing rule.

68. The term "integrated" agreement is most commonly used in North Carolina. See, e.g., *Marks v. Marks*, 316 N.C. 447, 451, 342 S.E.2d 859, 862 (1986); *Cecil v. Cecil*, 59 N.C. App. 208, 210-11, 296 S.E.2d 329, 330-31 (1982), *disc. rev. denied*, 307 N.C. 468, 299 S.E.2d 220 (1983); *Henderson v. Henderson*, 55 N.C. App. 506, 507, 286 S.E.2d 657, 659 (1982), *aff'd*, 307 N.C. 401, 298 S.E.2d 345 (1983); *Britt v. Britt*, 36 N.C. App. 705, 711, 245 S.E.2d 381, 385 (1978).

tentially denying the corollary benefit to the other party.⁶⁹ Moreover, as subsequent portions of this Article will illustrate in some detail, such payments do not meet the technical definition of alimony and, therefore, should be nonmodifiable for this reason as well.⁷⁰

Subsequent cases have confirmed and elaborated upon this all-important principle of reciprocal consideration. In the leading case, *White v. White*,⁷¹ the supreme court enunciated the principle quite clearly: periodic support payments, even if labeled as 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."⁷² The *White* court went on to hold that although the issue of whether or not an agreement was integrated turned upon the intentions of the parties,⁷³ in the absence of a clear indicia of intent, 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."⁷⁴

The principles that emerged from this series of cases were, by 1980, relatively straightforward: a "Type II" consent judgment could be created through a decree that "ordered, adjudged, and decreed" the recited terms of the settlement agreement, or by a decree that incorporated such agreement by reference. The alimony provisions of such a consent judgment were modifiable, unless, under *White*, they were determined to be reciprocal consideration for a property division. The support provisions of such agreements were subject to enforcement by contempt. On the other hand, if the court merely approved the agreement of the parties, the alimony provisions would be nonmodifiable, regardless of whether or not the agreement was integrated. Such an agreement would be enforceable by contract remedies only, unless, under *Moore v. Moore*,⁷⁵ remedies at law were deemed so inadequate that a decree for specific performance would

69. It should be noted that the power to modify an alimony award includes the power to terminate such award: "An order of a court of this State for alimony . . . may be modified or vacated . . ." N.C. GEN. STAT. § 50-16.9(a) (1987).

70. See *infra* notes 164-68 and accompanying text.

71. 296 N.C. 661, 252 S.E.2d 698 (1979). See also *Henderson v. Henderson*, 307 N.C. 401, 406-07, 298 S.E.2d 345, 349 (1983) (discussing requirements for true alimony); *Rowe v. Rowe*, 305 N.C. 177, 184-86, 287 S.E.2d 840, 844-46 (1982) (same).

72. *White*, 296 N.C. at 666, 252 S.E.2d at 701.

73. In *Jones v. Jones*, 42 N.C. App. 467, 256 S.E.2d 474 (1979), the court found that the following factors were indicia of the parties' intent to create an integrated agreement: that the payments were contingent upon the wife's leaving the house and conveying her half of the house to her husband, that the payments were limited to thirty-two months' duration, that there was no finding that grounds for alimony existed, and that there was no finding that the wife was a dependent spouse. *Id.* at 471, 256 S.E.2d at 476; see also *supra* note 59 (intent of the court the critical factor in determining if an agreement had been incorporated or merged).

74. *White*, 296 N.C. at 672, 252 S.E.2d at 704. It should be noted that courts lacked the power to make any distribution of property incident to divorce until 1981. See Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C.L. REV. 247, 247 (1983). The presumption of separability was thus consistent with the state of the law at that time. It would appear, however, that with passage of N.C. GEN. STAT. § 50-20 (1987), a presumption of integration would better accord with the realities of most divorce bargaining.

75. 297 N.C. 14, 252 S.E.2d 735 (1975); see *supra* note 55.

be granted. Property divisions were in any event beyond the power of the court to modify.⁷⁶

Some confusion persisted, nevertheless, particularly with regard to whether "adopted" agreements were integrated or not.⁷⁷ This confusion was both unnecessary and unfortunate: unnecessary because the intentions of the parties easily could have been identified by the inclusion of integration or nonintegration clauses in the agreement;⁷⁸ unfortunate because it may have been partly appellate frustration with the failure of parties and their lawyers to indicate such intentions clearly that led to the supreme court's decision in *Walters v. Walters*⁷⁹—a case that, in all likelihood, marks a more abrupt, drastic, and unsound change in both the law and public policy of North Carolina than any other in the history of the domestic law of the state.

B. *Walters*

Walters v. Walters originated as a relatively standard case involving the issue of the modifiability of the alimony provisions of a 1978 consent judgment that had been merged into the decree of the lower court.⁸⁰ The only issue before the court of appeals was whether the alimony provision was reciprocal consideration for a property division.⁸¹ The court held, quite sensibly given the nature of the "alimony" provisions, that the separability presumption of *White v. White*⁸² had been overcome and that the payments were thus nonmodifiable.⁸³

The supreme court reversed the court of appeals in a remarkable opinion, the apparent simplicity of which utterly belies its scope, complexity, and internal

76. See cases cited *supra* note 67.

77. See, e.g., *Rowe v. Rowe*, 305 N.C. 177, 287 S.E.2d 840 (1982); *Cecil v. Cecil*, 59 N.C. App. 208, 296 S.E.2d 329 (1982), *disc. rev. denied*, 307 N.C. 468, 299 S.E.2d 220 (1983); *Henderson v. Henderson*, 55 N.C. App. 506, 286 S.E.2d 657 (1982), *aff'd*, 307 N.C. 401, 298 S.E.2d 345 (1983). There was also some confusion as to the res judicata effect to be accorded custody and child support arrangements based upon agreements. The scope of this problem has been greatly amplified as a result of the decision in *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983). See *infra* text accompanying notes 202-07.

78. An excellent example of an integrated agreement clause appears in *Henderson v. Henderson*, 55 N.C. App. 506, 507, 286 S.E.2d 657, 659 (1982), where the agreement provided simply that it was an "integrated agreement of the parties, that each provision contained herein is intended to be in consideration for each of the other provisions." For a nonintegration provision, see *Britt v. Britt*, 36 N.C. App. 705, 711, 245 S.E.2d 381, 385 (1978) ("The provisions for the support . . . of wife are independent of any division or agreement for division of property between the parties, and shall not for any purpose be deemed to be . . . integrated with a property settlement of the parties.").

79. 307 N.C. 381, 298 S.E.2d 338 (1983).

80. *Walters v. Walters*, 54 N.C. App. 545, 545-47, 284 S.E.2d 151, 152-53 (1981), *rev'd*, 307 N.C. 381, 298 S.E.2d 338 (1983).

81. *Id.* at 545-48, 284 S.E.2d at 152-53. The agreement called for the payment of \$1,000 per month for sixty-three months, and specifically provided for such payments to continue regardless of any remarriage of the wife. *Id.* Plaintiff wife had remarried, and husband had ceased making payments. *Id.*

82. See *supra* notes 71-74 and accompanying text.

83. *Walters*, 54 N.C. App. at 548-51, 284 S.E.2d at 153-55. Provisions for payment of fixed amounts of alimony beyond the remarriage of the recipient spouse are a hallmark of an integrated agreement. See Annotation, *Power to Modify Spousal Support Award for a Limited Term, Issued in Conjunction with Divorce, so as to Extend the Term or Make the Award Permanent*, 62 A.L.R. 4TH 180, 190 (1988).

confusion.⁸⁴ It ignored completely the integration issue and instead conducted a cursory, and partially inaccurate,⁸⁵ review of the law of consent judgments, observing that "non-court ordered consent judgments generate great confusion in the area of family law."⁸⁶ Apparently, for this reason, and this reason alone, the court leapt to the almost wholly unsupported, and largely insupportable,⁸⁷ conclusion that "[w]e now see no significant reason for the continued recognition of two separate forms of consent judgments within the area of domestic relations law."⁸⁸

Based on this rather superficial assessment of the law in this area, the court then reached the following, and to say the least, surprising, conclusion:

Instead of following this dual consent judgment approach in family law, we now establish a rule that whenever the parties bring their separation agreements before the court for the court's approval, it will no longer be treated as a contract between the parties. All separation agreements approved by the court as judgments of the court will be treated similarly, to-wit, as court ordered judgments. These court ordered separation agreements, as consent judgments, are modifiable, and enforceable by the contempt powers of the court, in the same manner as any other judgment in a domestic relations case. Insofar as this rule is in conflict with the previous decisions of this Court in *Bunn v. Bunn* . . . and *Levitich v. Levitich* . . ., those cases will no longer control.⁸⁹

Then, presumably by way of explanation, the court explained that: "This is not a harsh rule. The parties can avoid the *burdens* of a court judgment by not submitting their agreement to the court. By not coming to court, the parties preserve their agreement as a contract, to be enforced and modified under traditional contract principles."⁹⁰ Finally, and most surprisingly, the court appeared to suggest that even unexecuted *property division* portions of agreements approved by a court could be subject to modification.⁹¹

Thus, in two brief pages, the supreme court abolished the "mere approval"

84. *Walters v. Walters*, 307 N.C. 381, 387, 298 S.E.2d 338, 342 (1983).

85. See *infra* notes 101-02 and accompanying text.

86. *Walters*, 307 N.C. at 386, 298 S.E.2d at 342. It should be noted that such confusion as existed lay more in the application by lawyers and lower court judges of the rules summarized earlier in this Article than in the rules themselves. Appellate courts' repeated warnings that judgments be worded with care apparently often went unheeded. 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, *cert. denied*, 278 N.C. 301, 180 S.E.2d 177 (1971). As noted previously, the principles governing this area of the law were relatively well settled by the early 1980s. See *supra* notes 54-55 and accompanying text.

87. See *infra* notes 92-95 and accompanying text for a critique of the court's conclusions.

88. *Walters*, 307 N.C. at 386, 298 S.E.2d at 341-42. Even at this early stage of analysis of the court's opinion, it is impossible to resist the observation that the court's lack of appreciation of the function of court approval of agreements is, at a minimum, shortsighted.

89. *Id.* at 386, 298 S.E.2d at 342. The court also held that this "new rule" would have prospective application only. *Id.*

90. *Id.* (emphasis added). It is important to note that the court clearly does view judicial approval of agreements as a "burden" for parties. As later portions of this Article will demonstrate, courts also apparently feel burdened by judicial review.

91. See *infra* notes 101-05 and accompanying text.

consent agreement option and created in its place a "contract only" procedure for which no judicial approval of settlement agreements whatsoever is necessary. It must be emphasized that this latter procedure: 1) represents an unrestrained freedom to contract that is virtually unparalleled among the fifty states;⁹² 2) authorizes a system of divorce by mutual consent that would appear to contravene long established public policy in North Carolina;⁹³ and 3) creates serious res judicata issues in the (not unlikely) event that a party seeks judicial modification of the child support or custody provisions of a "contract only" agreement.⁹⁴ The opinion as a whole, moreover, rests upon the assumption that the application and effect of "ordinary contract principles" will be sufficient to meet the needs of divorcing parties—an assumption that at both policy and practical levels, has already proved to be incorrect.⁹⁵ Each of these consequences will be discussed in considerable detail in subsequent portions of this Article.

Before proceeding further, however, it is necessary to point out that *Walters* does much more than simply create, and indeed urge use of, a "contract only" option. Whether or not by design, the effect of the opinion as a whole is actively to *discourage* parties from seeking court approval of their agreements, a consequence which has unfortunate policy and practical implications.⁹⁶ It does this by threatening the finality of court-approved agreements in two ways: first, by casting doubt upon the continued viability of the reciprocal consideration and integrated agreement principle, and second by seeming to suggest that some portions of property divisions may be modifiable. Because divisions of property are nonmodifiable, virtually by definition, and certainly by necessity,⁹⁷ it is the latter suggestion that constitutes the most serious obstacle to the practice of seeking court approval of settlement agreements.⁹⁸

Oddly, the source for this potentially most serious aspect of the *Walters* opinion derives from the court's inartful attempt to describe previous law. As part of its explanation of the "many years of confusion"⁹⁹ surrounding the established principles of law in this area, the supreme court attempted to summarize prior law as follows:

As an order of the court, the court adopted separation agreement is enforceable through the court's contempt powers In addition to being enforceable by contempt, the provisions of a court ordered separation agreement within a consent judgment are modifiable within cer-

92. See Brogan, *supra* note 2, at 241-42; *supra* note 14. Louisiana apparently allows parties the option of a "contract only" agreement with regard to alimony. See, e.g., *Spencer v. Spencer*, 472 So. 2d 302 (La. Ct. App. 1985).

93. See *supra* note 50 (discussion of the privy exam statute).

94. See *infra* notes 202-07 and accompanying text.

95. See *infra* notes 183-86 and accompanying text.

96. See *supra* note 40.

97. See *supra* note 67; *infra* note 102.

98. Analytically, of course, modification of unexecuted portions of property division and modification of "alimony" portions of an integrated agreement are identical, since installment alimony payments are in fact nothing more than unexecuted portions of a property division. See *supra* notes 71-74 and accompanying text. Because not all settlement agreements are integrated, however, the two issues will be treated separately here.

99. *Walters v. Walters*, 307 N.C. 381, 386 298 S.E.2d 338, 342 (1983).

tain carefully delineated limitations. As the law now stands, if the provision in question concerns alimony, the issue of modifiability is determined by G.S. 50-16.9. *However, if the provisions in question concern some aspect of a property settlement, then it may be modified only so long as the court's order remains unsatisfied as to that specific provision Therefore, property provisions which have not been satisfied may be modified.*¹⁰⁰

The suggestion that previous (or current)¹⁰¹ North Carolina law holds that nonexecuted portions of a court-ordered property settlement might be subject to modification is wholly inconsistent with what is perhaps the most well-established principle of family law in this state, and elsewhere; property divisions, whether merged into a final decree of divorce or not, are *final*, and thus not subject to modification.¹⁰² If such a property division provision is merged into an order, of course, it becomes not only final, but a final judgment, and a clear distinguishing feature of a final judgment is that it is *not* subject to judicial modi-

100. *Id.* at 385-86, 298 S.E.2d at 341 (emphasis added). In a later portion of the opinion, the court, observed that

except as herein stated, consenting parties may still elect any of the options available to them prior to this opinion. For example, the parties may keep the property settlement provision aspects of their separation agreement out of court and in contract, while presenting their provision for alimony to the court for approval. The result of such action would be that the alimony provision is enforceable and modifiable as a court order while the property settlement provisions would be enforceable and modifiable under traditional contract methods.

Id. at 386-87, 298 S.E.2d at 342. Traditional contract methods presumably include reformation and voiding of portions or all of a contract for fraud, duress, undue influence, and sometimes unconscionability. See Sharp, *supra* note 9. Traditional contract remedies, however, do *not* include modification, except under the most unusual of circumstances or with the consent of the parties. It is thus possible to suggest that the court was somewhat careless with its use of the term "modification" with regard to agreements that are merged into decrees or that retain independent validity as a contract. The other alternative is simply to conclude that the court was incorrect in its summary of previous law. See, e.g., Note, *A New Rule for Consent Judgments in Family Law*, 6 CAMPBELL L. REV. 125, 126 (1984).

101. It is critical to note that at no point in its opinion does the supreme court specifically state that henceforth any *property division* approved by a court will be subject to modification. See *infra* notes 110-13 and accompanying text.

102. See H. CLARK, *supra* note 1, at 780; 1 VALUATION AND DISTRIBUTION OF MARITAL PROPERTY, *supra* note 24, § 4.02, at 38. See also *Holsomback v. Holsomback*, 273 N.C. 728, 732-33, 161 S.E.2d 99, 102-03 (1968) (after entry of consent judgment, division of property is beyond the power of the court to modify absent consent of both parties); *Bunn v. Bunn*, 262 N.C. 67, 70, 136 S.E.2d 240, 243 (1964) (division of property in a consent judgment is "beyond the power of the court to change") *overruled in part by* *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983); *Kiger v. Kiger*, 258 N.C. 126, 129, 128 S.E.2d 235, 237 (1962) (court without power to modify absent consent of parties); *King v. King*, 225 N.C. 639, 640, 35 S.E.2d 893, 894 (1945) ("It is a settled principle of law . . . that a consent judgment . . . cannot be modified or set aside without the consent of the parties thereto, except for fraud or mistake, and that in order to vacate such judgment an independent action must be instituted . . .") (quoting *Keen v. Parker*, 217 N.C. 378, 386-87, 8 S.E.2d 209, 214 (1940)); *Cobb v. Cobb*, 54 N.C. App. 230, 233, 282 S.E.2d 591, 593 (1981) ("A judgment which determines property rights creates vested rights in the parties which cannot be divested."), *disc. rev. denied*, 304 N.C. 724, 288 S.E.2d 809 (1982). Note also that the Equitable Distribution Act makes no provision whatsoever for modification of property divisions, whether arrived at by agreement or by judicial determination. N.C. GEN. STAT. § 50-20 (1987). To the contrary, the statute states that such agreements concerning marital property, if duly acknowledged and deemed fair by the parties, "shall be binding on the parties." *Id.* § 50-20(d). For further discussion of this statute, see *infra* notes 115-18 and accompanying text.

fication.¹⁰³ That the supreme court intended to overrule such a cardinal principle of domestic law judgments in such an oblique, and confusing, manner is virtually unthinkable. An argument can be made, moreover, that the court spoke more broadly, and more loosely, than it intended or perhaps realized, and that the established nonmodification principles remain intact.

The first link in this argument derives from the fact that, as authority for its comments on the modification of property divisions, the court cited two unremarkable and obscure cases involving forced judicial sales.¹⁰⁴ Those cases stand for nothing more than the well-settled principle that even final judgments remain open for some purposes, through appropriate motions.¹⁰⁵ The power of a court to entertain *motions*—to set aside a judgment under rule 60(b),¹⁰⁶ or to alter or amend under rule 59(e)¹⁰⁷—is, of course, neither the analytical nor the technical equivalent of a blanket power to modify final judgments.¹⁰⁸ Thus, an

103. See, e.g., *Reavis v. Reavis*, 82 N.C. App. 77, 83, 345 S.E.2d 460, 464 (1986) (“The public policy of this State seeks to promote certainty and finality in domestic dispute resolution . . .”); see also *Bryant v. Shields*, 220 N.C. 628, 634, 18 S.E.2d 157, 161 (1942) (“It is fundamental that a final judgment . . . is conclusive of rights, questions and facts in issue . . . in all other actions involving the same matter.”); *Blake v. Norman*, 37 N.C. App. 617, 247 S.E.2d 256, *disc. rev. denied*, 296 N.C. 106, 250 S.E.2d 35 (1978); RESTATEMENT (SECOND) OF JUDGMENTS § 13 comment b (1980) (“[A] judgment will ordinarily be considered final in respect to a claim . . . if it is not tentative, provisional, or contingent.”).

104. These two cases, the relevancy of which to domestic law does not readily leap to mind, are *Abernethy Land & Fin. Co. v. First Sec. Trust Co.*, 213 N.C. 369, 196 S.E. 340 (1938) (involving the attempt by a judgment creditor to enjoin an execution sale by the administrator of an estate), and *Walton v. Cagle*, 269 N.C. 177, 152 S.E.2d 312 (1967) (involving the attempt by a buyer at a judicial sale to seek relief from the costs imposed upon him when he failed to comply with the winning bid). In *Walton* the supreme court upheld the judgment charging the buyer with the costs of resale and the difference between that price and the price at the original sale, citing *Abernethy Land* for the proposition that the “court has authority to implement the judgment entered.” *Id.* at 183, 152 S.E.2d at 317. Ironically, the *Walton* court also relied upon an earlier case, *Johnson v. Futrell Bros. Lumber Co.*, 225 N.C. 595, 35 S.E.2d 889 (1945), for the proposition that under a consent decree “the court had no power to change its terms without consent of all parties, except upon the ground of fraud or mistake.” *Walton*, 269 N.C. at 180, 152 S.E.2d at 315.

105. In explaining the rights of the judgment creditor, the court in *Abernethy Land* stated that: An action in court is not ended by the rendition of a judgment, but in certain respects it is still pending until the judgment is satisfied. It is open to motion for execution, for the recall of an execution, to determine proper credits and for other motions affecting the existence of the judgment or the amount due thereon.

Abernethy Land, 213 N.C. at 371-72, 196 S.E. at 341-42.

106. N.C.R. Civ. P. 60(b). Professor Clark gives the following summary: “Most, if not all, jurisdictions . . . provide that a party may be relieved from a judgment or decree on the ground of mistake, excusable neglect, newly discovered evidence, or fraud.” H. CLARK, *supra* note 1, at 551. The purpose of such rules “is to provide for relief from final judgments when other methods, such as motions for new trial or appeals, are no longer available.” *Id.* North Carolina courts have been very reluctant to grant rule 60(b) motions in the domestic law context. See, e.g., *Goff v. Goff*, 90 N.C. App. 388, 393, 368 S.E.2d 419, 422 (1988) (reversing a rule 60(b) motion for wife to set aside consent order to provide for reimbursement of tax refund); *Coleman v. Arnette*, 48 N.C. App. 733, 735, 269 S.E.2d 755, 756 (1980) (motion denied where husband wanted to claim children as dependents: court stated that rule cannot be used to “amend” a divorce judgment).

107. N.C.R. Civ. P. 59(e) provides that a judgment may be altered or amended on motion served within ten days after entry of judgment. After that time, the judgment may be attacked only under rule 60. See also C. WRIGHT, *THE LAW OF FEDERAL COURTS* 661 (4th ed. 1983) (explaining practice under FED. R. Civ. P. 60).

108. “A judgment otherwise final for purposes of the law of res judicata is not deprived of such finality by the fact that time still permits commencement of proceedings . . . to set aside the judgment and grant a new trial or the like . . .” RESTATEMENT (SECOND) OF JUDGMENTS § 13 comment f (1986) (emphasis added).

argument can, and indeed must, be made that the apparent breadth of the modifiability language of this portion of the *Walters* opinion should be interpreted, and limited, to stand for nothing more than the principle in the cases the court cited: that even final judgments may, under certain restricted circumstances, be subject to reopening, setting aside, or further orders for implementation.¹⁰⁹

Significantly, the language of *Walters* itself also may be interpreted to support the conclusion that property divisions remain nonmodifiable. It is important to note that in the crucial part of the opinion in which the court sets forth what will henceforth be the rule in North Carolina,¹¹⁰ the court speaks solely in terms of "separation agreements." As noted previously, although it is functionally unrealistic, and often impossible, to distinguish between a "separation agreement" and a "property division," the technical distinction between the two remains viable, particularly in North Carolina case law.¹¹¹ It is thus plausible to suggest that the court's statement that "[a]ll separation agreements approved . . . as judgments of the court . . . are modifiable"¹¹² refers only to the *technical* definition of a separation agreement.¹¹³ Such a narrow, but by no means unusual,¹¹⁴ interpretation of the term "separation agreement" would clearly preserve the traditional rule that property settlements are nonmodifiable.

Finally, but perhaps most critically, a judicial rule that unexecuted portions of a property division are modifiable would appear to contravene the spirit, if not also the letter, of the Equitable Distribution of Property Act.¹¹⁵ It seems clear, in the first instance, that the Act itself contemplates that *judicially* imposed divisions of property are nonmodifiable, regardless of whether the court orders a contemporaneous distribution or a distributive award payable over time.¹¹⁶

109. See *supra* notes 106-08; see also RESTATEMENT (SECOND) OF JUDGMENTS § 13 comment b (1980) (Final judgment "represents the completion of all steps in the adjudication of the claim by the court, short of any steps by way of execution or enforcement that may be consequent upon the particular kind of adjudication.").

110. See *supra* text accompanying note 78.

111. See *supra* notes 2, 36 and accompanying texts; *Stanley v. Cox*, 253 N.C. 620, 624, 117 S.E.2d 826, 832 (1960); *Britt v. Britt*, 36 N.C. App. 705, 711, 245 S.E.2d 381, 385 (1978); 2 R. LEE, *supra* note 10, at 461; *Sharp, supra* note 2, at 826-27 n.38. See also *infra* text accompanying notes 269-81 (discussing the highly technical distinction the court of appeals has begun to draw between separation and property agreements).

112. *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983).

113. See *supra* note 45.

114. See H. CLARK, *supra* note 1, at 756. Professor Clark soundly disapproves of such distinctions precisely because of the confusion they engender. See *infra* notes 241-42 and accompanying text.

115. N.C. GEN. STAT. §§ 50-20 to -21 (1987).

116. Several provisions of the statute strongly imply this conclusion when property distribution is the product of litigation. See, e.g., N.C. GEN. STAT. § 50-20(b)(3) (dealing with distribution of pension benefits, and specifically providing that any "unpaid balance" of a distributive award to a payee shall pass by will or intestacy in the event of the death of the payee); *id.* § 50-20(e) (providing for a "distributive award payable over a period of time" whenever an equitable distribution of property in kind would be "impractical"); *id.* § 50-20(j) (requiring a court to make written findings of fact that marital property was equitably divided). The statute further makes specific provision for modification of alimony or child support awards *after*, and in view of, the property division. *Id.* § 50-20(f). This appears also to indicate a legislative intention (or even assumption) that property divisions are nonmodifiable.

Furthermore, there is no indication in the Act that private agreements for the distribution of property should be accorded different treatment whether or not submitted for court approval.¹¹⁷ To the contrary, North Carolina General Statute section 50-20(d) provides that "parties may by written agreement . . . provide for distribution of the marital property in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties."¹¹⁸

An agreement that is binding on the parties need not, of course, be binding on the court. Indeed, in the great majority of states the requirement of judicial approval of agreements presupposes the power of courts to reject, or even modify, contracts presented to them for merger, incorporation, or approval at the time of divorce.¹¹⁹ This power to disapprove, reject, or in some fashion act upon an agreement at the time it is submitted to the court in the final divorce proceeding, however, is entirely distinct from the issue of modification of an agreement *after* it has been approved, merged, or incorporated.¹²⁰ As noted previously, once a court has acted upon an agreement in its final decree, the property division provisions thereof are, almost without exception, held to be nonmodifiable.¹²¹

The alternative proposition, that "unsatisfied" portions of merged property divisions are now automatically subject to judicial modification,¹²² amounts to nothing less than a complete reversal of fundamental principles of law, and to a virtual renunciation of *res judicata* principles in domestic consent judgments.¹²³ The latter outcome would, among other things, have the effect that court ordered/approved property divisions would *not* be entitled to full faith and credit in sister states.¹²⁴ It is difficult to imagine that the Supreme Court of North

117. The Act does provide that a consent judgment for equitable distribution "may be entered at any time during the pendency of the action" — *i.e.*, prior to a decree of absolute divorce. *Id.* § 50-21(a). If anything, however, this provision encourages the private settlement of property rights, a position consistent with long-standing public policy.

118. *Id.* § 50-20(d).

119. See cases and statutes cited *supra* at note 14. The Uniform Marriage and Divorce Act provides that if an agreement is found to be unconscionable, the court "may request the parties to submit a revised separation agreement or may make orders for the disposition of property, maintenance, and support." UNIF. MARRIAGE AND DIVORCE ACT § 306(c), 9A U.L.A. 216 (1987).

120. Although there is clearly no statutory requirement for judicial review of settlement agreements in North Carolina, at least one case has suggested in dictum that a court has the authority to refuse to incorporate if it finds that "incorporation would be inequitable." *Cavenaugh v. Cavenaugh*, 317 N.C. 652, 660 n.1, 347 S.E.2d 19, 24 n.1 (1986).

121. See *supra* note 102.

122. A further indication that the court did not intend to create such a sweeping change in North Carolina law is that it gave no indication whatsoever of what circumstances might justify a modification of "unsatisfied" portions of a property division. The introduction of such a radically new principle without the inclusion of guidelines for its application would be unusual indeed.

123. See, e.g., *Taysom v. Taysom*, 82 Idaho 58, 62-63, 849 P.2d 556, 559 (1960) (issue of validity of an agreement not *res judicata* in subsequent action where court had not approved property division); *Gardine v. Cottey*, 360 Mo. 681, 694, 230 S.W.2d 731, 738 (1950) (no *res judicata* effect where wife sought to set aside property settlement agreement because validity of contract was never passed on by rendering court); *Delp v. Schiel*, 223 Or. 267, 274, 354 P.2d 299, 303 (1960) (divorce decree did not approve or confirm parties' agreement, thus subsequent action to determine property rights was not barred).

124. See E. SCOLES & P. HAY, *CONFLICT OF LAWS* 929 (1982), where the authors point out that although some courts may choose to recognize nonfinal judgments, "it is generally assumed that recognition, in the interstate setting, is constitutionally required only for *final* decrees and judg-

Carolina intended property settlement decrees of this state to have such a fragile status in other states.

Finally, modification of property divisions would also create utter havoc in the settlement process.¹²⁵ Parties are highly unlikely to enter into contracts that can be modified without their consent. The effect would almost certainly be a geometric increase in litigation in the already overburdened district courts,¹²⁶ a result the supreme court cannot be deemed to have intended.

In summary, there are several rationales under which it may be possible to argue with some cogency that merged property divisions in North Carolina remain nonmodifiable. First, it seems reasonable to suggest that the *Walters* court's description of the law to encompass modification of unexecuted portions of property divisions should be limited to the narrow principles represented by the very cases cited by the supreme court—that even final judgments may be subject to various motions to set aside, reopen, vacate, or amend.¹²⁷ Second, that portion of the opinion abolishing the “mere approval” option and holding that henceforth “every court approved *separation agreement*”¹²⁸ should be considered a judgment and thus modifiable, should be interpreted to *exclude* property divisions, since provisions involving property are not technically separation agreements. Third, allowing modification of unexecuted property divisions contravenes legislative intentions implicit in the Equitable Distribution of Property Act. Fourth, the failure of the supreme court to overrule, or even mention, the imposing body of case law holding property divisions to be nonmodifiable¹²⁹ may itself indicate an absence of intent to disturb such a fundamental principle of domestic law.

Finally, a common-sense appreciation of the divorce bargaining process¹³⁰ creates a strong argument for retention of the traditional rules in this area. The most fundamental and far-reaching analytical problem in *Walters* is the highly

ments.” *Id.* The rationale for this rule is that “a judgment will not be given greater effect in the recognizing than in the rendering state.” *Id.*; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 107 (1971) (stating same rule). Scoles and Hay go on to discuss the multitude of problems caused by the nonfinal nature of support and alimony decrees, but no section of their treatise deals with modification of property divisions because such are deemed nonmodifiable under the laws of virtually all states.

125. A distributive award of marital property in a judicial decree, under the provisions of N.C. GEN. STAT. § 50-20 (c) (1987), for example, would be fraught with the danger of modification for the spouse receiving a property division via installment payments. The “contract only” option, moreover, while it may make settlements less vulnerable to “modification” (see *supra* note 90) is clearly unacceptable when a division of pension rights is delayed, since a Qualified Domestic Relations Order clearly requires an *order*. See 29 U.S.C.A. § 1056(d)(3) (West Supp. 1990). The “contract only” option creates many other problems as well. See *infra* text accompanying notes 201-12.

126. In 1988, for example, there were 32,396 divorces in North Carolina. N.C. DIV. OF STATISTICS AND INFORMATION SERV., DIVORCE, 1987-1988 (1990). Actual divorces, of course, constitute only the tip of the iceberg of district courts' overall domestic caseload.

127. See *supra* text accompanying notes 104-09.

128. *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983) (emphasis added).

129. See cases cited *supra*, at note 102. It should also be noted that *Walters* specifically overruled only the option of a “mere approval” consent judgment in *Bunn v. Bunn*, 262 N.C. 67, 69, 136 S.E.2d 240, 242 (1964). More vaguely, *Walters* overruled *Bunn* “insofar as” it was in conflict with the “new rule” abolishing the dual system of consent judgments. *Walters*, 307 N.C. at 386, 298 S.E.2d at 342.

130. See *infra* notes 131-33 and accompanying text.

technical, and equally unrealistic, distinction between separation and property division agreements, a distinction that it is necessary to interpret *Walters* as having drawn if the finality of property divisions is to be preserved. As the authors of one of the most significant articles on domestic law in the past two decades have forcefully pointed out, however, there are only two items of value on the divorce bargaining table: money and children.¹³¹ "Money" includes child support, true alimony, periodic payments of property divisions structured as alimony, periodic payments of money not structured as alimony, and in kind transfers of property. As unpalatable as the bald statement of the prospect may be, parties do in fact, and with great frequency, "trade" money for custody.¹³²

Virtually all full divorce settlements of marital rights involve a commingling of property, support, and custodial rights that are, at a practical level, impossible to separate.¹³³ Any attempt to do so—*i.e.*, to draw a bright line between one part of the bargain and another, and to apply different rules to each—thus ignores the realities of the bargaining process, and the ultimate bargain itself.

C. *The Integrated Agreement Principle*

If unexecuted property division provisions of settlement agreements submitted for judicial approval remain nonmodifiable, then not only does the most formidable obstacle to the freedom of parties to submit their agreements to a court disappear,¹³⁴ but any doubt about the post-*Walters* validity of the integration principle would also dissipate.¹³⁵ To restate the obvious, the issue of the principle of the nonmodifiability of an unsatisfied property division is analytically almost identical to the issue of the nonmodifiability of integrated agreement provisions labeled "alimony," because such "alimony" provisions are *in fact* part of a property settlement.¹³⁶ The two principles involved, however, are not identical, despite their shared analytical base. The proposition that property division settlements are nonmodifiable is analytically prerequisite to the integration principle, but the latter is an extension of the former. In addition, not all property divisions are part of an integrated agreement. Thus it is also necessary to reexamine the integrated agreement concept in the aftermath of *Walters*.

It is clear that the decision in *Walters* swept so broadly that it could well have been interpreted to have overruled the reciprocal consideration/integration principle.¹³⁷ Indeed, it seems that some practitioners and courts have done just

131. Mnookin & Kornhauser, *supra* note 1, at 963 (discussing use of threats to sue for custody as a bargaining tool).

132. *Id.* at 964; *see also* Sharp, *supra* note 9, at 1437-38 (custody threats may be made for sole purpose of coercing unfair settlement).

133. *See* H. CLARK, *supra* note 1, at 756, 785.

134. The desirability of preserving court approval for private agreements as an attractive option will be discussed in the next section of this Article.

135. *See supra* notes 97-98 and accompanying text.

136. *See supra* notes 64-66 and accompanying text; *see also* Marks v. Marks, 316 N.C. 447, 454, 342 S.E.2d 859, 864 (1986), discussed *infra*, at notes 161-65 and accompanying text.

137. *See supra* notes 97-98 and accompanying text. It bears noting that allowing modification of property divisions would render the integration principle virtually meaningless.

that: they have assumed that the integrated agreement principle met the same fate as the Type I consent judgment.¹³⁸ This conclusion is certainly precipitous, however, and in all likelihood erroneous.

Walters clearly did overrule *Bunn v. Bunn*,¹³⁹ to the extent that it was "in conflict" with its decision.¹⁴⁰ That statement, however, bears close examination. The only portions of *Bunn* that are incontrovertibly inconsistent with the *Walters* holding are those parts dealing with Type I consent judgments, in which, under pre-*Walters* law, alimony provisions were nonmodifiable without regard to their relationship to any property division.¹⁴¹ The integration/modification issue arose, and continues to arise, *only* with court ordered judgments—*i.e.*, the Type II consent judgments, expanded by *Walters* to include agreements that are "merely approved" by a court.¹⁴² As previously explained, the distinguishing features of these Type II consent judgments were: 1) that the support provisions thereof were directly enforceable, as a court order, by contempt; 2) that the alimony provisions were, as court orders, also modifiable;¹⁴³ unless 3) the "alimony" provisions were found to be part of an integrated settlement, in which case those provisions, like the property division for which they furnished the consideration, would be nonmodifiable absent the consent of both parties.¹⁴⁴

Without mention of this third well-established attribute of a court-adopted consent judgment *Walters* did go on to state, quite broadly, that such "court ordered separation agreements, as consent judgments, are modifiable, and enforceable by the contempt powers of the court."¹⁴⁵ And therein lies the problem, or, more accurately, two problems. First, as noted previously, the meaning of the term "separation agreement" has been, and continues to be, the subject of considerable confusion.¹⁴⁶ Especially in North Carolina the term has sometimes been defined so technically as to constitute a virtual term of art—that is, to refer to an instrument that provides solely for support.¹⁴⁷ Such an agreement, although a rarity in practice, would indeed constitute true alimony, modifiable and enforceable by contempt once adopted by a court. In this purely technical

138. See, e.g., *Cecil v. Cecil*, 74 N.C. App. 455, 456, 328 S.E.2d 899, 900 (1985); *Acosta v. Clark*, 70 N.C. App. 111, 115, 318 S.E.2d 551, 554 (1984). In each case the court dealt with the integration issue, but it clearly implied that it was dealing with an area of the law that had been changed by *Walters*. For a discussion of the ways in which practitioners have dealt with the uncertainties in this area since 1983, see *infra* notes 221-26 and accompanying text.

139. See *supra* notes 87-89 and accompanying text.

140. *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983).

141. *Bunn v. Bunn*, 262 N.C. 67, 70, 136 S.E.2d 240, 243 (1964) *overruled in part by Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983).

142. *Walters*, 307 N.C. at 386, 298 S.E.2d at 342.

143. As Justice Exum noted in his dissent in *Walters*, modifiability is an "inherent attribute" of true alimony. *Id.* at 391, 298 S.E.2d at 344 (Exum, J., dissenting).

144. See *supra* notes 64-66 and accompanying text. The fourth distinguishing feature of this kind of consent judgment involves its establishment of *res judicata* consequences, an issue discussed *supra* at notes 108-09.

145. *Walters*, 307 N.C. at 386, 298 S.E.2d at 342 (emphasis added).

146. See *supra* note 2 and accompanying text.

147. See 2 R. LEE, *supra* note 10, § 188, at 462. Provisions concerning custody and child support are also considered to fall within this technical definition of a separation agreement. For a further example of North Carolina courts' narrow interpretation of such agreements, see *infra* note 271 and accompanying text.

and theoretical sense, however, a "separation agreement" could not encompass an agreement that also provided for property division, including installment or periodic payments labeled as "alimony." Although in a later portion of this Article¹⁴⁸ I will argue strenuously against the continued use of the term "separation agreement" in such a limited and highly technical manner, a persuasive argument can be made that *Walters* should be interpreted to have used the term in precisely this fashion.

The second problem raised by the "court ordered separation agreements . . . are modifiable" language,¹⁴⁹ involves the always delicate task of interpreting an omission. It is again important to note that *Walters* did not, even obliquely, mention the integrated agreement concept,¹⁵⁰ much less specifically overrule it. Nor did the court in any way refer to *White v. White*,¹⁵¹ the leading case on the integrated agreement principle. The portions of *Bunn v. Bunn*,¹⁵² and the opinion in *Levitch v. Levitch*¹⁵³ that *Walters* did overrule dealt *only* with the requirements necessary to create a merged agreement, and with the distinction between Type I and Type II consent judgments. *Walters* clearly eliminated the distinction between adopted and approved consent judgments; it should not, and need not, be interpreted *by implication only* to have gone further and abolished the integration concept¹⁵⁴—to have, in effect, thrown out the baby with the bathwater.

Given the broad literal language of *Walters* and its potentially explosive impact, it is striking to find that in the eight years since the decision there have been almost no appellate cases that could be interpreted as contradicting this admittedly restrained and technical interpretation of *Walters*.¹⁵⁵ At a mini-

148. See *infra* notes 293-96 and accompanying text.

149. *Walters*, 307 N.C. at 386, 298 S.E.2d at 342.

150. In reciting the history of the case before it, the court noted that the court of appeals had found the alimony provision in question to be part of an integrated agreement, *id.* at 384, 298 S.E.2d at 340-41, but did not mention the concept in the body of its opinion. In his forceful dissent, however, Justice Exum did apparently assume that the majority had overruled this principle. *Id.* at 391, 298 S.E.2d at 345 (Exum, J., dissenting). The entire point of this discussion, however, is that although this conclusion could be correct, it certainly *need not be*.

151. 296 N.C. 661, 252 S.E.2d 698 (1979), discussed *supra* at notes 71-74.

152. 262 N.C. 67, 136 S.E.2d 240 (1964), *overruled in part by Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983).

153. 294 N.C. 437, 241 S.E.2d 506 (1978), *overruled by Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983); see discussion *supra* at notes 58-59.

154. Justice Exum did assume that the court had gone much further indeed. *Walters*, 307 N.C. at 387-92, 298 S.E.2d at 342-45 (Exum, J., dissenting). Even he, however, was somewhat uncertain as to the effect of the majority's opinion: "[a]pparently the majority's position is . . ." *Id.* at 388, 298 S.E.2d at 343 (Exum, J., dissenting). He also noted that, "On the one hand the opinion quotes and cites *Bunn* approvingly, but then indicates that some portions of *Bunn* and *Levitch v. Levitch* . . . may be inconsistent with the decision and are overruled." *Id.* (Exum, J., dissenting) (citation omitted).

155. The only possible exception to this observation is *Voshell v. Voshell*, 68 N.C. App. 733, 315 S.E.2d 763 (1984). Upon close scrutiny, however, *Voshell* may not be the exception that it would otherwise appear to be. The case involved a 1981 separation agreement which had provided that the marital home would be sold and the proceeds therefrom divided equally between the parties. *Id.* at 734, 315 S.E.2d at 764. At the time of the final divorce hearing a year later, the house had not been sold, and the district court judge ordered the husband to pay the wife \$5,000—a sum that represented her estimated equity in the house—and then incorporated the modified agreement into the final order. The court of appeals held that the lower court was without authority to order the

mum, it appears almost as if the courts, perhaps having sobering second thoughts about the implications of a literal interpretation of the *Walters* decision, have sought to avoid direct confrontation with principles of nonmodifiable property divisions and integrated agreements.¹⁵⁶

At the supreme court, moreover, there appears to be more than a simple judicial reluctance to deal directly with the *Walters* threat to these established principles. Several decisions from that court seem to reflect a subtle effort to distance itself from such an interpretation of *Walters*. Indeed, in *Henderson v. Henderson*,¹⁵⁷ a companion case published the same day as *Walters*, the supreme court dealt with the integration principle in a manner that gave no suggestion that there had been any change in existing law. In two other cases the supreme court also had ample opportunity, which it deftly declined, to affirm or clarify the principles left in doubt by *Walters*.¹⁵⁸ Each case dealt with the issue of the modifiability of what were clearly support provisions of agreements incorporated into decrees. In each instance the supreme court cited *Walters* merely for the proposition that "separation agreements" incorporated or approved by the district court were modifiable.¹⁵⁹ Both opinions, therefore, support an interpreta-

payment of \$5,000 in exchange for the wife's equity in the home because it could not modify the contract between the parties. It went on to note that, because the agreement had now been incorporated into the court order, "if the property still has not been sold, the arrangements in regard to it can properly be reconsidered by the trial court." *Id.* at 737, 315 S.E.2d at 766. It is possible, of course, to view this authorization of "reconsideration" by the trial court as authorization to modify the incorporated agreement of the parties. It is equally possible to view such "reconsideration" merely as an extension of the court's power to *implement* its previous order, a view that would be consistent with the earlier interpretation of *Walters* to allow well established, but carefully restricted, motions to implement, set aside, or otherwise affect final orders. See *supra* notes 105-09 and accompanying text.

156. It should be noted that no case has directly held that unexecuted property divisions are subject to judicial modification, and even the somewhat ambiguous *Voshell* case, discussed *supra* at note 155, has not been cited in any subsequent opinion.

157. In *Henderson v. Henderson*, 307 N.C. 401, 298 S.E.2d 345 (1983), the supreme court dealt with the issue of whether an integrated agreement alimony provision could be enforced by contempt. The court held that the nature of the payments as "alimony" or as part of an "integrated settlement" was not determinative of their enforceability by contempt. *Id.* at 406, 298 S.E.2d at 349. The existence of a court order, the court concluded, meant that the provisions were enforceable by contempt in either event. *Id.* at 406-08, 298 S.E.2d at 349-50. But it is worth pointing out that the court gave no indication that the integration principle had been in any way affected by its decision in *Walters*. Indeed, if anything, the court appeared rather carefully to sidestep *Walters*. Thus, it noted at one point that "we have purposely not . . . [dealt with] the provisions of the judgment relating to the periodic payments for the support of the wife because the nature of those payments as 'alimony' or as part of an 'integrated settlement' or their 'modifiability' or 'nonmodifiability' does not affect their enforceability by contempt." *Id.* at 406, 298 S.E.2d at 349.

158. *Cavanaugh v. Cavanaugh*, 317 N.C. 652, 347 S.E.2d 19 (1986); *Doub v. Doub*, 68 N.C. App. 718, 315 S.E.2d 732 (1984), *aff'd as modified*, 313 N.C. 169, 326 S.E.2d 259 (1985).

159. *Doub* involved a contract action to enforce the alimony provisions of a 1978 separation agreement that had been incorporated by reference in the 1978 divorce decree. The court of appeals, noting that *Walters* did not govern the case, held that the alimony was nonmodifiable because it fell within the "exception" of the reciprocal consideration principle. *Doub v. Doub*, 68 N.C. App. 718, 719, 315 S.E.2d 732, 733-34 (1984), *aff'd as modified*, 313 N.C. 169, 326 S.E.2d 359 (1985). It went on to observe that even if *Walters* were applicable, the "plaintiff has elected to sue defendant for breach of contract instead of invoking the contempt powers of the court to enforce the court ordered separation agreement. We do not read *Walters* as depriving plaintiff of the option of electing to sue for breach of contract." *Id.* at 720, 315 S.E.2d at 734. It was this quoted language that the supreme court, on discretionary review, expressly "disapprov[ed]" and "disavow[ed]." *Doub v. Doub*, 313 N.C. 169, 170, 326 S.E.2d 259, 260 (1985) (emphasis added). It then repeated the holding of *Walters* that all "separation agreements" approved by a court are court judgments and modifiable as such and

tion of *Walters* that centers on the highly technical and restricted definition of "separation agreements" to encompass agreements for support alone.¹⁶⁰

By far the most critical opinion supporting this limited interpretation of *Walters*, and affirming the continued validity of the integration agreement principle (and by necessary implication the nonmodifiability of property divisions), however, is *Marks v. Marks*,¹⁶¹ a case that has received very little notice, but that warrants close attention.¹⁶²

The court of appeals in *Marks* addressed the familiar issue of whether the alimony provisions of an agreement that had been incorporated by reference into a 1974 divorce decree were part of an integrated agreement or were subject to modification.¹⁶³ The court determined that the provision in question was part of an integrated agreement, that it thus fell within the "exception" of *White v. White*,¹⁶⁴ and therefore was not subject to judicial modification.¹⁶⁵

On appeal, the supreme court undertook an extremely detailed analysis and explication of North Carolina alimony rules, beginning with a statement of the principle that there are two requirements for true alimony.¹⁶⁶ The first requirement, which is both statutory and jurisdictional, is that there must be a "court

then cautioned that the "parties to a consent judgment controlled by *Walters* do not have an election to enforce such judgment by contempt or to proceed in an independent action in contract." *Id.* at 171, 326 S.E.2d at 260-61. Thus *Doub* reaffirmed the new "either/or rule" announced in *Walters*: either a "separation agreement" is a contract, enforceable only by independent action, or it is a court order, enforceable only by an action on the judgment. The court did not address the issue of whether the alimony provisions of a court-ordered integrated agreement were modifiable.

In *Cavanaugh v. Cavanaugh*, 317 N.C. 652, 347 S.E.2d 19 (1986), the parties had entered into a separation agreement in 1981, under which the defendant husband was to pay plaintiff certain sums of money each month. Although he paid child support and a monthly debt to a creditor, he was some \$3,210.00 in arrears on "payment in lieu of alimony" and mortgage payments at the time of the final hearing. *Id.* at 655, 347 S.E.2d at 21. The lower court ordered specific performance of the arrearages, without a finding of fact that the defendant's failure to pay had been willful, and thus was overruled on that issue by the supreme court. *Id.* at 660, 347 S.E.2d at 25. Of greater relevance to the present discussion, however, is the fact that the supreme court cited *Walters* basically only for the proposition that a "separation agreement" incorporated into a divorce judgment becomes "an order of the court subject to modification." *Id.* at 659, 347 S.E.2d at 24. The court cited *Vaughan v. Vaughan*, 211 N.C. 354, 361, 190 S.E.2d 492, 496 (1937), and 2 R. LEE, *supra* note 10, § 158, for the same proposition, noting that as a judgment of the court, the separation agreement could be enforced by execution. *Cavanaugh*, 317 N.C. at 660, 347 S.E.2d at 25. This grouping of *Walters* with older sources holding merely that true alimony is modifiable and enforceable by contempt or execution may or may not be of significance. It is, however, consistent with the restricted interpretation of *Walters* suggested in this Article.

160. *Doub*, 313 N.C. at 171, 326 S.E.2d at 260-61; *Cavanaugh*, 317 N.C. at 659, 347 S.E.2d at 24.

161. 316 N.C. 447, 342 S.E.2d 859 (1986).

162. See *infra* note 170 for an explanation of why *Marks* has undeservingly received little attention.

163. *Marks*, 316 N.C. at 448-49, 342 S.E.2d at 860-61.

164. See *supra* note 72 and accompanying text.

165. *Marks*, 316 N.C. at 455, 342 S.E.2d at 864. The use of the term "exception" to refer to integrated periodic payments that were not subject to modification refers, of course, to the general principle that true alimony is always modifiable. The *Marks* court admonished the court of appeals for its "exception" language because such payments are not an "exception" to alimony rules: they simply are not alimony. *Id.* The use of the term "exception" does betray a lack of full understanding that such periodic payments are a property division. Thus, the issue is more than semantic. In previous decisions, moreover, the supreme court itself had referred to integrated alimony provisions as an "exception." See, e.g., *Rowe v. Rowe*, 305 N.C. 177, 184, 287 S.E.2d 840, 844 (1982).

166. *Marks*, 316 N.C. at 455, 342 S.E.2d at 864; see also *Bunn v. Bunn*, 262 N.C. 67, 70, 136

order" for alimony.¹⁶⁷ It was in the context of its discussion of this requirement that the supreme court set forth its *own* interpretation of *Walters* — an interpretation that is succinct, restrained, and wholly consistent with this Article's previous analysis. *Walters*, explained the *Marks* court, had merely simplified the problem of determining *when* the necessary court order existed. It had abolished the previous "bifurcated view of consent judgments and thus prospectively alleviated the complex analysis previously required by *Bunn* and its progeny in determining whether the first element ('court order' confers jurisdiction) of N.C.G.S. § 50-16.9(a) has been met."¹⁶⁸

The court then discussed the second requirement for alimony¹⁶⁹—a discussion notable for its lack of any mention of *Walters*, or for any indication whatsoever that *Walters* had in any way affected this second prong of the alimony test.¹⁷⁰ In addition to being part of a court order, the court stated, a support payment must constitute "true alimony" in order to be modifiable.¹⁷¹ The court then explained that:

Support provisions, although denominated as 'alimony,' *do not constitute true alimony* within the meaning of N.C.G.S. § 50-16.9(a) if they actually are part of an integrated property settlement. The test for determining if an agreement is an integrated property settlement is whether the support provisions for the dependent spouse "and other provisions for a property division between the parties constitute reciprocal consideration for each other."¹⁷²

Then, in a statement that strongly supports the limited and technical interpretation of *Walters* suggested earlier, the court explained that:

[T]he rule that support provisions in an integrated property settlement are not 'alimony' and are not modifiable is not an 'exception' to any rule. It is merely a definitional method of determining whether the second element of N.C.G.S. § 50-16.9(a) has been met, that is, whether the provisions sought to be modified are true alimony . . . or are, in

S.E.2d 240, 243 (1964) (discussing same principles of reciprocal consideration), *overruled in part* by *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983).

167. *Marks*, 316 N.C. at 452, 342 S.E.2d at 862. N.C. GEN. STAT. § 50-16.9(a) (1987) provides that: "An order of a court of this State for alimony . . . 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."

168. *Marks*, 316 N.C. at 452, 342 S.E.2d at 862.

169. *Id.* at 454, 342 S.E.2d at 864.

170. It is very important to note that just prior to the discussion of the first requirement for true alimony, the court cautioned that its opinion would be of "limited public interest," because it involved pre-*Walters* law. *Id.* at 451, 342 S.E.2d at 861. The only part of the *Marks* opinion, however, in which *Walters* was cited as having *changed* the law was in the court's discussion of what constituted a "court order." *Id.* at 452, 342 S.E.2d at 862. The remainder of the opinion, as discussed *infra*, dealing with the second requirement for technical alimony, does not contain so much as a hint that the discussion or outcome would have been different had *Walters* been applicable. Indeed, the remainder of the opinion can only be interpreted as a discussion of current, not previous, North Carolina law. Thus, despite the court's own caveat, it appears both possible and reasonable to view *Marks* as an attempt to reaffirm and clarify what *Walters* had left in doubt—the continued viability of the two-pronged test for technical alimony.

171. *Id.* at 454, 342 S.E.2d at 864.

172. *Id.* at 454-55, 342 S.E.2d at 864 (emphasis added) (quoting *White v. White*, 296 N.C. 661, 666, 252 S.E.2d 698, 701 (1979)).

fact, something else. If support provisions are found to be consideration for, and inseparable from, property settlement provisions, the support provisions, even if contained in a court-ordered consent judgment, *are not alimony* but instead are merely a part of an integrated property settlement which is *not* modifiable by the courts.¹⁷³

At the risk of belaboring the point, it is difficult not to attach significance to the fact that the *Marks* court carefully specified that *Walters* had indeed changed the first prong of the "true alimony" test—what constitutes a court order. It is equally difficult to avoid the conclusion that the court's failure to so much as hint that *Walters* had in any way changed the second prong of the "true alimony" requirement, its lengthy and painstaking explanation of that requirement (including the integrated agreement principle), its consistent use of the present tense, and its reliance upon *White v. White*, all indicate that the principle of nonmodifiability of integrated agreements, specifically property divisions, remains the law in North Carolina.

In summary, it seems possible, if not necessary, to interpret *Walters* as follows. First, the case stands for the already established proposition that unsatisfied portions of property division agreements may be subject to motions to implement, vacate, amend, or set aside, but not to a general judicial power to modify. This analysis is consistent with existing principles, with legislative intent in the enactment of the Equitable Distribution of Property Act, with the finality requirement for court judgments, and with important public policy concerns of the state. Second, the opinion should be interpreted to be premised upon the highly technical definition of "separation agreement" that equates only with support agreements, so that true alimony remains modifiable, whereas periodic payments that are in reality property divisions remain nonmodifiable. This analysis is consistent with well-established precedent, with existing domestic law principles, and with standard contract law. Third, as *Marks* definitively stated, *Walters* obviously stands for the proposition that Type I consent judgments have been judicially abolished in North Carolina. Unfortunately, acceptance of the first and second propositions does not, and cannot, compensate for the damage caused by the elimination of the "mere approval" option and the creation of a "contract only" option for settlement agreements.

III. THE AFTERMATH OF *Walters*

A. *Contract Only* — *Analysis*

Consent judgments are a viable vehicle for the settlement of the distributional consequences of divorce only so long as two conditions are met. First, the rules governing the creation of such judgments must be clear. Second, the effect of these judgments must also be clear, and must recognize not only the principle that property divisions remain nonmodifiable after incorporation into, or ap-

173. *Id.* at 455, 342 S.E.2d at 864. See *supra* note 165 for a discussion of the significance of eliminating the concept of integrated periodic payments as an "exception" to alimony rules.

proval by, a court, but also the corollary concept of integrated agreements.¹⁷⁴ *Walters* certainly accomplished the first of these prerequisites by providing that all settlement agreements submitted to the court for approval or incorporation will become court judgments.¹⁷⁵

With regard to the second requirement, however, *Walters* raised more questions than it answered. The most critical of these issues, whether property division portions of approved settlement agreements remain immune from judicial modification, has been virtually avoided in the years since that decision. The analysis and argument set forth in the previous section of this Article that these provisions do remain nonmodifiable, however, does not negate the need for a judicial or legislative pronouncement to that effect.¹⁷⁶ And until that question is answered definitively,¹⁷⁷ parties, or at least parties with knowledgeable lawyers, will continue to avoid the use of consent judgments to embody settlement agreements that contain provision for periodic or installment payments for property divisions.¹⁷⁸ Indeed, even the possibility that a meticulously negotiated settlement bargain could be destroyed by judicial modification, at potentially great prejudice to one party, is sufficient effectively to eliminate use of a consent judgment as an option.¹⁷⁹

174. True alimony remains modifiable, of course—a principle to which the public policy of North Carolina is firmly devoted. See, e.g., *Rowe v. Rowe*, 305 N.C. 177, 183-84, 287 S.E.2d 840, 844 (1982); *Frykberg v. Frykberg*, 76 N.C. App. 401, 410, 333 S.E.2d 766, 772 (1985); *Acosta v. Clark*, 70 N.C. App. 111, 113-14, 318 S.E.2d 551, 553 (1984).

175. *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983).

176. As noted previously, *Marks v. Marks*, 316 N.C. 447, 342 S.E.2d 859 (1986), might well be interpreted as just such a judicial statement of this principle. For reasons discussed *supra* at note 170, however, that opinion has received far less attention than it deserves.

177. One very recent decision from the court of appeals has taken an extremely important step in providing that answer. In *Hayes v. Hayes*, 100 N.C. App. 138, 394 S.E.2d 675 (1990), the parties entered into a modification of a consent judgment that provided for "alimony" payments to the wife for a period of five years. She remarried shortly after the judgment was entered, and husband ceased making alimony payments. The lower court found that the payments were intended to be reciprocal consideration for a property division and that the payments did not terminate upon wife's remarriage. *Id.* at 145, 394 S.E.2d at 679. The court of appeals remanded for an evidentiary hearing on the issue of the parties' intent regarding the integrated nature of the agreement. *Id.* at 147, 394 S.E.2d at 680. In unmistakable language, however, the court of appeals ruled that *Walters* had not overruled the principle of reciprocal consideration and affirmed the traditional rule in this area. *Id.* at 146-47, 394 S.E.2d at 679. Although this issue still needs to be addressed directly by the supreme court, the *Hayes* opinion is a critical step in the right direction.

178. Among the many problems created by *Walters* are potential pitfalls for lawyers who are less than expert in this increasingly complex area of the law. See also *supra* notes 221-26 and accompanying text (discussion of the ways in which practitioners have dealt with the uncertainties in this area since 1983).

179. By way of common example, in a sizeable number of divorces there are insufficient ready assets to effectuate a complete property settlement at the time of the divorce or agreement. This is particularly true where one spouse has substantial pension benefits or owns a business or corporation for which a division in kind would be impractical. In such instances, distributive awards—*i.e.*, periodic payments (which may or may not be labeled "alimony") that one spouse agrees to make to the other, in return for which the other spouse agrees to waive all other "rights arising out of the marriage"—are the only means by which a property settlement can be concluded. These waivers constitute the consideration for the periodic payments. They are, moreover, fully performed at the moment of execution, and have been broadly and strictly interpreted in North Carolina. See, e.g., *Hagler v. Hagler*, 319 N.C. 287, 288, 354 S.E.2d 228, 231 (1987) (interpreting release of all rights to "all property now owned by the 'husband'" as a full waiver of equitable distribution); *Morris v. Morris*, 79 N.C. App. 386, 391-92, 339 S.E.2d 424, 427-28 (1986) (interpreting general waiver clause to include waiver of rights to military retirement benefits of spouse despite the fact that statutory

The *Walters* court saw no harm in this. Indeed, *Walters*, along with several other appellate decisions, can only be interpreted not only to have encouraged use of the "contract only" option, but to have actively discouraged use of the courts to approve or incorporate private agreements.¹⁸⁰ This lack of appreciation of the function of judicial review is in itself remarkable. But *Walters* itself implicitly rests upon the assumption that a settlement agreement is no different from any other contract,¹⁸¹ and rests explicitly upon the complementary assumptions that "contract only" resolution is both less complicated than court approval and more than adequate to meet the needs of the parties.¹⁸²

All of these assumptions are seriously flawed, however, at both practical and policy levels. First, it is worth repeating that the state has strong and legitimate policy interests in settlement agreements that differ markedly from its interests in most other private contracts. In general, the state has an interest in protecting all citizens from bargaining contexts which are peculiarly conducive to overreaching tactics.¹⁸³ Specifically, the state has a very real interest in the creation of some procedures by which it can ensure that settlement agreements make adequate provision for children and dependent spouses.¹⁸⁴ It is important to emphasize that this state interest is not "triggered" by a decision to seek court approval of an agreement. The policy interests of the state are no less imperative simply because the agreement has been withheld from judicial scrutiny.¹⁸⁵

rights to such benefits did not exist at time agreement was signed), *rev. denied*, 316 N.C. 733, 345 S.E.2d 390 (1986); *McArthur v. McArthur*, 68 N.C. App. 484, 486, 315 S.E.2d 344, 345 (1984) (general waiver clause effective to bar all rights to substantial properties not mentioned in agreement). The waiving party will have thus fully, and irrevocably, performed his or her half of the bargain, whereas under the "worst case" interpretation of *Walters*, the other party might be able to secure judicial modification of his or her half of the bargain.

180. In one noteworthy case, for example, the court of appeals commented that agreements which had been "merely approved" (a Type I consent judgment) "serve no useful purpose and have been a source of litigation giving rise to unforeseen consequences in the form of numerous exceptions." *Henderson v. Henderson*, 55 N.C. App. 506, 510, 286 S.E.2d 657, 661 (1982), *aff'd*, 307 N.C. 401, 298 S.E.2d 345 (1983). In *Acosta v. Clark*, 70 N.C. App. 111, 115, 318 S.E.2d 551, 554 (1984), the court, discussing *Walters*'s reaffirmation of a policy in favor of modification of alimony, observed that "[a]s justification for this seemingly harsh rule, the Court noted that if the parties wish to preserve their agreement as a contract they need only avoid submitting their agreement to the court."

181. *See, e.g., Cavanaugh v. Cavanaugh*, 317 N.C. 652, 657, 347 S.E.2d 19, 22-23 (1986) ("A marital separation agreement is generally subject to the same rules of law with respect to its enforcement as any other contract.") (quoting *Moore v. Moore*, 297 N.C. 14, 16, 252 S.E.2d 735, 737 (1979)); *Lee v. Lee*, 93 N.C. App. 584, 586, 378 S.E.2d 554, 555-56 (1989) (court is "bound by the rules which apply in interpreting any other contract" in construing a separation agreement); *Knight v. Knight*, 76 N.C. App. 395, 398, 333 S.E.2d 331, 333 (1985) (separation agreement today is "like any other bargained-for exchange").

182. *See supra* note 90.

183. The "underprivileged consumer" is a classic example of a class of persons whom both federal and state governments have sought to protect from the often harsh results of traditional contract principles. Ellinghaus, *In Defense of Unconscionability*, 78 *YALE L.J.* 757, 771 (1969).

184. *See supra* notes 14-15 and accompanying text.

185. It is perhaps appropriate at this point to note several points of inconsistency in the court's "either/or" approach to settlement agreements. Not only do the interests of the state remain constant without regard to whether an agreement is incorporated or not, but the interests of the parties in relying on their contract rights remain constant as well. Yet the court creates an unparalleled freedom to contract in one instance (the "contract only" option), to the potential detriment of the interests of the state; but it threatens, on the other hand, to limit that very freedom to contract once

Second, at an analytical level, it is difficult to resist the conclusion that settlement agreements are in fact different from other types of contracts.¹⁸⁶ Standard contract principles are designed to operate within the context of a rational, competitive market that assumes a relative parity of bargaining strength between the parties.¹⁸⁷ To equate the "market" of settlement agreements, marriage dissolution—a situation virtually always accompanied by extraordinary stress and rarely accompanied by mutual desires to achieve fair results—with the paradigmatic "marketplace" in which strangers bargain at arms' length, is simply to ignore the realities of human nature, the adversarial process, and the realities of most divorce bargaining.¹⁸⁸

Indeed, marriage dissolution constitutes an excellent example of the kind of "imperfect" market in which, as one distinguished commentator has aptly noted, standard marketplace principles are not only inadequate, but also contribute to both unfairness and inefficiency in results.¹⁸⁹ The greater the variation from the "perfect" competitive marketplace, the greater the inadequacies of the operation of standard bargaining principles.¹⁹⁰ As the treatment of settlement agreements in the overwhelming number of states amply demonstrates, a more imperfect "market" for the operation of these principles than divorce may not exist.¹⁹¹

Recognition of the essential differences between settlement agreements and other types of contracts does not obscure the basic fact that such agreements are contracts, and generally should be subject to the same principles governing the execution and enforcement of other contracts. It does, however, interject into the operation of the standard principles certain policy and procedural restrictions, notably requirements of judicial review, that are designed to ensure at least minimal protection for the interests of the state and the parties.

The "contract only" option created by *Walters* turns a blind eye to these policy and procedural considerations, and, in effect, encourages parties to exclude the state from playing any role in the substantive, *i.e.*, distributional consequences of divorce.¹⁹² Such a result almost mocks the state's traditional, and

agreements are incorporated (by potential modification of unexecuted property divisions), to the detriment of the parties' intentions.

* 186. See *supra* note 39 and accompanying text. In addition, an interesting parallel may be drawn with federal court abstention from jurisdiction in domestic relations cases. See C. WRIGHT, *supra* note 107, at 144. The various factors that have long led federal courts to decline to exercise jurisdiction in domestic cases—the particularly strong interest of the several states, the potential for continuing litigation and court supervision, and the nonfinal nature of decrees involving children—are part of the same group of factors that make settlement agreements different from other kinds of contracts. See *Barber v. Barber*, 62 U.S. (21 How.) 582 (1858).

187. For an excellent discussion of this principle, and its weaknesses, see Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 799 (1982).

188. *Id.*

189. As Professor Eisenberg has observed, "a market [that] is less than perfectly competitive does set the stage for transactions in which the bargain principle loses much or all of its force, because it is supported by neither fairness nor efficiency." *Id.*

190. *Id.*

191. See *supra* note 14 for a discussion of the judicial review standards for settlement agreements in most states.

192. See *supra* note 90.

legitimate, interest in consequences of divorce. It is also particularly unfortunate at a time when, as a result of equitable distribution, the practice of domestic law has become exponentially more complex.¹⁹³ It is possible to speculate that it is in part this mushrooming complexity of domestic law that has led courts to seek to decrease their already nearly overwhelming involvement in domestic issues.¹⁹⁴

Any judicial economy purpose that is served in the short run, however, is more than undermined in the long term. As much of the remainder of this Article will seek to demonstrate, the "contract only" approach is far from simple in its application and far from adequate in its operation and effect to meet the long range needs of the parties. Indeed, the advantages of the court approval option can best be illustrated by an examination of the problems that can be, and in large part already have been, created by use of the pure contract approach.

B. "Contract Only"—Practical Implications

The most obvious, but the least critical, disadvantage of the "contract only" approach is the lack of contempt as a readily available enforcement mechanism.¹⁹⁵ Although the ultimate availability of specific performance decrees to enforce contractual obligations is of some solace to ex-spouses of recalcitrant payors, the requirement that a party demonstrate that his remedies at law are inadequate remains a very real obstacle.¹⁹⁶ More importantly, orders for specific performance are clearly subject to judicial modification,¹⁹⁷ so that spouses with a nonmodifiable contract right to periodic payments may well find themselves with modifiable specific performance orders.¹⁹⁸

193. Domestic law has become the most recent area of specialization to be recognized by the North Carolina State Bar Association.

194. As Professor Eisenberg has aptly observed, however, "an increase in the complexity of some areas of law may be desirable, if it accurately mirrors the increased complexity of social and economic life." Eisenberg, *supra* note 187, at 801.

195. *Doub v. Doub*, 313 N.C. 169, 171, 326 S.E.2d 259, 260-61 (1985); *Henderson v. Henderson*, 307 N.C. 401, 408, 298 S.E.2d 345, 350 (1983); *Walters v. Walters*, 307 N.C. 381, 385, 298 S.E.2d 338, 341, (1983).

196. See *Cavenaugh v. Cavenaugh*, 317 N.C. 652, 658, 347 S.E.2d 19, 23 (1986); *Whitaker v. Earnhardt*, 289 N.C. 260, 265, 221 S.E.2d 316, 319-20 (1976). In addition, there must be a finding that the defendant had the ability to pay. *Cavenaugh*, 317 N.C. at 658, 347 S.E.2d at 23; *Harris v. Harris*, 307 N.C. 684, 688, 300 S.E.2d 369, 373 (1983).

197. The leading case is *Harris v. Harris*, 307 N.C. 684, 300 S.E.2d 369 (1983). In that case the plaintiff wife sought and obtained an order of specific performance that husband comply with the terms of a 1974 separation agreement that was not incorporated into a court order. As per the agreement, the district court initially ordered that husband pay to wife the equivalent of fifty percent of his military retirement pay. *Id.* at 686, 300 S.E.2d at 371. In 1981, however, the court modified its order of specific performance to require that husband pay a sum equal to twenty percent of his retirement pay (plus an additional ten percent to be applied to arrearages). *Id.* Wife appealed, arguing that the court lacked the power to modify the separation agreement between the parties. The supreme court agreed with the proposition that the agreement was nonmodifiable, but noted that it was not the agreement that was modified, but the court's previous order. *Id.* at 687, 300 S.E.2d at 372. It also observed, "In the exercise of its equitable powers, the court could order specific performance of all or only part of the contract and could modify its orders from time to time as equity required." *Id.* at 688, 300 S.E.2d at 372-73. Plaintiff's contract remedies, however, remained unaffected by any action of the court. *Id.* at 688, 300 S.E.2d at 373. For further discussion of the survival of contract rights after court modification, see *infra* notes 215-16.

198. Under these circumstances, the "advantage" of nonmodifiable periodic payments under a

A much more serious problem, and one that creates profoundly troubling policy issues, arises when the *res judicata* effect of a settlement agreement not presented to a court for approval or incorporation is brought into question. This problem is particularly acute when the agreements in question involve child support and child custody—issues that are always subject to modification.¹⁹⁹ Thus the issue is not whether provisions involving children are modifiable; rather, it is one of what standard will be used for modification, that is, whether *res judicata* principles will be applicable or not.²⁰⁰

The North Carolina standard for modification of decree provisions affecting children is quite typical. An order for support or custody of minor children may be modified "at any time, upon motion in the cause and a showing of changed circumstances."²⁰¹ The only relevant changed circumstances are those which have occurred since the entry of the decree.²⁰² Even prior to *Walters*, however, the issue of whether or not the changed circumstances standard should apply to agreement-based settlement provisions involving children had arisen in North Carolina.²⁰³ Indeed, there was an earlier line of cases holding that the standard should not be applicable to any agreement-based provisions involving children.²⁰⁴ There was also a strong line of authority holding that the changed

"contract only" agreement would appear to be illusory. If an order of specific performance is necessary for effective enforcement of such an obligation, and if that order may be modified as equity warrants (notably inability to pay), any surviving contract rights are likely to be unenforceable as a practical matter.

199. North Carolina, like most states, strongly embraces the principle that parties may not, by contract, withdraw their children from the protection of the court. *Bottomley v. Bottomley*, 82 N.C. App. 231, 234, 346 S.E.2d 317, 320 (1986) ("It is settled that any separation agreement dealing with the custody and the support of the children . . . cannot deprive the court of its inherent as well as statutory authority to protect the interests of and provide for the welfare" of minor children. (quoting *McKaughn v. McKaughn*, 29 N.C. App. 702, 704, 225 S.E.2d 616, 618 (1976))); see also *Hershey v. Hershey*, 57 N.C. App. 692, 693-94, 292 S.E.2d 141, 143 (1982) ("[N]o agreement between husband and wife can serve to deprive the courts of their inherent authority to protect the interests of . . . minor children.").

200. The application of *res judicata* principles, including collateral estoppel issues, in the domestic law involving children results in the application, in all states, of the changed circumstances standard for modification of provisions affecting children. See *Sharp*, *supra* note 3, at 1266.

201. N.C. GEN. STAT. § 50-13.7(a) (1987). Case law has added the further gloss that there must be a "substantial" change of circumstances "affecting the welfare of the child." See *Tyndall v. Tyndall*, 80 N.C. App. 722, 723, 343 S.E.2d 284, 284, *disc. rev. denied*, 318 N.C. 420, 349 S.E.2d 606 (1986); *Hershey v. Hershey*, 57 N.C. App. 692, 694, 292 S.E.2d 141, 143 (1982); *Wachacha v. Wachacha*, 38 N.C. App. 504, 507, 248 S.E.2d 375, 377 (1978).

202. See, e.g., *Cavanaugh v. Cavanaugh*, 317 N.C. 652, 660, 347 S.E.2d 19, 24 (1986) (relevant changed circumstances include only those changes which occurred subsequent to incorporation of agreement); *Hamilton v. Hamilton*, 93 N.C. App. 639, 642-43, 379 S.E.2d 93, 94 (1989) (competent evidence for modification of custody decree includes only evidence of circumstances "existing at the time of the prior custody decree" which were not disclosed to the court and "other pertinent circumstances occurring since the entry of the prior . . . decree"). It should be noted, however, that in a case involving the modification of alimony, the court of appeals held that proof of changed circumstances need not be limited to the previous findings of fact made in the original decree, but that the modifying court could make additional findings as to circumstances existing at the time of the original decree. *Self v. Self*, 93 N.C. App. 323, 327, 377 S.E.2d 800, 802 (1989).

203. This is an issue that has arisen in a number of states, most of which have concluded that the changed circumstances standard should apply. For further discussion of this point, and for an argument in favor of this position, see *Sharp*, *supra* note 3.

204. See, e.g., *Newsome v. Newsome*, 42 N.C. App. 416, 256 S.E.2d 849 (1979) (no need to prove change of circumstances for custody modification because original decree had merely approved the agreement of the parties); *Perry v. Perry*, 33 N.C. App. 139, 234 S.E.2d 449, *disc. rev.*

circumstances standard should be applicable regardless of whether the initial decree was the product of litigation or agreement.²⁰⁵ The latter position is the rule followed in the majority of states and is supported by a strong policy argument: withholding the protection of the changed circumstances standard from agreement-based decrees discourages parental agreements concerning the parents' children, and thereby exposes children to the always more traumatic effects of litigation between their parents.²⁰⁶ The former position, in effect, penalizes parents who seek to act in the best interest of their children by reaching agreement in the first instance.

Although the question of according different *res judicata* effects to agreement-based, as opposed to litigated, decree provisions regarding children had never been fully resolved in North Carolina case law, its focus has shifted dramatically, and definitively, since the decision in *Walters*. The "contract only" option obviously does not involve a court order of any kind. Courts have thus reasoned, quite logically, that the child support provisions of a "contract only" agreement may be modified merely by a showing of what is currently in the best interests of the child, without regard to whether any change of circumstances affecting the child has occurred since execution of the agreement.²⁰⁷

The leading case on this issue apparently is *Boyd v. Boyd*,²⁰⁸ in which the court of appeals, with respect to modification of child support amounts in an unincorporated agreement, observed that the

court is called upon, for the first time, to exercise its authority to see that the reasonable needs of the child are provided for We hold . . . that the moving party's only burden is to show the amount of support necessary to meet the reasonable needs of the child at the time of the hearing.²⁰⁹

denied, 292 N.C. 730, 235 S.E.2d 784 (1977) (same); *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964) (arguably standing for this position). The rationale for this line of cases, in North Carolina and elsewhere, is that only a judicial (*i.e.*, litigated) determination of issues involving children entails the kind of "full-scale" inquiry necessary to trigger the application of *res judicata* principles. *Freye v. Freye*, 56 Wis. 2d 193, 197, 201 N.W.2d 504, 506 (1972). Interestingly enough, some states impose a higher burden of proof for modification of agreement-based alimony or child support decrees. See *Sharp*, *supra* note 3, at 1269 n.27.

205. See *Fuchs v. Fuchs*, 260 N.C. 635, 639-40, 133 S.E.2d 487, 491 (1963); *Hassell v. Means*, 42 N.C. App. 524, 530-31, 257 S.E.2d 123, 127 (1979); *Rabon v. Ledbetter*, 9 N.C. App. 376, 379, 176 S.E.2d 372, 375 (1970). *Fuchs* actually held that there is a "presumption" that the amount of child support set by agreement is "just and reasonable." *Fuchs*, 260 N.C. at 639, 133 S.E.2d at 491. Later cases have indicated that this "presumption" virtually disappears in the face of any "evidence to the contrary." *Williams v. Williams*, 261 N.C. 48, 59, 134 S.E.2d 227, 235 (1964).

206. See *Sharp*, *supra* note 3, at 1289-90.

207. See, *e.g.*, *Morris v. Morris*, 92 N.C. App. 359, 363, 374 S.E.2d 441, 443 (1988) (when called upon to modify child support set by agreement only, "the trial court is writing upon a clean slate, and the previously agreed upon level of support is but one factor to be considered"); *Holderness v. Holderness*, 91 N.C. App. 118, 120, 370 S.E.2d 602, 604 (1988) (with unincorporated agreement, the "moving party's only burden is to show the amount of support necessary to meet the reasonable needs of the child[ren] at the time of the hearing." (quoting *Boyd v. Boyd*, 81 N.C. App. 71, 76, 343 S.E.2d 581, 585 (1986))); *Bottomley v. Bottomley*, 82 N.C. App. 231, 233, 346 S.E.2d 317, 319 (1986) (with an unincorporated separation agreement, the court "makes its own independent determination of what is fair and reasonable child support.").

208. 81 N.C. App. 71, 343 S.E.2d 581 (1986).

209. *Id.* at 76, 343 S.E.2d at 584-85.

The court's holding is a logical, and probably necessary, interpretation of North Carolina General Statutes section 50-13.7, which requires use of the changed circumstances standard only with court orders.²¹⁰ Nonapplication of the standard to child support modification efforts nonetheless undermines the stability of parental agreements, particularly those withheld from the court altogether.²¹¹ The risks of easy modification appear to be particularly acute for parents who had agreed to pay sums markedly more or less than those that a court would otherwise impose under the mandatory child support guidelines.²¹²

An additional complication stemming from this superimposition of judicial decree upon private agreement also appears to have become rather firmly established in North Carolina law. It seems clear that contract support rights will survive any subsequent judicial modification. In *Bottomley v. Bottomley*,²¹³ for example, the court of appeals upheld a district court order that had decreased the child support payments from the amount set forth in the parties' agreement, but carefully noted that the judicial determination of the appropriate amount of child support "does not change the plaintiff's contractual obligations under the separation agreement."²¹⁴

This survival of contract rights is consistent with the principles that the court is without the authority to modify the agreement of the parties and that the parties are likewise without authority to restrict the power of a court to act in the best interests of the child.²¹⁵ This theoretical preservation of the integrity of the parties' agreement is largely illusory, however, because, much like modifiable specific performance orders for the enforcement of "contract only" alimony rights, surviving contract rights to child support are likely to be of little practical value to the obligee.²¹⁶

Of immensely greater concern is the very real possibility that custody agree-

210. See *supra* note 201.

211. Again, it should be noted that this same risk may exist with all agreement-based decrees. See *supra* notes 199-200. More recent cases have done little to clarify the confusion in this area. See, e.g., *Outlaw v. Outlaw*, 89 N.C. App. 538, 540, 366 S.E.2d 247, 248 (1988) ("material change" in circumstances must be shown to modify 1986 consent judgment); *Rice v. Rice*, 81 N.C. App. 247, 250, 344 S.E.2d 41, 43 (no need to show changed circumstances from time separation agreement was entered into in 1981 in order to increase child support in 1983 final divorce decree), *disc. rev. denied*, 317 N.C. 706, 347 S.E.2d 439 (1986); see also *Payne v. Payne*, 91 N.C. App. 71, 76, 370 S.E.2d 428, 431 (1988) (reversing child support modification of consent order for failure to find necessary facts, and relying heavily upon *Coble v. Coble*, 44 N.C. App. 327, 261 S.E.2d 34 (1979)). The court in *Coble* noted that a contractual provision between the parents regarding child support "would only be presumptively just and reasonable, subject to change by the court upon a showing of need." *Coble*, 44 N.C. App. at 331, 261 S.E.2d at 36. There appears to be no doubt whatsoever, however, that agreements withheld from the court will not receive the benefit of the changed circumstances standard with regard to modification of child support.

212. N.C. GEN. STAT. § 50-13.4(c1) (Supp. 1989) authorized the Conference of Chief District Judges to prescribe uniform statewide presumptive guidelines for the determination of child support guidelines.

213. 82 N.C. App. 231, 346 S.E.2d 317 (1986).

214. *Id.* at 233, 346 S.E.2d at 319 (1986) (with an unincorporated separation agreement, the court "makes its own independent determination of what is fair and reasonable child support").

215. See *supra* note 199 and accompanying text.

216. Although a decree of specific performance might theoretically be available in these circumstances, inability to pay the contractual amount would constitute a defense to any contempt motion. See *Cavenaugh v. Cavenaugh*, 317 N.C. 652, 660, 347 S.E.2d 19, 25 (1986).

ments not presented to the court for approval or incorporation also will be denied the protection of the changed circumstances standard. This is undoubtedly the result in some cases involving interstate enforcement of such custody agreements, in which several courts have clearly held that the moving party's only burden is to show what is currently in the child's best interests.²¹⁷ And although the status of custody arrangements in "contract only" settlement agreements remains unclear in North Carolina,²¹⁸ the logical parallel with our courts' treatment of child support is sadly compelling. This outcome would not only discourage parental agreement as to custody, but it also would create a virtual invitation for parents to seek modification of such unincorporated custody agreements. This result can only compound the already severe psychological effects that divorce inflicts upon children.²¹⁹ It also goes without saying that judicial economy purposes would be (and clearly are in the case of child support) ill served by such a rule.

Thus, in contrast to the assumption of *Walters* that a simple contract is an adequate vehicle for the resolution of divorce consequences, the "contract only" option creates risks of easy modification that are simply unacceptable when children are involved. As a result, lawyers in the state have found themselves in a "Catch-22" dilemma. They may incorporate or seek approval for their agreements, thereby establishing contempt as a remedy and probably securing application of the changed circumstances standard for provisions concerning children. Unfortunately, this same approval or incorporation creates the potential for the destruction of the finality of any periodic or installment payment portions of a property division. On the other hand, attorneys may withhold agreements from the court, in order to ensure that the unexecuted property divisions will remain nonmodifiable, but only at the cost of sacrificing the application of the changed circumstances standard to provisions concerning children²²⁰ and the ready availability of contempt as a means of enforcement. Thus neither of the options created by *Walters* furnishes an adequate, or indeed even viable, alternative for the treatment of settlement agreements.

Faced with this unnecessarily harsh dilemma, the more knowledgeable domestic law practitioners have devised an ingenious, if highly unusual, "solution" of sorts. *Walters* itself pointed the way to what aptly could be called the "cut and paste" method for coping with the new system it announced:

For example, the parties may keep the property settlement provision aspects of their separation agreement out of court and in contract,

217. See Sharp, *supra* note 3, at 1276 n.53.

218. See *supra* notes 204-05 and accompanying text.

219. See Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 785-90 (1985). The author presents an excellent summary of the psychological and sociological effects of divorce upon children. Empirical data would clearly appear to confirm the proposition that divorce is in fact a *process* that extends over a period of time. Custody relitigation during this period, not surprisingly, intensifies the adverse effects of the divorce process upon children. *Id.* at 790-91; see also Sharp, *supra* note 3, at 1289-90 (arguing for application of the changed circumstances standard to any agreement-based decree).

220. This is clearly the case with child support, if not so clearly with custody. See *supra* notes 199-219 and accompanying text.

while presenting their provision for alimony to the court for approval. The result of such action would be that the alimony provision is enforceable and modifiable as a court order while the property settlement provisions would be enforceable and modifiable under traditional contract methods.²²¹

Upon closer examination, this "cut and paste" device proves to be a rather poor solution indeed.²²² First, it clearly creates potentially severe traps, in the form of unforeseen or unintended consequences, for all but the most knowledgeable of domestic law practitioners and their clients.²²³ Second, even assuming that one has sufficient knowledge of this complex body of law to avoid the more obvious pitfalls, the necessity to bifurcate what is in fact a single agreement is cumbersome, complicated, and unrealistic. By way of only one example, the distinction between "support" and "property" rights is often difficult, if not impossible, to draw.²²⁴ Third, as discussed in a previous portion of this Article,²²⁵ portions of property divisions that are embodied in a mere contract that never receives judicial approval may create significant full faith and credit problems in the increasingly likely event that interstate enforcement of such an agreement is required. The necessity to undertake this kind of bifurcation, moreover, greatly reinforces the artificial and unrealistic distinction between "separation agreements" and "property settlements"—a problem that has already led to the creation of remarkable confusion in the law dealing with the effect of reconciliation of the parties.²²⁶

Finally, and perhaps most critically, this process of carefully choosing portions of an agreement that will be submitted to the court, and just as carefully shielding other portions of the same agreement from the court, deprives the judiciary of any *opportunity* for meaningful judicial review. That is to say, it allows the parties to deprive the state of any mechanism by which the interests of the state may be protected, or even voiced.²²⁷ Sadly, this is a situation that is unique

221. *Walters v. Walters*, 307 N.C. 381, 387, 298 S.E.2d 338, 342 (1983).

222. Both anecdotal experiences relayed by a large number of attorneys and a scattering of cases that have reached the appellate level indicate that fear of modification of property divisions leads a majority of practitioners to withhold agreements from the court.

223. In *Brown v. Brown*, 91 N.C. App. 335, 371 S.E.2d 752 (1988), the court set forth the following (knowledgeable but still cumbersome) description of what had occurred with regard to the parties' agreement:

On 21 April 1986, the parties entered into a consent order and a separation agreement. The consent order approved a waiver of alimony . . . awarded child custody and child support . . . and established visitation privileges The separation agreement detailed the property settlement, included a non-molestation clause, and outlined remedies for breach of the agreement. The separation agreement was not incorporated into the consent order.

Id. at 336, 371 S.E.2d at 753.

224. The right of a spouse to support, for instance, has long been held to be a "property" right in North Carolina. *See, e.g., Kiger v. Kiger*, 258 N.C. 126, 128, 128 S.E.2d 235, 237 (1962) (right to support and maintenance is a property right and thus may be released by contract); *Bolin v. Bolin*, 246 N.C. 666, 668, 99 S.E.2d 920, 922 (1957) (right of support is a property right in this state); *Daughtry v. Daughtry*, 225 N.C. 358, 360, 34 S.E.2d 435, 436-37 (1945) (same); *Pope v. Pope*, 38 N.C. App. 328, 330, 248 S.E.2d 260, 261 (1978) ("The right of a married woman to support and maintenance is held in this State to be a property right.")

225. *See supra* notes 123-24 and accompanying text.

226. *See discussion infra* beginning at note 233 and accompanying text.

227. Allowing opportunity for meaningful judicial review is, of course, a different matter from

to North Carolina.²²⁸ In the name of freedom to contract, the courts of this state have virtually abandoned their traditional, and still critically important, role as overseer of, if no longer "parties" to, the divorce process.²²⁹

Ironically, true resolution of all these problems is remarkably simple. The only disadvantage to court approval is the threat created by *Walters* that property divisions, or periodic payments that are reciprocal consideration for such divisions, might be modifiable. A definitive statement from the supreme court that *Walters* does not carry such a threat to the finality of property divisions,²³⁰ or a legislative provision to ensure the finality of such divisions,²³¹ would virtually eliminate any useful function now served by the "contract only" option. It would thereby eliminate as well the res judicata and full faith and credit problems caused by such extra-judicial agreements. Ironically, this suggested resolution would accomplish what *Walters* set out to do in the first instance: it would greatly simplify what had been, and is now even more, a confusing area of the law. True alimony, as carefully defined in *Marks v. Marks*, would remain modifiable.²³² Other portions of an incorporated agreement would, as court orders, have both res judicata and full faith and credit effect, and would be enforceable by contempt. It is impossible to avoid the conclusion that such a resolution would better serve the purposes of judicial economy, the lawyering process, and the interests of the state and its citizens.

IV. THE RECONCILIATION PROBLEM

The artificial distinction between "property" and "separation" agreements obviously constitutes a major analytical weakness of the *Walters* opinion. It also constitutes, however, the primary vehicle by which *Walters* can be reconciled with existing law on the relationship between property divisions and divorce decrees.²³³ Unfortunately, in the context of the law regarding the effects of reconciliation upon settlement agreements, a similar distinction has been drawn,

undertaking such a review—a subject that will be dealt with in a forthcoming article. That the mechanism exists which allows the opportunity, however, is critical.

228. See *supra* note 15.

229. With the advent of no-fault divorce, the state may no longer be an active "third party" to divorce. See *supra* note 43. That does not mean, however, that it has become a disinterested observer in the process.

230. Such "finality" would, of course, be cushioned by the availability of motions to set aside, vacate or amend, as discussed *supra* at notes 106-09.

231. Several states have statutory provisions that allow parties to contract for nonmodifiable alimony. See, e.g., ILL. REV. STAT. ch. 40, para. 502(f) (1984) (except for terms concerning the support, custody, or visitation of children, the judgment may expressly preclude or limit modification of terms if the separation agreement so provides); KY. REV. STAT. ANN. § 403.180(6) (Michie 1984) (same); MD. FAMILY LAW CODE ANN. § 8-103c (1984) ("court may modify any provision of . . . agreement . . . with respect to alimony or spousal support . . . unless there is . . . a provision that specifically states that the provisions with respect to alimony or spousal support are not subject to any court modification."); VA. CODE ANN. § 20-109 (1990) (court may modify spousal support unless a stipulation or contract signed by party receiving relief and filed prior to entry of final decree stipulates otherwise); WASH. REV. CODE ANN. § 26.09.070(7) (Supp. 1990) (when separation contract so provides, decree may expressly preclude or limit modification of any provision for maintenance).

232. See *supra* notes 168-72.

233. See *supra* notes 146-48 and accompanying text.

with results that are the ironic mirror image of the threat *Walters* poses to the finality of property divisions.

Analytically and developmentally, the law on the effects of reconciliation on settlement agreements has paralleled the changes, and ensuing confusion, that have occurred in the law affecting settlement agreements and final decrees. For decades, the law was quite straightforward. Like the majority of states, North Carolina held that separation agreements could be entered into only after separation of the parties,²³⁴ and that reconciliation between the parties voided the executory, but not the executed, portions of the agreement.²³⁵ Unlike all other states, North Carolina followed for years the anachronistic principle that either a resumption of cohabitation between the parties,²³⁶ or, under the rule of *Murphy v. Murphy*, a single act of sexual intercourse between the parties, could constitute a reconciliation.²³⁷ Repeated and unsuccessful attempts by the court of appeals²³⁸ to chip away at the inflexible *Murphy* rule were finally rendered moot by the enactment of North Carolina General Statutes section 52-10.2, which sensibly defines the resumption of marital relations as "voluntary renewal of the husband and wife relationship, as shown by the totality of the circumstances."²³⁹ To allay any doubts surrounding the interpretation of this statute, the drafters explicitly provided that "[i]solated incidents of sexual intercourse between the parties shall not constitute resumption of marital relations."²⁴⁰

Legislative abrogation of the harsh *Murphy* rule should have marked the end of difficulty surrounding the effect of reconciliation in this state. Unfortunately, a new area of confusion arose instead, focusing squarely upon the attempt to distinguish and sever (and treat differently) the "separation agreement" and "property division" portions of a settlement agreement.

This focus upon the highly technical distinction between "separation agreements" and "property settlement agreements" hardly sprang from thin air. Indeed, the difficulties in, and importance of, controlling whether or not provisions for payment of periodic sums of money were "true alimony" or reciprocal consideration for property division,²⁴¹ had led lawyers commonly to use separate headings in one agreement. Thus an instrument titled "separation agreement and property settlement" would be divided into two distinct portions, one labeled "property division," and the other labeled "separation agreement."²⁴² Placement of a provision for periodic payments of sums to a spouse in the "prop-

234. See H. CLARK, *supra* note 1, at 757. The traditional rationale for this requirement was that unless agreements were executed just prior to, or after separation of the parties, they would tend to "promote" divorce and therefore would violate public policy. 2 R. LEE, *supra* note 10, § 188, at 466.

235. See 2 R. LEE, *supra* note 10, § 188, at 515.

236. *In re Estate of Adamee*, 291 N.C. 386, 391, 230 S.E.2d 541, 545 (1976) ("a separation agreement between husband and wife is terminated for every purpose insofar as it remains executory upon their resumption of the marital relation").

237. *Murphy v. Murphy*, 295 N.C. 390, 397, 245 S.E.2d 693, 698 (1978) ("sexual intercourse between a husband and a wife after the execution of a separation agreement avoids the contract").

238. See Sharp, *supra* note 2, at 842-43.

239. N.C. GEN. STAT. § 52-10.2 (Supp. 1989).

240. *Id.*

241. See *supra* note 223 and accompanying text.

242. See *Stanley v. Cox*, 253 N.C. 620, 629, 117 S.E.2d 826, 832 (1961). Professor Lee made this

erty division" portion of the agreement was a compelling indicia of an integrated agreement and helped ensure that the provision would be nonmodifiable.²⁴³ It was in fact this practice that formed much of the basis for the distinction drawn in *Walters*, which, in turn, powerfully reinforced the artificial division of a single instrument into two parts.

Equally significant in this development was the enactment of the Equitable Distribution of Property Act, particularly subsection (d), which authorizes parties "[b]efore, during or after marriage" to "provide for distribution of the marital property in a manner deemed by the parties to be equitable."²⁴⁴ This provision, innocuous on its face, did work a profound change in North Carolina law, particularly in the law of antenuptial agreements.²⁴⁵ More relevant for our purposes is the fact that this provision received a precipitous, and almost certainly incorrect, interpretation in the case of *Buffington v. Buffington*.²⁴⁶

In *Buffington* the parties signed a separation agreement, but continued to live together for eighteen days thereafter. The wife later sought an equitable distribution of property on the grounds that the continued cohabitation after the execution of the agreement had rendered it void.²⁴⁷ The court of appeals upheld the validity of the agreement, but not on the traditional grounds that the continued cohabitation was of insufficient duration to violate public policy. Instead, it reasoned that "by the enactment of section 50-20(d), the General Assembly manifested a clear intent to change the former rule which required the actual separation of the parties to a marriage in order for a *property* settlement to be effective between spouses."²⁴⁸ It continued to observe, quite correctly, that the new section "permits spouses to execute a property settlement at any time, regardless of whether they separate immediately thereafter or not."²⁴⁹ It then concluded, however, in a classic example of the kind of confusion in terminology that pervades this area of law, that the wife "cannot avoid her *separation agree-*

precise suggestion as to terminology and practice. 2 R. LEE, *supra* note 10, § 188, at 462. More specifically, he stated that:

Hence, if the draftsman is called upon to incorporate into a single contract the provisions of both a true separation agreement and a true property settlement, as will usually be the wishes of the parties when they reach the point of separation, it would be prudent for him to state the provisions of the separation and the provisions of property settlement so that everyone will readily understand that they are distinguishable. A simple way of accomplishing this purpose is to head the instrument, "Separation Agreement and Property Settlement," and then proceed to divide the instrument into two parts

Id. Throughout his treatise, however, Professor Lee uses the term "separation agreement" in the broad sense to include a full settlement of all marital rights and issues.

243. See *supra* notes 63-64 and accompanying text.

244. N.C. GEN. STAT. § 50-20(d) (1987).

245. For a discussion of the limited scope of antenuptial contracts in North Carolina prior to 1981, see 2 R. LEE, *supra* note 10, § 188, at 434-44. The passage of the Uniform Premarital Agreement Act in 1987 has vastly expanded the scope of antenuptial contractual freedom beyond that authorized in the Equitable Distribution of Property Act. See 1987 N.C. Sess. Laws 473 (codified at N.C. GEN. STAT. § 52B (1987)).

246. 69 N.C. App. 483, 317 S.E.2d 97 (1984). In all fairness, it should be noted that *Buffington* was one of the first appellate decisions interpreting the new Act.

247. *Id.* at 484, 317 S.E.2d at 98.

248. *Id.* at 488, 317 S.E.2d at 100 (emphasis added).

249. *Id.*

ment solely on the grounds that she continued to live with plaintiff for 18 days after the agreement was signed."²⁵⁰

The problem with *Buffington* is both obvious and simple: it failed to distinguish between a pure division of property that, as clearly set forth in the statute, can occur at any time without regard to the separation of the parties, and an agreement that settles *all* the rights of the parties arising out of the marriage — *i.e.*, a separation or settlement agreement.²⁵¹ The latter type of agreement clearly does require separation of the parties, either at the time of or shortly after, its execution.²⁵² Indeed, the separation of the parties is itself part of the necessary consideration upon which the agreement must be based.²⁵³ At the risk of belaboring the point, a "separation" agreement may, and usually does, include provisions for property division; a property division, however, "says nothing about support or alimony for the wife, custody or support of children, or the right to live separate and apart."²⁵⁴

The failure of the court in *Buffington* to recognize that a clear statutory authorization²⁵⁵ for parties to execute agreements disposing of marital property rights during marriage is not, and should not be interpreted to be, the equivalent of authority for parties to execute true separation or settlement agreements during marriage is thus a serious error. On its facts, the opinion is at least limited to the situation in which parties continue to cohabit after execution of a separation agreement.²⁵⁶ The court's broad interpretation of North Carolina General Statutes section 50-20(d) as evincing a legislative intent to change the traditional rules regarding "separation agreements" and its consistent confusion in the use of the terms "separation agreement" and "property agreement," however, have obvious and serious implications for the rules involving the effect of reconciliation of the parties.²⁵⁷

The court of appeals appears to have recognized that an expansive interpretation of *Buffington* might bind parties to settlement agreements despite any subsequent reconciliation. In quick succession, the court handed down two opinions in 1985 that appeared effectively to limit and distinguish *Buffington* and

250. *Id.* (emphasis added).

251. In fact, even prior to passage of N.C. GEN. STAT. § 50-20 (1987), parties could contract with reference to property during marriage. See N.C. GEN. STAT. § 52-10(a) (1984); 2 R. LEE, *supra* note 10, § 188, at 460.

252. 2 R. LEE, *supra* note 10, § 188, at 460.

253. *Id.*

254. *Id.*

255. It should be noted, however, that even prior to passage of N.C. GEN. STAT. § 50-20(d), husbands and wives were authorized to enter into such agreements under the provisions of N.C. GEN. STAT. §§ 52-10 to -10.1. See also 2 R. LEE, *supra* note 10, at 460 ("A property settlement, as such, may be validly entered into when the parties are . . . living together with no intention of separating.").

256. See, e.g., *Carlton v. Carlton*, 74 N.C. App. 690, 694, 329 S.E.2d 682 (1985), discussed *infra* at notes 263-67 and accompanying text. It is even possible, and certainly desirable, that *Buffington* might be interpreted to apply only to property division agreements executed while parties are still living together. See *infra* note 315 and accompanying text.

257. For a very good discussion of the weaknesses of the analysis in *Buffington*, see Note, *Property Settlement or Separation Agreement: Perpetuating the Confusion*, 63 N.C.L. REV. 1166 (1985).

to reaffirm the traditional rules, particularly with regard to the effects of reconciliation.

In *Case v. Case*,²⁵⁸ the defendant husband had executed a quitclaim deed to the marital residence pursuant to a separation agreement. The parties then reconciled for one week, and the husband subsequently claimed that this reconciliation had voided the parties' agreement.²⁵⁹ The court of appeals held simply that the provision concerning the marital home was executed, not executory, and thus was unaffected by the reconciliation.²⁶⁰ Significantly, it cited *Buffington* only for the proposition that a "request for equitable distribution of property may not be granted in the face of a prior, valid agreement disposing of the parties' marital property,"²⁶¹ and went on to observe that North Carolina General Statutes section 50-20(d) "did not purport to change the validity of separation agreements."²⁶²

*Carlton v. Carlton*²⁶³ posed an even more direct confrontation with the possible implications raised by *Buffington*. The parties in *Carlton* had separated and signed a "Deed of Separation" in 1963, in which the wife had waived any right to property "now owned or hereafter acquired" by the husband.²⁶⁴ Shortly after the agreement was signed, the parties reconciled and continued to live together until 1982, at which time they again separated. The husband's attempt to rely upon *Buffington* to bar the wife's equitable distribution claim was swiftly dismissed by the court of appeals, which found *Buffington* distinguishable²⁶⁵ and reaffirmed the traditional rule that the wife's promise was executory and thus was voided by the reconciliation.²⁶⁶ Significantly, the court went on to hold that:

We do not believe that in enacting G.S. 50-20(d) the General Assembly intended that a written separation agreement, once entered into, would be forever binding, forever a bar to an equitable distribution action. Rather, the parties to separation agreements must still be able to cancel their agreements, and the indicia of the intent to cancel as developed in our common law, we believe, must also still be intact.²⁶⁷

Although neither *Case* nor *Carlton* posed a direct challenge to the *Buffington* proposition that a separation agreement is unaffected by the continued co-

258. 73 N.C. App. 76, 325 S.E.2d 661, *rev. denied*, 313 N.C. 597, 330 S.E.2d 606 (1985).

259. *Id.* at 77, 79, 325 S.E.2d at 662-63.

260. *Id.* at 79-80, 325 S.E.2d at 664.

261. *Id.* at 82, 325 S.E.2d at 665.

262. *Id.* at 81, 325 S.E.2d at 665; *see also* *McArthur v. McArthur*, 68 N.C. App. 484, 487, 315 S.E.2d 344, 346 (1984) (holding that N.C. GEN. STAT. § 50-20(d) "did not purport to change the general validity of separation agreements").

263. 74 N.C. App. 690, 329 S.E.2d 682 (1985).

264. *Id.* at 693, 329 S.E.2d at 684 (quoting the parties' separation agreement).

265. *Id.* at 694, 329 S.E.2d at 685. The court in *Carlton* observed that *Buffington* "is distinguishable, because it deals with common law principles affecting the validity of separation agreements entered into while the parties are still living together." *Id.* Again, such a statement confuses separation agreements with agreements to divide marital property.

266. *Id.* at 693, 329 S.E.2d at 684.

267. *Id.* at 694, 329 S.E.2d at 685.

habitation of the parties,²⁶⁸ they clearly appeared to eliminate the possibility that courts would interpret subsection (d) of the equitable distribution act to have destroyed the settled principles involving the effect of reconciliation upon settlement agreements. Unfortunately, several recent cases from the court of appeals may well have compounded the confusion between separation and property settlement agreements, eliminated the distinction between executed and executory provisions of a settlement agreement insofar as the effect of reconciliation is concerned, and, in short, reduced this area of the law to a state of almost total confusion.

The first of these opinions is particularly complicated. In 1980 the parties in *Small v. Small*²⁶⁹ had executed a "Post-Nuptial Contract" which contained waivers of alimony and existing or after-acquired rights in the property of one another. They subsequently entered into two separation agreements, each affirming the terms of the postnuptial agreement. Both parties conceded, however, that they had had sexual relations several times after each agreement was executed.²⁷⁰ At trial, the husband was granted a summary judgment denying the wife's claim for property division and alimony. The wife appealed only the denial of her claim to equitable distribution, contending that continuation of the parties' sexual relationship had voided the separation agreements and that the 1980 agreement was void as contrary to public policy.²⁷¹

The court of appeals, in an opinion that purported to rest upon the technical distinction between a "separation" agreement and a "property settlement" agreement, affirmed the lower court.²⁷² It reached this result, however, by way of an analysis that is not only remarkably confusing, but is also profoundly flawed analytically in at least two different respects. First, the court apparently ignored the fact that each of the three agreements was a *single* instrument dealing with both support and property rights. Instead, it *severed out* the "property division" portions of all the agreements from the support provisions thereof,²⁷³ and then concluded that the property division agreements "must be analyzed with reference to those rules which pertain to property settlements rather than

268. Other cases arguably have posed this challenge, however. See *infra* notes 307-08 and accompanying text.

269. 93 N.C. App. 614, 379 S.E.2d 273 (1989).

270. *Id.* at 619-20, 379 S.E.2d at 276.

271. *Id.* at 620, 379 S.E.2d at 276. It appears, however, that the analysis of the court would have been precisely the same even had wife perfected an appeal from the dismissal of her alimony claim. Wife's arguments with regard to the property division issues appear, moreover, to have been correct. Because the "postnuptial" agreement dealt with support and property rights, it constituted a true "separation agreement," and thus violated the public policy rule against execution of such agreements while parties are still living together. *Id.* at 619-20, 379 S.E.2d at 276. Because the parties had engaged in sexual intercourse after the execution of each of the separation agreements, moreover, the executory provisions of such agreements would have been void. See *supra* note 239 and accompanying text. *Small*, however, clearly changed the rules *during* the ball game with regard to wife's arguments.

272. *Small*, 93 N.C. App. at 624-27, 379 S.E.2d at 279-81.

273. *Id.* at 621, 379 S.E.2d at 277-78. The court used conclusory logic to support its opinion on this issue, noting that "the alimony provisions of the Post-Nuptial Contract are clearly separable from the property division." *Id.*

separation agreements."²⁷⁴ This division of what is in fact one instrument into two distinct agreements, to which different rules were then applied, is in itself a radical departure from well-established principles.²⁷⁵ It also directly conflicts with the firmly established principle that a "separation agreement" deals with *both* property and support rights.²⁷⁶

The court went on, moreover, to compound greatly its initial error by eliminating the distinction between executed and executory provisions of a "property settlement" agreement insofar as the effect of reconciliation is concerned. Reconciliation of the parties, it held, would have no effect on a property division "whether or not the provisions of the property settlement have been fully executed."²⁷⁷ Although the court purported to rely upon the leading case of *Jones v. Lewis*²⁷⁸ for its conclusion, the *Jones* case has long stood, and clearly continues to stand, for precisely the opposite proposition: that reconciliation voids all executory provisions of a settlement agreement, without regard to whether those provisions concern support or property.²⁷⁹

The opinion in *Small* undoubtedly sent shock waves throughout the domestic bar in the state. It was, however, sufficiently confusing²⁸⁰ and sufficiently at odds with the entire body of appellate law in this area that it might have been regarded, much like *Buffington*, as an aberrant opinion, to be distinguished, rather than followed, by future cases. Unfortunately, within two months the court of appeals came again to the same conclusion, and this time with considerable clarity, in *In re Estate of Tucci*.²⁸¹

274. *Id.* at 622, 379 S.E.2d at 278.

275. At the risk of stating the obvious, the well-recognized distinction between a "separation" agreement and a "property settlement" agreement does not mean that the property division *portion* of a separation agreement is severable from the remainder of the agreement. A "property division" agreement deals *only* with property; a "separation" agreement deals with property and support rights. See *supra* note 147 and accompanying text.

276. See *supra* note 45; 2 R. LEE, *supra* note 10, § 188, at 461. Although it is possible, of course, to encounter a separation agreement that does not deal with property rights, such agreements almost always dispose of all marital rights, including both support and property rights. *Id.*; H. CLARK, *supra* note 1, at 756.

277. *Small*, 93 N.C. App. at 625, 379 S.E.2d at 279 (emphasis added). The court reasoned that, since the parties could have executed a property division without regard to resumption of sexual intercourse, living separate and apart constituted no part of the consideration for the agreement. *Id.* at 624, 379 S.E.2d at 279. Such logic is impeccable when applied to a simple agreement dividing marital property; it is wholly inapplicable and inapposite, however, when a "separation agreement" and "property division" are embodied in one instrument.

278. 243 N.C. 259, 90 S.E.2d 547 (1955). See *infra* notes 297-300 and accompanying text for an explanation of why the court's reliance upon this case in *Small* is clearly misplaced.

279. *Jones*, 243 N.C. at 261, 90 S.E.2d at 549; see also *In re Estate of Adamee*, 291 N.C. 386, 391, 230 S.E.2d 541, 545 (1976) (A "separation agreement between husband and wife is terminated for every purpose insofar as it remains executory upon their resumption of the marital relation."). Both cases clearly use the term "separation agreement" in its common form, *i.e.*, to include agreements as to property and support rights.

280. Using the term "separation agreement" in its most restrictive sense, to encompass only agreements for support and custody, *Small* did reiterate the traditional rule that such an agreement "is terminated for every purpose insofar as it remains executory upon their resumption of the marital relation." *Small*, 93 N.C. App. at 626, 379 S.E.2d at 280 (quoting *Adamee*, 291 N.C. at 391, 230 S.E.2d at 545). No case prior to *Small*, however, ever gave the term "separation agreement" such a restrictive definition.

281. 94 N.C. App. 428, 380 S.E.2d 782, *disc. rev. denied*, 325 N.C. 271, 384 S.E.2d 514 (1989).

The parties in *Tucci* executed a "Separation Agreement" in November of 1983,²⁸² reconciled in December of that year, and lived together until September, 1985, when they again separated.²⁸³ Mrs. Tucci died in March of 1986, and Mr. Tucci dissented from the will. The district and superior courts found that the reconciliation had voided the 1983 separation agreement, and that the husband's waiver of his right to dissent under the agreement was executory at the time of the reconciliation, and thus was voided by the reconciliation, leaving husband free to dissent.²⁸⁴ Relying heavily upon its opinion in *Small*, the court of appeals reversed. It did so, however, with a logic that confirmed and compounded the analytical flaws of the earlier case, and deserves close attention.

The court first concluded, far too easily, that the statutory right to dissent, because it did not affect any marital support duty and was not conditioned upon living separate and apart, was a property right.²⁸⁵ This property right would, it reasoned, be part of a "property settlement," and under *Small* property settlements are severable from "separation agreement" portions of the instrument.²⁸⁶ Thus, the court concluded, it was "immaterial"²⁸⁷ whether the release was executory or executed at the time of the reconciliation, because, unlike a "separation agreement," "no public policy is offended by the continued validity of the property settlement provisions of this Agreement."²⁸⁸ Finally, the court came to the hasty, and almost certainly incorrect, conclusion that *Carlton v. Carlton*²⁸⁹—which clearly would have required affirming the decisions of the lower courts apparently had been "superseded" by a recent case from the supreme court.²⁹⁰

Close examination of the premises upon which the analysis in both *Small* and *Tucci* are based reveals that both decisions are fundamentally flawed. First, the implicit assumption in both cases that the "support" elements in an agreement even can be identified with any certainty is contradicted by the well-

282. *Id.* at 429, 380 S.E.2d at 783. The instrument was titled "Separation Agreement," and was referred to in the instrument as a "Separation Agreement and Property Settlement." *Id.* The division of the single instrument into two parts is, as noted previously, a common practice in North Carolina, particularly since the *Walters* opinion. See *supra* note 242 and accompanying text. The majority opinion in *Tucci* went to considerable pains to deduce that the "Separation Agreement" was in fact two separate, and severable, agreements. *Tucci*, 94 N.C. App. at 434-37, 380 S.E.2d at 785-87. The dissent pointed out that the agreement itself, and the findings of fact unexcepted to below, clearly indicated that the instrument was a single entity, a separation agreement. *Id.* at 440, 380 S.E.2d at 789 (Eagles, J., dissenting). Anyone unfamiliar with the tangled history of this nomenclature in North Carolina would be utterly confounded by the court's discussion of this issue.

283. *Tucci*, 94 N.C. App. at 430, 380 S.E.2d at 783. The parties had entered into a consent judgment for a divorce from bed and board in December 1985, but the court of appeals had earlier upheld an order setting aside that consent judgment on the grounds that it contained no findings as to appropriate grounds for the divorce. *Allred v. Tucci*, 85 N.C. App. 138, 143, 354 S.E.2d 291, 295, *cert. denied*, 320 N.C. 166, 358 S.E.2d 47 (1987).

284. *Tucci*, 94 N.C. App. at 431-32, 380 S.E.2d at 784.

285. *Id.* at 436, 380 S.E.2d at 787.

286. *Id.* The court also held that the resumption of the marital relationship did not constitute an "implied rescission" of the "property division." *Id.* at 436-37, 380 S.E.2d at 787.

287. *Id.* at 437, 380 S.E.2d at 787.

288. *Id.* at 438, 380 S.E.2d at 787.

289. 74 N.C. App. 690, 329 S.E.2d 682 (1985); see *supra* notes 263-67 and accompanying text.

290. *Tucci*, 94 N.C. App. at 439, 380 S.E.2d at 788. For a discussion of the court's interpretation of *Higgins v. Higgins*, 321 N.C. 482, 363 S.E.2d 426 (1988), see *infra* notes 310-15 and accompanying text.

defined distinction between "true alimony" and payments labeled "support" or "alimony."²⁹¹ It is further contradicted by an established, if somewhat surprising, line of cases holding that the right to support in North Carolina is a "property right."²⁹² Second, the assumption that the "separation agreement" portions and the "property division" portions of a single agreement can be severed from one another is contradicted by common sense, common experience, and—most critically—by the still viable concept of reciprocal consideration.²⁹³

As Professor Homer Clark, the leading commentator on domestic law in the nation, has aptly observed: "A property settlement is just that portion of the separation agreement dealing with property of the spouses."²⁹⁴ He continues to explain that because property division and alimony provisions are so closely related "[i]t is therefore both misleading and unhelpful to talk as if there were two different kinds of agreements and as if the impact of reconciliation upon one should be different from the impact on the other. Specious distinctions of this kind ought to be abandoned."²⁹⁵ Ironically, moreover, the cases upon which both *Small* and *Tucci* rely for the "severance" conclusion and for the proposition that even "unexecuted" provisions of a property division are unaffected by a reconciliation are in fact an affirmation not only of the traditional rules in this area, but of the reciprocal consideration or integrated agreement principle as well.²⁹⁶ In particular, both *Tucci* and *Small* relied heavily upon *Jones v. Lewis*²⁹⁷ and *Love v. Mewborn*.²⁹⁸ In fact, *Jones* stands for precisely the opposite result. In unmistakably clear language, that case held: "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 insofar as it remains executory."²⁹⁹ The property division provisions in question in *Jones*, moreover, were *fully executed* at the time of the parties' reconciliation.³⁰⁰

291. See *supra* notes 161-73 and accompanying text. Since true alimony clearly requires a court order, it is even possible to suggest that no provision for "alimony" in a separation agreement that has not been incorporated into a final divorce decree meets the technical definition of alimony.

292. See, e.g., *Kiger v. Kiger*, 258 N.C. 126, 128, 128 S.E.2d 235, 237 (1962) (right to support is a property right in North Carolina), and cases cited *supra* at note 224.

293. See *supra* notes 172-73 and accompanying text.

294. H. CLARK, *supra* note 1, at 770. Professor Clark goes on to point out that, particularly under equitable distribution schemes that call for a "just" or "equitable" distribution of property according to certain statutory factors, "the purpose and function of the property division then looks very much like the purpose and function of alimony The task of making a rational distinction between the two becomes difficult, indeed impossible." *Id.* at 594. North Carolina's equitable distribution statute, it will be observed, falls precisely into the category singled out by Professor Clark.

295. *Id.*

296. See *supra* notes 64-70.

297. 243 N.C. 259, 90 S.E.2d 547 (1955).

298. 79 N.C. App. 465, 339 S.E.2d 487, *disc. rev. denied*, 317 N.C. 704, 347 S.E.2d 43 (1986). For a further discussion of this case, see *supra* notes 297-98; *infra* note 300.

299. *Jones*, 243 N.C. at 261, 90 S.E.2d at 549. It should be noted that the statement from *Jones* that both *Small* and *Tucci* relied upon, that "[r]egardless of what the rule may be as to a settlement with executory provisions, an executed property settlement is not affected by a mere reconciliation" was a reference from an A.L.R. annotation discussing the law of other states. *Id.* *Jones* itself makes it clear that the North Carolina rule is that the executory portions of a settlement agreement are voided by a reconciliation.

300. *Id.* at 259, 90 S.E.2d at 548.

Although the *Love* case is slightly more complicated, it nevertheless constitutes an equally clear affirmation of the traditional rules. The parties in *Love* executed a separation agreement in 1980 under which the defendant husband agreed to pay the wife \$800.00 per month "alimony" for ten years. The parties "reconciled" for twenty-four hours in May of 1981, and defendant ceased making payments after that date.³⁰¹ Husband contended at trial that under the rule of *Murphy v. Murphy*³⁰² the reconciliation terminated his "executory" duty to make the alimony payments. The court of appeals did observe that property settlements "are not necessarily terminated by reconciliation."³⁰³ It went on, however, to make it clear that these payment provisions, which were in the narrow sense, "executory" because they had not been paid in full, were in fact part of a "separation agreement and property settlement" that was "intended to be mutually dependent,"³⁰⁴ and thus were not voided by the reconciliation. This explicit recognition of the operation and validity of the reciprocal consideration or integrated agreement principle in this context makes it clear that *Love* does not, and should not be interpreted to, stand for the proposition that even unexecuted provisions of a settlement agreement are unaffected by reconciliation. The wife in *Love* had fully performed—i.e., executed—her half of the bargain: the husband was merely told that he must likewise perform his half of the bargain, for which he had already received full consideration.³⁰⁵

A thorough analysis of *Love* reveals that the case is the predivorce equivalent of the integrated agreement principle and thus lends virtually no support to the conclusions reached in *Small* and *Tucci*. If one side of a bargain is fully executed, the other must be as well. If one side of a bargain (property division) is not modifiable, then the same result must obtain for the other half of the bargain. In the context of an integrated agreement, part of which has been executed, the label "executory" simply has no meaning to which any substantive consequence should attach. To interpret *Love* as *Small* and *Tucci* did gives one party the benefit of the bargain and wholly deprives the other party of the consideration which formed the basis of the bargain in the first instance.³⁰⁶

301. *Love*, 79 N.C. App. at 466, 339 S.E.2d at 488.

302. *Id.* For a discussion of the *Murphy* decision, see *supra* note 237 and accompanying text.

303. *Love*, 79 N.C. App. at 466, 339 S.E.2d at 488. In *Small*, the court of appeals summarized the *Love* opinion as: "upholding cash payments as part of property settlement even though obligation executory when parties resumed sexual relations." *Small*, 93 N.C. App. at 625, 379 S.E.2d at 280. As this discussion illustrates, this description of the holding in *Love* is both inadequate and inaccurate.

304. *Love*, 79 N.C. App. at 467, 339 S.E.2d at 489. It should also be noted that the *Love* opinion specifically cited to *White v. White*, 296 N.C. 661, 252 S.E.2d 698 (1979), the leading case on the principle of integrated agreements, in support of its conclusion. See *supra* notes 71-74 and accompanying text. The evidence below, including negotiation letters between the attorneys for the parties in *Love*, left no doubt that the "alimony" payments were in fact a property settlement. *Love*, 79 N.C. App. at 467, 339 S.E.2d at 489.

305. See, e.g., I A. CORBIN ON CONTRACTS 631-35 (1953) (discussing nonsimultaneous performance and constructive conditions).

306. For a more concrete example of the kind of injustice that can be produced by the *Small* and *Tucci* decisions, see *Howell v. Landry*, 96 N.C. App. 516, 386 S.E.2d 610 (1989). In that case the court held that the alimony provisions in a prenuptial agreement were invalid because the agreement was executed prior to the enactment of N.C. GEN. STAT. § 52B (the Uniform Premarital Agreement Act), at which time such provisions were void under the law. *Howell*, 96 N.C. App. at 525-26, 386

Several other cases stand for this same predivorce integration proposition. *Potts v. Potts*, for example, held that the "alimony" provisions of a settlement agreement would not be abrogated by a subsequent reconciliation, where the property settlement portion of the agreement was fully executed.³⁰⁷ Similarly, in *Whitt v. Whitt*, the wife was ordered specifically to perform (to transfer property as called for in the settlement agreement) even after reconciliation, where the agreement was otherwise fully executed.³⁰⁸ In each case the provision in question was technically "executory" at the time of the reconciliation. In each case the other party had fully performed his or her half of the bargain. The most elementary of contract principles dictates that there can be no other result.³⁰⁹

Finally, the *Tucci* court's reliance upon the case of *Higgins v. Higgins*,³¹⁰ in support of its result, and in derogation of *Carlton v. Carlton*,³¹¹ seems almost entirely misplaced. *Higgins* dealt with the narrow question of how to interpret a provision in a separation agreement requiring that the parties live "separate and apart" for one year before the wife would be obligated to convey the marital home to the husband.³¹² It held that, at the time the agreement was entered into, the term "living separate and apart" must be construed to have meant that the parties could not engage in sexual relations. They admittedly had done so several times, and thus the court held that the provision for transfer of the house was unenforceable.³¹³ In the course of its discussion the court did observe that it believed this resolution was consistent with *Love, Buffington*, and North Carolina General Statutes section 50-20(d).³¹⁴ In the next sentence, however, the plurality decision explained that the statute "provides that married persons may provide for division of *marital property* while they are cohabiting. . . . [and] *Love* and *Buffington* hold that such agreements are enforceable under the statute."³¹⁵

Thus, if anything, it appears that *Higgins* should be interpreted as an affirmation of the traditional rule that *property* settlement agreements may be entered into at any time, and that the executory portions of such agreements may be affected by conduct of the parties after execution of the agreement and before a final divorce decree. By no stretch of the imagination, however, does *Higgins* support the "severance" position of *Small* and *Tucci* or the elimination of the

S.E.2d at 615-16. The court went on, however, to sever the "property division" portion of the agreement and find that it was enforceable under N.C. GEN. STAT. § 50-20(d). *Howell*, 96 N.C. App. at 530-32, 386 S.E.2d at 618-20. The case thus stands, once again, for the anomalous proposition that only half of a bargain is enforceable.

307. 24 N.C. App. 673, 674-75, 211 S.E.2d 815, 816 (1975).

308. 32 N.C. App. 125, 129-30, 230 S.E.2d 793, 796 (1977).

309. See *supra* notes 301-04 and accompanying text.

310. 321 N.C. 482, 364 S.E.2d 426 (1988) (plurality opinion).

311. 74 N.C. App. 690, 329 S.E.2d 682 (1985). See *supra* notes 264-68 and accompanying text.

312. *Higgins*, 321 N.C. at 484, 364 S.E.2d at 428 (Webb, J., plurality).

313. *Id.* at 485, 364 S.E.2d at 428-29 (Webb, J., plurality).

314. *Id.* at 485, 364 S.E.2d. at 428 (Webb, J., plurality).

315. *Id.* at 485, 364 S.E.2d at 429 (Webb, J., plurality) (emphasis added). In his dissent, Justice Whichard cited *Buffington* merely for the proposition that "spouses may now execute a property settlement at any time, without separating afterwards." *Id.* at 491, 364 S.E.2d at 432 (Whichard, J., dissenting).

traditional distinction between executory and executed provisions of the agreement.

For a variety of reasons, therefore, it appears that the analytical foundations of *Small* and *Tucci* are weak indeed. The integrated agreement principle is, and should be, as compelling in the predivorce context as it is the postdivorce context. The distinction between "separation" agreements and "property division" agreements is equally unrealistic and artificial in either context.

V. CONCLUSION

It is difficult to avoid the conclusion that the law regarding settlement agreements in North Carolina has been reduced to such a state of confusion as almost to defy summary. This Article, moreover, has taken an apparently ironic approach toward resolution of some of the most troubling developments in this area of the law in the past decade. It has, on the one hand, urged that *Walters* be interpreted to have focused on the highly technical distinction between a separation agreement and a property settlement agreement, in order to preserve the critically important principle of finality of property division portions of settlement agreements. It has also criticized that opinion for allocating to private parties an unparalleled, and unsound, freedom to contract, by its creation of the "contract only" option.

On the other hand, the Article has criticized as unjust, unrealistic, and unprecedented, the use of a similar technical distinction by the court of appeals to determine the effects of a reconciliation upon a settlement agreement. In this context, the distinction between a separation agreement and a property settlement, and particularly the severance of the latter from the former, has undermined the intentions of the parties and has limited their freedom to contract.

The more significant point, however, is that regardless of whether the use of this artificial distinction has had salutary or unfortunate effects, the distinction itself is a largely inappropriate vehicle for the imposition of legal consequences as important as the modifiability of property divisions or the effect of reconciliation on a settlement agreement. Rather, those consequences should be determined by rules that look to the *substance*, not the form, of settlement agreements and that attempt to carry out the intentions of the parties. Such rules should, above all, include the concept of an integrated agreement.

With regard to the problem of the effect of reconciliation upon settlement agreements, *Small* and *Tucci* have clearly created great confusion, at both analytical and practical levels. That issue clearly needs definitive clarification from the supreme court. A major thrust of this Article has been the proposition that any instrument that deals with support and property rights, and that purports to be a "final settlement" of all issues between the parties is a *single* instrument — a settlement or "separation" agreement that cannot, and must not, be severed into two contracts, one of them subject to one set of rules and the other subject to a different set of rules. Again, the concept of an integrated agreement is critical. Whatever the rule with regard to the effect of reconciliation, it should be the *same* rule for the entire agreement.

Ironically, the principle of the finality of property divisions (including, of course, any periodic payments that are reciprocal consideration for a waiver of property rights, regardless of the label attached thereto) can best be preserved, in the face of the language of *Walters*, by drawing this technical distinction between a "separation" and a "property" settlement agreement. This "solution," it must be admitted, has little to recommend it beyond the fact of saving *Walters* from its own careless use of terminology. This awkward "solution" need not be sustained beyond a clear statement, from either the supreme court or the legislature, that leaves intact both the principle that property divisions incorporated in a divorce decree are final judgments and the corollary and analytically almost identical principle of reciprocal consideration or integration. Resolution of this finality issue would also obviate the practical need for the division of a settlement agreement into two distinct headings.

The continued and unmistakable viability of the principle of finality of property divisions incorporated into decrees is critical for two reasons. First, in the absence of assurance that property divisions so incorporated are nonmodifiable, parties and their lawyers will, and indeed must, continue to make use of the "contract only" option created by *Walters*. Second, as this Article has sought to demonstrate, this option is woefully inadequate to meet the needs of the parties. It results in the denial of *res judicata* consequences to the agreement, thus endangering enforcement of the agreement in other jurisdictions. It also virtually invites parties to seek modification of the provisions of their agreement affecting children. The absence of the changed circumstances standard for provisions affecting children creates additional, and needless, strains upon the parties, their children, and the judicial system itself.

More importantly, the "contract only" option virtually bars the judicial branch from playing any effective role in the distributional consequences of divorce. As this Article has pointed out, settlement agreements are different from other kinds of contracts, both in terms of the interests of the state in such contracts and in terms of the "market" in which the agreements are negotiated. And although the issue of whether judicial review of all settlement agreements should be required in North Carolina is beyond the scope of this Article, the opportunity for such review must, as a matter of vitally important public policy, be preserved.

Judicial elimination of the "contract only" option would, in fact, be a desirable outcome. It is probably not necessary, however, because the advantages of judicial review of agreements—*so long as* the finality of property divisions can be preserved—so far outweigh any advantages of the "contract only" option that it is difficult to believe that the latter would remain a viable alternative.

Thus, in summary, it appears that a return to, or reaffirmation of, the principles of finality of property divisions, integrated agreements, and the effects of reconciliation on executory portions of settlement agreements would serve well the interests of the state, the parties, and the practicing bar. *Walters*, and to a lesser degree *Small* and *Tucci*, for too long have led domestic law in this state

toward results that are bewilderingly complex, and fundamentally unsound, at practical, policy, and analytical levels.