



NORTH CAROLINA LAW REVIEW

Volume 67 | Number 6

Article 12

9-1-1989

Duties of Fairness between Separating Spouses: North Carolina Continues to Find That All Is Fair in Love and Divorce

Laura A. Ward

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>

 Part of the [Law Commons](#)

Recommended Citation

Laura A. Ward, *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).

Available at: <http://scholarship.law.unc.edu/nclr/vol67/iss6/12>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

Duties of Fairness Between Separating Spouses: North Carolina Continues to Find that all is Fair in Love and Divorce

The existence of a confidential relationship between a husband and wife in the process of separating has been discussed with some regularity by the courts during the past twenty years.¹ In an effort to recognize women as equal partners in marriage, North Carolina courts frequently have held separation agreements to be arm's length transactions with the parties on equal footing in the negotiations.² In *Avriett v. Avriett*³ the North Carolina Court of Appeals recently restated its now common approach to separation agreements—neither party owes a duty of fairness or full disclosure to the other.⁴ Dismissing a wife's claim for rescission of a separation agreement she entered with her husband, the *Avriett* court sent the message that it will not look beyond the face of a separation agreement for substantive or procedural fairness, and that the morals of the marketplace will be applied to this often emotion-fraught transaction.⁵

This Note outlines the position of the North Carolina courts toward separation agreements and contrasts it with the more sympathetic approaches used in other jurisdictions. It then argues that a separation agreement should not be treated as an arm's length transaction and that the special treatment afforded to some other types of contracts due to their unique characteristics⁶ should also be applied to agreements between separating spouses.

Lynda and Robert Avriett were married August 16, 1969.⁷ In late 1985 they began to experience marital problems and discussed the possibility of separating.⁸ Mr. Avriett, with the full knowledge of his wife, consulted a lawyer.⁹ The couple continued to discuss the terms of their separation, including custody of their son and division of the assets accumulated during their marriage. On October 8, 1985, the Avrietts discussed their tentative agreement with Mr. Avriett's lawyer, who prepared the eleven page separation agreement that both parties later signed.¹⁰

In the settlement agreement, Mrs. Avriett waived all rights to her hus-

1. See *infra* notes 39-68 and accompanying text.

2. See *infra* notes 39-49 and accompanying text.

3. 88 N.C. App. 506, 363 S.E.2d 875, *aff'd*, 322 N.C. 468, 368 S.E.2d 377 (1988).

4. See *infra* notes 19-22 and accompanying text.

5. See Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1458-60 (1984). Professor Sharp argues persuasively that the marketplace mentality is antithetical to the husband-wife relationship and that subjecting it to contract principles that govern relationships between strangers ignores the psychological and economic realities of the marital relationship.

6. See *infra* notes 90-98 and accompanying text (outlining how partnership agreements and antenuptial contracts are not treated as arm's length transactions and the parties are held to higher standards of conduct).

7. Record at 1, *Avriett v. Avriett*, 88 N.C. App. 506, 363 S.E.2d 875 (No. 8712DC291), *aff'd*, 322 N.C. 468, 368 S.E.2d 377 (1988).

8. *Id.*

9. *Id.* at 21.

10. *Id.* at 2.

band's military pension in consideration of his promise to pay her alimony.¹¹ Mr. Avriett never tried to conceal the existence of the pension from his wife. The agreement advised both parties that they had the right to separate attorneys and that by signing they were waiving that right as well as the right to set aside the agreement later on the basis of lack of representation.¹² It also recited that full disclosure had been made by both parties and that the settlement replaced each party's right to equitable distribution.¹³

Although Mrs. Avriett knew about the pension, she did not fully comprehend its value or know that, unlike alimony, it would not terminate upon her remarriage.¹⁴ Mrs. Avriett sought to have the separation agreement set aside on the basis of fraud.

She alleged that her husband had violated their confidential relationship by misrepresenting or concealing the advice he had received from his attorney regarding the value of his pension.¹⁵ The trial court granted defendant's motion for summary judgment on two grounds. First, defendant was represented by counsel with the full knowledge of his wife. The parties became adversaries while negotiating the terms of their separation agreement and defendant had no duty to disclose the information he received from his attorney to his wife.¹⁶ Second, prior to executing the separation agreement and property settlement, plaintiff was under a duty to read it for her own protection and was presumed to know the contents of the instrument. With reasonable diligence, plaintiff could have obtained separate legal advice¹⁷ on the terms and conditions of the agreement.¹⁸ From these conclusions of law, the trial court concluded that plaintiff had not established a prima facie case of fraud.

The court of appeals affirmed the grant of summary judgment and held that plaintiff's fraud allegation was fatally deficient for three reasons. First, the cause of action was based on the existence of a confidential relationship with its consequential duty to disclose. Because Mr. and Mrs. Avriett had begun negotiating the terms of their separation and because Mr. Avriett had consulted an attorney prior to the agreement with his wife's full knowledge, the court held

11. "In consideration of Wife's agreement to waive any and all interests in Husband's military retirement pension . . . Husband does hereby agree to pay . . . \$250 per month." *Id.* at 9.

12. *Id.* at 11; see *infra* note 17 and accompanying text.

13. "Both parties hereto agree that full and complete disclosure has been made with regard to all the assets of each party hereto . . . Both parties acknowledge that a mutually satisfactory division has been made between them of all assets that have been disclosed to each other." Record at 12.

14. *Id.* at 2. Alimony usually terminates upon the wife's remarriage or death. The pension would be considered property, not income. Once a portion of the pension was given to the wife, it would be hers to keep regardless of any subsequent change in circumstances. *Id.*

15. *Id.* at 2-3.

16. *Id.* at 22.

17. Plaintiff alleged that she thought her husband's attorney was representing them both. Neither the trial court nor the court of appeals addressed this allegation and there is no evidence that plaintiff had any grounds for her belief. However, the separation agreement itself could be interpreted as implying one attorney for both parties. "Both parties hereto have been advised that they have a right to seek *separate* attorneys . . . but they are agreed to the terms and conditions herein . . . and do not desire separate counsel and waive any issues or defenses based upon not having separate counsel." *Id.* at 11 (emphasis added).

18. *Id.* at 22.

that any confidential relationship had terminated before the agreement was executed.¹⁹

Second, plaintiff's fraud allegation was based on defendant's failure to reveal to her the advice he received from his attorney regarding the relative values of alimony and a property settlement that included a portion of his military pension. The court ruled that fraud cannot be based on a failure to disclose an opinion about a legal concept, nor will an agreement be set aside because the other party is ignorant of the law.²⁰

Finally, the court noted that the record clearly showed that plaintiff chose to execute the agreement without discussing it with a lawyer even though she knew defendant had consulted an attorney.²¹ She was informed that she could consult counsel and she expressly contracted not to use this failure to obtain separate counsel as a means of invalidating the agreement.²²

Judge Greene vigorously dissented, arguing for finding a confidential relationship between the spouses with its accompanying duties of fairness and full disclosure.²³ He insisted that neither separation²⁴ nor retention of counsel²⁵ is enough to create an adversarial relationship. He reasoned that the existence of a confidential relationship is a question of fact and that certain factors in this case indicated that such a relationship continued to exist.²⁶ Judge Greene considered summary judgment inappropriate because, when the evidence was viewed in the light most favorable to the plaintiff, a confidential relationship could have been found.²⁷

Until recently, the history of contracts between husbands and wives in North Carolina paralleled that of most states. The common law notion that a

19. *Avriett v. Avriett*, 88 N.C. App. 506, 508, 363 S.E.2d 875, 877, *aff'd*, 322 N.C. 468, 368 S.E.2d 377 (1988).

20. *Id.* at 508, 363 S.E.2d at 877-78.

21. *Id.* at 508, 363 S.E.2d at 878.

22. The court found nothing in the record to furnish a reason why Mrs. Avriett should not be bound to what she agreed. *Id.* at 509, 363 S.E.2d at 878.

23. *Id.* at 508-09, 363 S.E.2d at 878 ("[T]he relationship of husband and wife is 'the most confidential of all relationships.'" (Greene, J., dissenting) (quoting *Joyner v. Joyner*, 273 N.C. 189, 196, 159 S.E.2d 562, 567 (1968)).

24. *Id.* at 510, 363 S.E.2d at 879 (Greene, J., dissenting) (citing *Link v. Link*, 278 N.C. 181, 193, 179 S.E.2d 697, 704 (1971)).

25. *Id.* at 511, 363 S.E.2d at 879. In a recent case, the court of appeals interpreted *Joyner v. Joyner*, 264 N.C. 27, 140 S.E.2d 714 (1965), as holding that retention of counsel alone is enough to terminate a fiduciary relationship. *Harton v. Harton*, 81 N.C. App. 295, 297, 344 S.E.2d 117, 119 (1986). Judge Greene questioned this decision, emphasizing the portion of the *Joyner* court's holding which stated that a confidential relationship terminates when one party employs an attorney and negotiates through that attorney with the other spouse as adversary. *Avriett*, 88 N.C. App. at 511, 363 S.E.2d at 879 (Greene, J., dissenting).

26. *Avriett*, 88 N.C. App. at 511, 363 S.E.2d at 879 (Greene, J., dissenting). These factors included the parties' negotiating the terms prior to separation, the husband's attorney not attending the negotiations, and the wife not employing counsel at all. *Id.* (Greene, J., dissenting).

27. *Id.* (Greene, J., dissenting). Judge Greene concluded that it was for the jury to decide whether Mr. Avriett's alleged statement that "payment of alimony was the same thing as receiving a portion of his pension" constituted a statement of fact or one of opinion. *Id.* at 512, 363 S.E.2d at 880 (Greene, J., dissenting). Even if the husband's statement was an expression of opinion, "it would nonetheless support an action for fraud if a confidential relationship were found to exist between the parties." *Id.* (Greene, J., dissenting).

wife's identity merges with her husband's to form one legal entity initially prevented judicial recognition of any contract between husband and wife.²⁸

However, in 1912 the North Carolina Supreme Court held that separation agreements were not void as a matter of law.²⁹ To be enforceable, an agreement had to be fair to the wife, recognizing that she was not in an economically equal position with her husband. The state initially assumed the burden of ensuring that fairness.³⁰ In more recent cases, however, the courts have not rescinded separation agreements on fairness grounds alone.³¹

One of the major reasons for this lack of development of fairness standards was a statute, repealed in 1978, which required a court to examine privately the fairness of separation agreements to the wife.³² These privy examinations were little more than formalities but had a conclusive effect upon the validity of the agreement.³³ Repeal of this statute in 1978 led to judicial denial of even the limited protection provided by the privy examinations.³⁴ One commentator expressed the hope that repeal of the privy examination might free the courts for deeper inquiry.³⁵ This proved not to be the case³⁶ and though the privy examination statute did retard the growth of stricter standards regarding unfairness in separation agreements,³⁷ its repeal did not effect the expected change.

With repeal of the privy statute, the current law allows a married couple to

28. See Sharp, *Divorce and the Third Party: Spousal Support, Private Agreements, and the State*, 59 N.C.L. REV. 819, 827 (1981); Note, *Property Settlement or Separation Agreement: Perpetuating the Confusion*—Buffington v. Buffington, 63 N.C.L. REV. 1166, 1168 (1985).

29. Archbell v. Archbell, 158 N.C. 409, 413, 74 S.E. 327, 329 (1912).

30. See Ritchie v. White, 255 N.C. 450, 453, 35 S.E.2d 414, 415 (1945) ("There are three parties to a marriage contract—the husband, the wife, and the State."); Smith v. Smith, 225 N.C. 189, 194, 34 S.E.2d 148, 151 (1945) (circumstances surrounding the execution of the agreement must be fair and reasonable to the wife).

31. The courts continue to refer to a fairness standard in separation agreements but have not examined this standard in depth. See, e.g., Johnson v. Johnson, 67 N.C. App. 250, 255, 313 S.E.2d 162, 165 (1984); Murphy v. Murphy, 34 N.C. App. 677, 680, 239 S.E.2d 597, 599 (1977), *rev'd in part on other grounds*, 295 N.C. 390, 245 S.E.2d 693 (1978).

32. N.C. GEN. STAT. § 52-6 (repealed 1978) ("[N]or shall any separation agreement between husband and wife be valid . . . unless [it] is acknowledged before a certifying officer who shall make a private examination of the wife . . .").

33. Sharp, *supra* note 28, at 828-29, 833-34. In Biesecker v. Biesecker, 62 N.C. App. 282, 302 S.E.2d 826 (1983), the wife conveyed a deed to their marital home to her husband without consideration. Although the husband had counsel when he signed the deed and the wife did not, the conveyance was upheld on appeal because the deed was acknowledged before a certifying officer in accordance with section 52-6. *Id.* at 285, 302 S.E.2d at 828.

34. The repeal of the statute abolished any search for fairness that was previously required. Knight v. Knight, 76 N.C. App. 395, 397-98, 333 S.E.2d 331, 332-33 (1985) (now that the statute is repealed, contracts between husband and wife are enacted without providing the woman any extra protection; parties are on equal footing and the judge need not make an independent determination whether the agreement is fair). In dissent in *Avriett*, Judge Greene argued for a contrary interpretation. He believed that repeal of section 52-6 did not eliminate a court's duty to look into the fairness of separation agreements. *Avriett v. Avriett*, 88 N.C. App. 506, 510, 363 S.E.2d 875, 878-79 (Greene, J., dissenting), *aff'd*, 322 N.C. 468, 368 S.E.2d 377 (1988).

35. Sharp, *supra* note 28, at 834 ("With the repeal of the privy examination statute and its conclusive effect on findings of reasonableness and fairness, there exists for the first time in the state the opportunity for courts to refuse to become parties to overreaching or unfair separation agreements.").

36. See *supra* note 34 and accompanying text.

37. Sharp, *supra* note 28, at 836-37.

execute any separation agreement that is not inconsistent with public policy.³⁸ Given North Carolina's traditional refusal to examine closely the separation agreement once any indication of minimal procedural fairness is present, the result in *Avriett* is not surprising. North Carolina courts consider termination of a confidential relationship enough to satisfy procedural fairness. If no confidential relationship exists, the agreement will be enforced as valid.

Whether either party retains an attorney has been considered a major factor by the courts in determining whether a confidential relationship still exists between spouses. In *Joyner v. Joyner*³⁹ the North Carolina Supreme Court held that when plaintiff negotiated through an attorney and dealt with her husband as an adversary, the confidential relationship no longer existed.⁴⁰ The court also held that negotiation through an attorney negates any presumption that the husband has a dominating influence or that the wife did not know what she was doing.⁴¹ Later cases continued the presumption established in *Joyner* that presence of an attorney means the confidential relationship has been terminated.⁴² In *Johnson v. Johnson* the court indicated that it was inquiring into fairness,⁴³ yet the result was the same—validating the agreement on the basis that the complaining spouse had an attorney.

The presence of an attorney will terminate a confidential relationship, but lack of an attorney will not invalidate the agreement unless there are additional extenuating circumstances.⁴⁴ The North Carolina Supreme Court set aside a

38. 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.").

39. 264 N.C. 27, 140 S.E.2d 714 (1965).

40. *Id.* at 32, 140 S.E.2d at 719.

41. *Id.* *Joyner* was the first North Carolina case to discuss the presence of legal representation as a factor in determining the level of scrutiny that the court would undertake in determining fairness. Earlier cases discussed the trust and confidence that accompanies a marital relationship and presumed that the wife was dependent upon her husband. *See, e.g., Fulp v. Fulp*, 264 N.C. 20, 23, 140 S.E.2d 708, 711-12 (1965). In *Murphy v. Murphy*, 34 N.C. App. 677, 680-81, 239 S.E.2d 597, 599-600 (1977), *rev'd in part on other grounds*, 295 N.C. 390, 245 S.E.2d 693 (1978), the court reiterated that any confidential relationship terminates as soon as the complaining spouse obtains an attorney.

42. *E.g., Harton v. Harton*, 81 N.C. App. 295, 298, 344 S.E.2d 117, 119 (1986) (husband not under a duty to disclose borrowing against life insurance policy he assigned to wife under the separation agreement; parties lacked a confidential relationship and were adversaries because they had attorneys); *Winborne v. Winborne*, 41 N.C. App. 756, 759, 255 S.E.2d 640, 643 (husband had no duty to disclose his adulterous relationship, which might entitle wife to alimony under section 50-16.2, because wife had an attorney and parties negotiated as adversaries), *disc. rev. denied*, 298 N.C. 305, 259 S.E.2d 918 (1979).

43. 67 N.C. App. 250, 255, 313 S.E.2d 162, 165 (1984). ("Courts have thrown a cloak of protection around separation agreements and made it their business, when confronted, to see to it that they are arrived at fairly and equitably. . . . [R]elief will be granted if the settlement is manifestly unfair to a spouse because of the other's overreaching."). In *Johnson*, because both parties had lawyers, the court of appeals found the agreement fair even though the husband was threatening to expose the wife's unfaithfulness to members of the community. *Id.* at 255-56, 313 S.E.2d at 165. The court also found that there was no duress because Mrs. Johnson sat in a notary's office for 30 minutes waiting to sign the agreement without appearing to be upset. *Id.*

44. *See infra* note 49 and accompanying text. *Biesecker v. Biesecker*, 62 N.C. App. 282, 285, 302 S.E.2d 826, 828 (1983), illustrates this point. In *Biesecker* the wife deeded her entire interest in the marital residence to her husband without consideration when they separated, and 10 months later the couple resumed living together only to separate again in 1981. During their reconciliation,

separation agreement in *Eubanks v. Eubanks*⁴⁵ but the case involved egregious facts. The husband did not offer his wife an attorney or tell her that she needed one. The court found this omission, combined with the wife's mental problems (of which her husband was aware) and her minority status, sufficient to invalidate the agreement.⁴⁶ The court used forceful language, stating that the relationship between husband and wife was the most confidential of all relationships and transactions between them had to be fair and reasonable.⁴⁷ This language does not disguise the fact, however, that the dispositive factor in this case was the wife's minority status. There is no indication that the unfairness alone would have been enough to invalidate the agreement.⁴⁸

The general rule remains that the courts will not inquire into the fairness of separation agreements when it determines that the confidential relationship has ended. A lack of coercion and an opportunity to consult with an attorney are all that is required to terminate the confidential relationship.⁴⁹ *Avriett* is the most recent in a long line of cases establishing that any action indicating a less than trustful relationship, including employing an attorney, will be construed as ending the couple's confidential relationship along with its inherent duties of full disclosure and fairness.

Most states do not terminate separating couple's duty to each other as quickly as North Carolina. Some states provide by statute that a confidential relationship exists between the separating husband and wife.⁵⁰ In these states

Mr. Biesecker never reconveyed the title to his wife. When he filed for divorce, his wife requested rescission of the deed. *Id.* at 283, 302 S.E.2d at 827-828. Although Mrs. Biesecker did not have an attorney, the conveyance was upheld. *Id.* at 285, 302 S.E.2d at 828. The wife's claim that she did not understand her legal rights because she did not have an attorney was also dismissed, for "[a] person signing a written instrument is under a duty to read it for his own protection, and ordinarily is charged with the knowledge of its contents." *Id.* at 285, 302 S.E.2d at 828-29. Unlike *Eubanks*, no additional factors of fraud or duress were present. See *infra* notes 45-48 and accompanying text.

45. 273 N.C. 189, 159 S.E.2d 562 (1968).

46. *Id.* at 194-95, 159 S.E.2d at 566-67.

47. *Id.* at 195-96, 159 S.E.2d at 567. "To be valid, 'a separation agreement . . . must be in all respects fair, reasonable and just, and . . . entered into without coercion . . . and with full knowledge of all the circumstances, conditions, and rights of the contracting parties.'" *Id.* (quoting *Taylor v. Taylor*, 197 N.C. 197, 201, 148 S.E. 171, 173 (1929)).

48. Likewise, in *Link v. Link*, 278 N.C. 181, 179 S.E.2d 697 (1971), the court set aside the wife's conveyance of corporate stock to her husband made when she did not have an attorney. Again, however, the facts strongly suggested duress. The wife signed over securities to her husband, an experienced businessman. *Id.* at 191, 179 S.E.2d at 703. Emphasizing the husband's business acumen and his wife's inexperience, the court found a confidential relationship even though the parties already had separated at the time. *Id.* at 193, 179 S.E.2d at 704.

49. *Knight v. Knight*, 76 N.C. App. 395, 396, 333 S.E.2d 331, 332 (1985) (wife did not speak with an attorney but she had the opportunity to do so). The court in *Knight* held that "a separation agreement should be viewed today like any other bargained-for exchange between parties who are presumably on equal footing." *Id.* at 398, 313 S.E.2d at 333.

50. *E.g.*, ALA. CODE § 30-4-9 (1983) ("All contracts into which [husband and wife] enter are subject to the rules of law as to contracts by and between persons standing in a confidential relationship."); NEV. REV. STAT. § 123.070 (1985) (husbands and wives enter into contracts with each other "subject to general rules which control the actions of persons occupying relations of confidence and trust"); N.M. STAT. ANN. § 40-2-2 (1978) (contract between husband and wife subject "to the general rules of common law which control the actions of persons occupying confidential relations with each other"); OHIO REV. CODE ANN. § 3103.05 (Anderson 1980) (contract between husband and wife subject "to the general rules which control the actions of persons occupying confidential relations with each other").

any contract between married people, including a separation agreement, must satisfy the statutory requirements of full disclosure and fairness implicit in a confidential relationship.⁵¹ Other states have adopted a presumption of a confidential or fiduciary relationship through case law.⁵² In *Christian v. Christian*⁵³ the New York Court of Appeals set aside a separation agreement that heavily favored the husband.⁵⁴ The court refused to treat the separation agreement as an arm's length transaction: "Equity is so zealous [in surveillance of separation agreements] that a separation agreement may be set aside on grounds that would be insufficient to vitiate an ordinary contract."⁵⁵

Other states do not use presumptions to define the relationship but instead look at the circumstances of each case, categorizing them individually as confidential or arm's length.⁵⁶ Maryland, for example, does not presume the existence of a confidential relationship between husband and wife but considers several factors, including age, mental condition, education, business experience, and degree of dependence of the spouse in question to determine whether a confidential relationship exists.⁵⁷ If the confidential relationship is found to have terminated, the agreement is presumed valid unless shown to be unjust on its face.⁵⁸

51. See, e.g., *In re Kesler*, 59 Ohio Misc. 33, 38-40, 392 N.E.2d 905, 910-11 (1978) (Ohio statute governing contracts between husband and wife controls in a separation agreement).

52. See 1 A. LINDEY & L. PARLEY, *LINDEY ON SEPARATION AGREEMENTS AND ANTE-NUP-TIAL CONTRACTS* § 6.02 (1988) (law presumes that a "confidential relationship . . . exists between spouses [with] the attendant fiduciary duties of disclosure and fair dealing, particularly with regard to finances").

53. 42 N.Y.2d 63, 72, 365 N.E.2d 849, 855, 396 N.Y.S.2d 817, 823 (1977) ("Agreements between spouses, unlike ordinary business contracts, involve a fiduciary relationship requiring utmost good faith.") (citations omitted).

54. The agreement split the couple's individually owned stock in half, giving the husband 50% of the wife's stock, which was worth \$900,000. Although the wife received 50% of the husband's stock as well, his individual portfolio was worth only \$200,000. *Id.* at 67, 365 N.E.2d at 852, 396 N.Y.S.2d at 820.

55. *Id.* at 72, 365 N.E.2d at 855, 396 N.Y.S.2d at 824 (citations omitted); see also *Levine v. Levine*, 56 N.Y.2d 42, 47, 436 N.E.2d 476, 478, 451 N.Y.S.2d 26, 28 (1982) (fiduciary relationship between husband and wife calls for closer scrutiny of separation agreements and such contracts may be set aside in equity under circumstances that would be insufficient to nullify ordinary contracts).

56. See, e.g., *Koizim v. Koizim*, 181 Conn. 492, 495 n.1, 435 A.2d 1030, 1033 n.1 (1980) (confidential relationship found to exist because wife was accustomed to being guided by husband's judgment since he was a lawyer and banker; she was justified in placing confidence in him); *Castro v. Castro*, 508 So. 2d 330, 333-34 (Fla. 1987) (once the complaining spouse establishes that the agreement is unreasonable, a presumption of concealment arises; the defending spouse can rebut by showing full and fair disclosure or by showing that the complaining spouse had a general knowledge of the extent and character of the assets sufficient to provide a reasonable estimate of their value); *DePaul v. DePaul*, 287 Pa. Super. 244, 248-49, 429 A.2d 1192, 1194 (1981) (no confidential relationship found because the parties dealt on equal terms and there was no dependence on either side); see also *supra* notes 26-27 and accompanying text (Judge Greene, dissenting in *Avriett*, considered existence of confidential relationship a question of fact).

57. *Bell v. Bell*, 38 Md. App. 10, 15, 379 A.2d 419, 422 (1978). In *Bell* the court did not find a confidential relationship even though the husband was much better educated than the wife. Evidence that the wife had negotiated several changes in the agreement and questioned other provisions led the court to hold that the parties were on equal footing and that the wife lacked trust and confidence in her husband. *Id.*

58. *Id.* The presumption of validity, once established, is not easily rebutted. The *Bell* court found that giving up \$210,000 of property in exchange for \$45,000 in cash and property was not sufficiently unjust on its face to negate the presumption of validity established by lack of a confidential relationship. *Id.*

States with community property laws often define the relationship of husband and wife as encompassing a fiduciary duty.⁵⁹ In *Golder v. Golder*⁶⁰ the Idaho Supreme Court allowed the wife to modify provisions of a property settlement that the husband's attorney had drafted. The court held that the "marital relationship imposes the high duty of care of a fiduciary on each of the parties."⁶¹

Similarly, California courts have held that marriage partners owe fiduciary duties to one another at least with regard to the community property.⁶² The fiduciary relationship exists even if both sides have attorneys. In *Vai v. Bank of America*⁶³ the California Supreme Court noted that business partners are considered to have fiduciary duties to each other although each partner often has his own attorney and concluded that no less should be expected of a dissolving marriage partnership.⁶⁴ Every marriage is not, however, considered to encompass a fiduciary relationship. In *In re Marriage of Connolly*⁶⁵ the husband's failure to inform his wife of the market value of stock did not constitute concealment because the wife could have ascertained the value of the publicly traded stocks with very little effort.⁶⁶ Factors including the spouses' separate representation, their separate residences during the negotiations, and a finding that each party "pursued their individual and separate legal interests with enthusiasm,"⁶⁷ led the court to conclude that the relationship was completely adversarial.⁶⁸

Lack of an attorney does not necessarily invalidate separation agreements.⁶⁹ Even states that impose higher standards on spouses when negotiating

59. Imposition of a fiduciary duty may provide at least as much protection as a confidential relationship because a fiduciary duty lasts longer and is not as likely to dissolve as soon as the parties separate. Sharp, *supra* note 5, at 1422-23. For a comparison between common law and community property systems, see Comment, *The Development of Sharing Principles in Common Law Marital Property States*, 28 UCLA L. REV. 1269 (1981). See also Note, *Property Division and Alimony Awards: A Survey of Statutory Limitations on Judicial Discretion*, 50 FORDHAM L. REV. 415, 420-22 (1981) (surveying community property states and how each state treats alimony awards).

60. 110 Idaho 57, 714 P.2d 26 (1986).

61. *Id.* at 60, 714 P.2d at 29. The court further stated that the fiduciary relationship continues into negotiations and requires disclosure by both parties of all information within their knowledge. In *Golder* the husband concealed the value of the couple's property and led the wife to believe they were on the verge of bankruptcy when their net worth exceeded \$250,000. *Id.*

62. *Vai v. Bank of Am.*, 56 Cal. 2d 329, 337, 364 P.2d 247, 252, 15 Cal. Rptr. 71, 76 (1961) (husband's control of the community property continues by court decree, as does his fiduciary duty to make adequate disclosure of the nature and value of the property to his spouse until there has been a division of it by agreement).

63. 56 Cal. 2d 329, 364 P.2d 247, 15 Cal. Rptr. 71 (1961).

64. *Id.* at 338-39, 364 P.2d at 253, 15 Cal. Rptr. at 77 ("The dissolution of a partnership and attendant agreements respecting partnership property appear to be remarkably similar to the dissolution of the conjugal relation.").

65. 23 Cal. 3d 590, 591 P.2d 911, 153 Cal. Rptr. 423 (1979).

66. *Id.* at 598, 591 P.2d at 915, 153 Cal. Rptr. at 427.

67. *Id.* at 600, 591 P.2d at 916, 153 Cal. Rptr. at 428.

68. *Id.*; see also *Boeseke v. Boeseke*, 10 Cal. 3d 844, 849-50, 519 P.2d 161, 164-65, 112 Cal. Rptr. 401, 404-405 (1974) (husband's full listing of all property assets without complete disclosure of their value did not constitute fraud when wife accepted his offer without further investigation even though her attorney advised her against it; husband had no duty to evaluate the assets).

69. In North Carolina courts consider retention of an attorney as a dispositive factor; as soon as either party gets an attorney, both parties are relieved of the full disclosure duties that accompany a trusting relationship. See *supra* notes 39-42 and accompanying text.

separation agreements will not necessarily invalidate agreements just because one party does not have an attorney.⁷⁰ Likewise, the fact that the parties share an attorney does not necessarily mean the agreement is unfair. In *Levine v. Levine*⁷¹ one attorney represented both parties and prepared their separation agreement. Both parties knew the attorney, who was related to the husband by marriage. The New York Court of Appeals recognized the existence of a fiduciary relationship between the husband and wife and held that a separation agreement could be set aside in equity under circumstances that would be insufficient to nullify an ordinary contract.⁷² Although the absence of independent representation was a significant factor in determining whether the agreement was entered into freely, it did not alone provide a basis for rescission.⁷³ Unlike in *Avriett*, the attorney in *Levine* explicitly represented both parties, and the wife stated that she had "complete faith and trust in him."⁷⁴

Even if procedural fairness is met, including full disclosure, some states additionally mandate substantive fairness by statute in contracts between spouses.⁷⁵ The words of a statute do not necessarily indicate, however, whether courts truly require substantive fairness in separation agreements.⁷⁶ North Carolina's equitable distribution statute, for example, appears to mandate substantive fairness in property divisions.⁷⁷ That statute allows parties to make their own property distribution agreements "before, during, and after marriage" as long as the parties consider the agreements equitable.⁷⁸ Yet, as discussed above, North Carolina courts have given this language little force.⁷⁹ An examination of

70. See, e.g., *Lowery v. Lowery*, 195 Colo. 86, 87-88, 575 P.2d 430, 431 (1978) (insufficient basis to set aside agreement as unconscionable when husband, who did not have an attorney when he signed the separation agreement, later discovered he could have received a more favorable agreement).

71. 56 N.Y.2d 42, 436 N.E.2d 476, 451 N.Y.S.2d 26 (1982).

72. *Id.* at 47, 436 N.E.2d at 478, 451 N.Y.S.2d at 28.

73. *Id.* at 48, 436 N.E.2d at 478, 451 N.Y.S.2d at 28.

74. *Id.* at 49, 436 N.E.2d at 479, 451 N.Y.S.2d at 29. New York does require full disclosure, especially when only one party has an attorney; full disclosure can mean the difference in whether an agreement is enforced. "[W]hen there has been full disclosure between the parties, not only of all relevant facts but also of their contextual significance, . . . [the] courts should not intrude so as to redesign the bargain." *Christian v. Christian*, 42 N.Y.2d 63, 72, 365 N.E.2d 849, 855, 396 N.Y.S.2d 817, 823 (1977) (court will look for an inference or even a negative inference of overreaching, but if the execution is fair and includes full disclosure, no further inquiry will be made).

75. E.g., CONN. GEN. STAT. § 46b-66 (1986) (the court will inquire into "financial resources and actual needs of the spouses . . . in order to determine whether the agreement of the spouses is fair and equitable under all the circumstances"); HAW. REV. STAT. § 572-22 (Supp. 1988) (contract between spouses providing for support and maintenance in contemplation of divorce is valid but subject to court approval and modification from time to time as circumstances warrant); KAN. STAT. ANN. § 60-1610(b)(3) (1983) (separation agreement must be valid, just, and equitable to be incorporated into decree); WIS. STAT. § 767.255(11) (1980) ("Any written agreement . . . concerning any arrangement for property distributed [will be] binding upon the court [unless] the terms of the agreement are inequitable to either party.").

76. See Sharp, *supra* note 5, at 1444-47. Professor Sharp asserts that substantive fairness rarely is required. Even when states allow courts to set aside agreements as substantively unfair, courts rarely do so. Whenever an agreement is set aside as substantively unfair, it is usually the product of procedural unfairness (unfair bargaining, concealment, etc.) as well. *Id.*

77. N.C. GEN. STAT. § 50-20 (1987).

78. *Id.* § 50-20(d) ("distribution . . . in a manner deemed by the parties to be equitable . . . shall be binding" upon them).

79. See *supra* notes 38-49 and accompanying text.

case law is more instructive than relying on the text of the statute.

North Carolina and most other states set aside agreements if they are so unfair that they can be classified as unconscionable.⁸⁰ Unconscionability has both procedural and substantive requirements.⁸¹ Procedural unconscionability is evidenced by an absence of bargaining ability that does not fall to the level of incapacity or an abuse of process that does not rise to the level of misrepresentation or duress.⁸² Substantive unconscionability is marked by inherent unfairness in the terms or an unreasonable favoring of one party over the other.⁸³ A complaining party must show both aspects of unconscionability to invalidate an agreement, though generally the two are weighed together so that weakness in one can be offset by strength in the other.⁸⁴

The North Carolina Supreme Court has stated, "In determining whether a contract is unconscionable, a court must consider *all the facts and circumstances* of a particular case. If the provisions are viewed as so one-sided that the contracting party is denied any opportunity for a meaningful choice, the contract should be found unconscionable."⁸⁵ Although there is no reason for the North Carolina courts to deal more harshly with separation agreements than with any other agreement,⁸⁶ none of the North Carolina cases discussed above has set aside an agreement for unconscionability.⁸⁷ Because a finding of unconscionability requires both procedural unfairness and an unfair result,⁸⁸ unconscionability is unlikely to be found. Furthermore, North Carolina courts use a lenient standard of procedural fairness and do not consider substantive fairness at all in analyzing separation agreements. One commentator noted, "[U]nconscionability has been interpreted with considerably greater restraint in family law than, for example, in consumer law."⁸⁹

80. See *Brenner v. School House, Ltd.*, 302 N.C. 207, 213, 274 S.E.2d 206, 210 (1981); E. FARNSWORTH, *CONTRACTS* § 4.27 (1982). "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

81. For a general discussion of procedural and substantive unconscionability in commercial transactions, see Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

82. E. FARNSWORTH, *supra* note 80, § 4.28.

83. E. FARNSWORTH, *supra* note 80, § 4.28.

84. E. FARNSWORTH, *supra* note 80, § 4.28.

85. *Brenner v. School House, Ltd.*, 302 N.C. 207, 213, 274 S.E.2d 206, 210 (1981) (emphasis added).

86. *Blount v. Blount*, 72 N.C. App. 193, 195, 323 S.E.2d 738, 740 (1984) (a valid separation agreement is an enforceable contract between husband and wife and the same rules apply which govern the interpretation of contracts generally), *disc. rev. denied*, 313 N.C. 506, 329 S.E.2d 389 (1985).

87. See *supra* notes 38-43 and accompanying text. Some states have set aside separation agreements based on unconscionability. In *In re Marriage of Manzo*, 659 P.2d 669 (Colo. 1983), the Colorado Supreme Court held that an agreement could be set aside if unconscionable and that in order to determine unconscionability it would look at the economic circumstances of each party resulting from the agreement and knowledge of the opposing party. *Id.* at 673.

88. Sharp, *supra* note 5, at 1447 (citing a number of jurisdictions in which evidence of overreaching, in addition to terms unreasonably favorable to one party, resulted in the invalidation of agreements).

89. Sharp, *supra* note 5, at 1447.

North Carolina is more absolutist than most states both in defining when a confidential relationship terminates and in refusing to look beyond the face of the agreement for underlying procedural or substantive unfairness. This seems at odds with statutory treatment in North Carolina of other areas in which contracts are made under special circumstances. One such special circumstance concerns contracts made between partners in a partnership. Judicial treatment of these contracts is enlightening when considering the validity of a contract between husband and wife.⁹⁰ Good faith and disclosure duties among business partners continue past formal dissolution and throughout the winding up or liquidation phase.⁹¹ Partners are statutorily obligated to disclose fully all information to their copartners,⁹² and this obligation continues until dissolution is complete.⁹³ The reason that this duty exists is that the morals of the marketplace are inappropriate for any enterprise that requires a duty of the finest loyalty.⁹⁴ Such loyalty is required in relationships when trust and personal dealings are both common and necessary.⁹⁵ There is social pressure on the parties to continue to work together to achieve a settlement which carries with it a message to trust and rely on the other party's good will in such negotiations.⁹⁶ This duty has been recognized by courts when dealing with partnership transactions and should be recognized when dealing with an agreement between spouses as well, for surely the marital relationship involves the finest loyalty. Premarital agreements are also unenforceable absent full disclosure and fairness.⁹⁷ Given the relationship's history of dependence and trust, a separation agreement should merit at least the same standard.⁹⁸

90. See *supra* notes 62-64 and accompanying text (same comparison used by a California court).

91. Sharp, *supra* note 5, at 1422-23.

92. N.C. GEN. STAT. § 59-50 (1987) ("Partners shall render on demand true and full information of all things affecting the partnership to any partner. . .").

93. *Id.* § 59-60 ("On dissolution the partnership is not terminated but continues until the winding up of partnership affairs is completed."); see *Compton v. Compton*, 101 Idaho 328, 335, 612 P.2d 1175, 1183 (1980) ("Like a business partner, each spouse is free to adopt a position favorable to himself or herself regarding the property's valuation . . . [but] not free, however, to resolve such issues unilaterally by concealing the very existence of particular items or amounts of property.").

94. Sharp, *supra* note 5, at 1424 (citing *Meinhard v. Salmon*, 249 N.Y. 458, 463-64, 164 N.E. 545, 546 (1928)).

95. Sharp, *supra* note 5, at 1405-07.

96. A. LINDEY & L. PARLEY, *supra* note 52, § 6.03.

97. Haskell, *The Premarital Estate Contract and Social Policy*, 57 N.C.L. REV. 415, 415-19 (1979). Professor Haskell, referring to antenuptial contracts that anticipate death as well as divorce, argues that even full disclosure is not enough without substantive fairness at the time of the spouse's death. *Id.* at 419. The Uniform Premarital Agreement Act, adopted in North Carolina at N.C. GEN. STAT. Ch. 52B (1987), provides that the agreement will not be enforced if unconscionable when made and if a party was not provided with fair and reasonable disclosure of the property, did not waive full disclosure, and did not have or could not have had an adequate knowledge of the property. *Id.* § 52B-7(a)(2).

98. See *In re Marriage of Manzo*, 659 P.2d 669, 675 (Colo. 1983). The Colorado court recognized that the standard must be more protective of parties in separation agreements than in antenuptial contracts. The reason for the additional examination was stated as a public policy concern for safeguarding the interests of a spouse whose consent to an agreement may have been obtained under more emotionally stressful circumstances, especially if the spouse was unrepresented by counsel. *Id.*; see also Sharp, *supra* note 5, at 1427 n.124 (arguing that the standard of disclosure used in antenuptial agreements also should prevail in separation contracts).

Separation agreements are clearly different from other contracts between strangers or businesspersons. They are negotiated under conditions of extraordinary stress and deal with issues of deep personal significance.⁹⁹ The parties are uniquely positioned to exploit each other's psychological dependencies and weaknesses.¹⁰⁰ Other states have recognized this¹⁰¹ by continuing a presumption of confidentiality and trust and mandating full disclosure between couples throughout the separation negotiations.¹⁰² At a minimum the nature of the relationship suggests that summary judgment rarely will be appropriate, since the court must delve into individual relationships to decide issues of dependence, trust, and fairness that may not be ascertainable on the face of an agreement. One commentator has suggested that treating separation agreements as arm's length transactions ignores the fact that many married women are still financially dependent upon their husbands and thus in need of state protection.¹⁰³ By contrast, even retail buyers appear to have more protection from burdensome agreements than does a spouse who has been married for a long time.¹⁰⁴

North Carolina courts have failed to realize what most other jurisdictions accept—separation agreements are not like other contracts. Employing an attorney should not presumptively establish the end of a confidential relationship with its duties of full disclosure.

With court dockets already overcrowded, some might argue that in-depth, substantive examination will be unduly burdensome.¹⁰⁵ Most other states are able to ensure that certain minimal standards of procedural fairness including

99. Sharp, *supra* note 5, at 1406.

100. Sharp, *supra* note 5, at 1406.

101. See *Casto v. Casto*, 508 So. 2d 330, 334 (Fla. 1987) ("Courts . . . must recognize that parties to a marriage are not dealing at arm's length, and, consequently, trial judges must carefully examine the circumstances to determine the validity of these agreements."); *Christian v. Christian*, 42 N.Y.2d 63, 65, 365 N.E.2d 849, 851, 396 N.Y.S.2d 817, 819 (1977) (when dealing with a separation agreement the court will not limit its inquiry into fairness as it would in a contract between other persons).

102. See *supra* notes 50-74 and accompanying text.

103. See Haskell, *supra* note 97, at 426. Unlike Professor Haskell, most scholars tend to regard judicial review as an unnecessary vestige of a paternalistic legal system that creates opportunities for excessive subjectivity in the exercise of judicial discretion and undermines the reasonable expectation of the parties in the finality of their agreement. Sharp, *supra* note 5, at 1403; Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 993 (1979) (judicial approval may protect people from their own ignorance and also might be thought to prevent unfair results, but in reality the court merely rubberstamps the agreement; usually the couple is similarly educated and each is able to protect his or her own interests). However, this position ignores the fact that many women are not as well educated as their husbands and that women are still more likely to remain at home with young children.

One study showed that women, after divorce, experience a drastic decline in their standard of living (an average of 73%) while men actually improve their standard of living (average of 42%) relative to their needs. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1265-66 (1981). "Old-fashioned norms of redistributive justice and simple fairness seem more appropriate than current norms of post divorce self-sufficiency" for women who have been married for a long time and do not work outside the home. *Id.* at 1267.

104. *E.g.*, N.C. GEN. STAT. § 25A-43(b) (1986) (affords a retail customer who claims that an agreement is unconscionable a reasonable opportunity to present evidence as to the setting, purpose, and effect of the agreement to aid the court in its determination of whether the agreement is unconscionable).

105. See Mnookin & Kornhauser, *supra* note 103, at 993 (discussing the need to find a way to

full disclosure have been met; North Carolina could do the same. In addition, not every agreement would require extensive examination—only those in which there is suggested a lack of the highest degree of fairness.¹⁰⁶ This approach appears fairer in view of the inadequacies of the current system to recognize that a separating couple's interests are not always well-represented in an arm's length transaction.¹⁰⁷

LAURA A. WARD

bring only the unequal bargaining cases to the court's attention without having to sift through all agreements).

106. The court could look for an inference or even a negative inference of overreaching, but if the execution is fair and includes full disclosure, no further inquiry would be made. *Christian v. Christian*, 42 N.Y.2d 63, 73, 365 N.E.2d 849, 856, 396 N.Y.S.2d 817, 824 (1977).

107. The current system does not provide procedural fairness. "In operation, if not by definition, the goal of the adversary process is to pursue the interests of one's client in a rather single-minded fashion, without regard to fairness." Sharp, *supra* note 28, at 820 n.4. It does not provide for substantive fairness either. "[F]or all its aims at fairness, the current *laissez-faire* system of divorce is taking a high economic casualty toll among women and children." Weitzman, *supra* note 103, at 1266.