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Property Settlement or Separation Agreement: Perpetuating the Confusion--Buffington v. Buffington

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Property Settlement or Separation Agreement: Perpetuating the Confusion—*Buffington v. Buffington*

Domestic law in North Carolina has changed dramatically since 1867 when the North Carolina Supreme Court recoiled at the idea of a "separation agreement," which "would virtually annul our marriage laws, and make the relation of husband and wife a mere trade or bargain, dependent upon their caprice."[1] Over time, the courts and the legislature have come to accept as valid separation agreements between spouses.[2] In 1981 North Carolina joined other common-law states by adopting a system for equitable distribution of property upon divorce.[3] Equitable distribution statutes reflect the growing view that marriage is a partnership, and that if a marriage ends, a fair and comprehensive system should govern the economic division of property.[4]

In *Buffington v. Buffington*[5] the North Carolina Court of Appeals tried to continue North Carolina's progression from outdated common law to modern policies governing marriage.[6] The court interpreted North Carolina General Statutes section 50-20(d)[7] of the equitable distribution statute to reject the former public policy rule that a property agreement between spouses was invalid unless the parties were actually separated.[8] In its brief opinion, the *Buffington* court opened a Pandora's box of problems for drafters of marital agreements by committing the common mistake of ignoring the distinction between "property settlements" and "separation agreements."[9] In addition, the court failed to consider the potential conflict between its holding in *Buffington* and other recent

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1. Collins v. Collins, 62 N.C. (Phil. Eq.) 153, 159 (1867).

2. *See infra* notes 25-38 and accompanying text.

3. Act of July 3, 1981, ch. 815, 1981 N.C. Sess. Laws 1184 (codified as amended at N.C. GEN. STAT. § 50-20 (1984)). Mississippi is the only common-law property state that has not yet adopted an equitable distribution system. *See* Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1423 n.103 (1984). Eight states (Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington) have community property laws. *See Family Law I: Property Division upon Divorce*, 1983 ANN. SURV. AM. L. 973, 973-74 n.3 (1984).

4. Sharp, *supra* note 3, at 1455; *see also* Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C.L. REV. 247, 247 (1983) (Equitable distribution systems reflect the concept of marriage as "a shared enterprise to which both spouses make valuable contributions.").

5. 69 N.C. App. 483, 317 S.E.2d 97 (1984).

6. *Id.* at 488, 317 S.E.2d at 100. Applying rules of statutory construction, the court held that the legislature had "manifested a clear intent to change the former [common-law] rule." *Id.*

7. N.C. GEN. STAT. § 50-20(d) (1984) provides:

> Before, during and after marriage the parties may by written agreement, duly executed and acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1, or by a written agreement valid in the jurisdiction where executed, 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.

8. *Buffington*, 69 N.C. App. at 488, 317 S.E.2d at 100. The court used the term "property settlement" in its discussion of the former common-law rule. For a criticism of this phrasing, see *infra* notes 71-75 and accompanying text.

9. *See infra* notes 39-44 and accompanying text.

North Carolina decisions.[10]

The facts of *Buffington* were relatively simple. The Buffingtons were married on June 13, 1970.[11] They subsequently experienced marital problems and executed a separation agreement on November 12, 1981.[12] After signing the agreement, both spouses continued to reside in the marital home until November 30, 1981.[13] Under the terms of the separation agreement, Mrs. Buffington was to convey her rights in five real estate properties to Mr. Buffington in exchange for Mr. Buffington's payment of $60,000.[14] On December 10, 1982, Mr. Buffington filed suit for divorce and specific performance of the separation agreement.[15] Mrs. Buffington did not contest the divorce, but counterclaimed for equitable distribution under section 50-20, alleging that the separation agreement was void.[16] After obtaining an absolute divorce, both parties moved for summary judgment on defendant wife's counterclaims. The trial court found the agreement valid and denied defendant's motion.[17]

On appeal[18] defendant based her argument on long standing public policy that voided a separation agreement unless the parties were separated at the time they executed the agreement or planned to separate immediately after its execution.[19] Defendant argued that by referring to North Carolina General Statutes sections 52-10 and 52-10.1, the requirements in section 50-20(d) implicitly affirmed existing public policy rules governing separation agreements.[20] Plaintiff argued that the clear language of section 50-20(d) explicitly approved property

10. *See infra* notes 82-88 and accompanying text.

11. Record at 1.

12. *Id.* The parties captioned their contract of November 12, 1981, as a "Separation Agreement." *Id.* at 4.

13. In the original complaint, Mr. Buffington, plaintiff, alleged that he "allowed" defendant to remain in the house until she made other arrangements. *Id.* at 1. Defendant described the 18-day period between November 12 and November 30, 1981, quite differently. She mentioned common displays of affection and one occasion of sleeping in the same bedroom. Brief for Defendant-Appellant at 14.

14. Record at 4-8. Defendant also waived any rights she might have had for alimony or support payments from plaintiff. *Id.* at 13.

15. In the alternative, plaintiff claimed damages for defendant's breach of the agreement. *Buffington*, 69 N.C. App. at 484, 317 S.E.2d at 98.

16. *Id.*

17. *Id.*

18. Before reaching the merits of the case, the court of appeals first addressed some procedural issues. *Id.* at 485-86, 317 S.E.2d at 98-99. The court noted that the denial of summary judgment was a proper order for appeal because it disposed of an issue that affected defendant's substantial rights. The court also recognized that defendant had failed to compile her record for appeal in the proper form. Because of "the importance of the issues presented," however, the court used its discretionary power to consider the appeal. *Id.*

19. Brief for Defendant-Appellant at 8-11. *See* 1 A. LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 4, at 10 (rev. ed. 1983). Defendant also raised the question whether the parties had actually separated before November 30, 1981. Brief for Defendant-Appellant at 11-14. This issue, however, was a question of fact and would not have been properly raised in defendant's summary judgment motion.

20. Brief for Defendant-Appellant at 14-19; *see also* Note, *The North Carolina Act for Equitable Distribution of Marital Property*, 18 WAKE FOREST L. REV. 735, 738 (1982) (Under N.C. GEN. STAT. § 50-20(d), "the key to establishing a valid separation agreement is physical separation."). N.C. GEN. STAT. § 52-10 (1984) provides, in part, that "contracts between husband and wife not inconsistent with public policy are valid." N.C. GEN. STAT. § 52-10.1 (1984) is a general authorization for married couples to execute separation agreements not inconsistent with public policy.

settlements without requiring immediate separation of the spouses.[21] Plaintiff also argued that his interpretation of section 50-20(d) was consistent with existing law on property distribution.[22] The court of appeals accepted plaintiff's basic interpretation of section 50-20(d) and held that "the public policy of our state, as expressed by G.S. § 50-20(d), permits spouses to execute a property settlement at any time, regardless of whether they separate immediately thereafter or not."[23] Based on this finding, the court affirmed the denial of defendant's summary judgment motion and barred her from equitable distribution of the marital property.[24]

The common-law fiction that a wife's identity merged with her husband's and made the couple "one person" initially prevented judicial acceptance of any contract between a husband and wife.[25] Although by the late nineteenth century courts generally allowed married parties to contract with each other, a large degree of judicial hostility to separation agreements remained.[26] In the 1912 case of *Archbell v. Archbell*,[27] the North Carolina Supreme Court finally held that separation agreements between spouses were not void as a matter of law.[28] The court held, however, that separation agreements were valid only under certain conditions. The *Archbell* case established the rule that separation of the parties must occur prior to or immediately after the agreement's execution for the agreement to be valid.[29] This requirement reflected the widespread disapproval of agreements facilitating divorce and agreements contingent upon divorce.[30] This public policy, which voided any agreement made in contemplation of divorce and without separation, prevailed in most states throughout most of

21. Brief for Plaintiff-Appellee at 6-9. Plaintiff argued that the references in § 50-20(d) to §§ 50-10 and 50-10.1 only incorporated technical requirements for properly executed agreements. *Id.* at 8.

22. *Id.* at 9-10. Plaintiff claimed that defendant's argument consistently ignored the distinction between separation agreements and property settlements. *Id.* at 9; *see infra* notes 71-75 and accompanying text.

23. *Buffington*, 69 N.C. App. at 488, 317 S.E.2d at 100.

24. *Id.*

25. *See* 2 R. LEE, NORTH CAROLINA FAMILY LAW § 188, at 465 (4th ed. 1980); Sharp, *Divorce and the Third Party: Spousal Support, Private Agreements, and the State*, 59 N.C.L. REV. 819, 827 (1981); *see also* Comment, *An Analysis of the Enforceability of Marital Contracts*, 47 N.C.L. REV. 815, 816-17 (1969) (theory behind unity of married couple was fear that the husband was a dominating influence on the wife).

26. *See* Sharp, *supra* note 25, at 828.

27. 158 N.C. 409, 74 S.E. 327 (1912).

28. *Id.* at 413, 74 S.E. at 329.

29. *Id.*; *see* 2 R. LEE, *supra* note 25, § 188, at 469-70. In Smith v. Smith, 225 N.C. 189, 194, 34 S.E.2d 148, 151 (1948), the court restated the *Archbell* requirements for a valid separation agreement:

(1) Existing separation or separation immediately following the execution of the deed,
(2) Some adequate reason for executing a separation agreement other than the parties' "mere volition,"
(3) Circumstances surrounding the execution which were fair and reasonable to the wife,
(4) Statutory formalities.

30. *See* Sharp, *supra* note 25, at 830-31; 24 AM. JUR. 2D *Divorce and Separation* § 823 (1983); *see also* Matthews v. Matthews, 2 N.C. App. 143, 147, 162 S.E.2d 697, 699 (1968) ("[T]he law now looks with disfavor upon an agreement which will encourage or bring about a destruction of the home."). The requirement of immediate separation also meets the need for consideration in a valid separation agreement. 1 A. LINDEY, *supra* note 19, § 4, at 6.

the twentieth century.[31] Following a 1970 Florida case,[32] courts in many jurisdictions began to apply the "contemplating divorce" standard more loosely to antenuptial agreements and to agreements made during the marriage but without immediate separation.[33] In North Carolina, courts tended to invalidate only the more outrageous contracts on the basis of contemplating divorce.[34] The policy was not abandoned[35] however, and the requirement of immediate separation for a valid separation agreement remained entrenched in North Carolina law.[36] Thus, although the law eventually favored separation agreements,[37] until *Buffington* it still forbad separation agreements executed without immediate separation.[38]

Throughout the development of law defining and enforcing marital contracts, courts and advocates have repeatedly confused the terms "separation agreement" and "property settlement."[39] The distinctions between a true separation agreement and a true property settlement are simple. A separation agreement is a contract between spouses providing for marital support rights and is executed while the parties are separated or are planning to separate immediately.[40] A property settlement provides for a division of real and personal property held by the spouses.[41] The parties may enter a property settlement at any time, regardless of whether they contemplate separation or divorce.[42] The term "postnuptial agreements" generally is used to describe property division contracts or property transfers executed by spouses who have no intention of separating.[43] North Carolina follows the practice of most states and treats "separation agreements" and "property settlements" differently in various

31. *See* Klarman, *Marital Agreements in Contemplation of Divorce*, 10 U. MICH. J.L. REF. 397, 397-98 (1977); Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169, 1259 (1974).

32. Posner v. Posner, 233 So. 2d 381, 384-85 (Fla. 1970).

33. *See* 2 R. LEE, *supra* note 25, § 183.1, at 446-48; Klarman, *supra* note 31, at 399-402; Note, *supra* note 20, at 737; 24 AM. JUR. 2D *Divorce and Separation* § 825 (1983).

34. Sharp, *supra* note 25, at 831-32; *see also* Howland v. Stitzer, 236 N.C. 230, 72 S.E.2d 583 (1952) (applying New York law, court held that agreement intended to smooth litigation process would not be per se void for contemplating divorce).

35. *See, e.g.*, Thompson v. Thompson, 70 N.C. App. 147, 157, 319 S.E.2d 315, 321 (1984) ("It is well established that a promise or contract looking to the future separation of a husband and wife will not be sustained.").

36. *See* 2 R. LEE, *supra* note 25, § 188, at 470-71; 1 A. LINDEY, *supra* note 19, § 4, at 10-11; Sharp, *supra* note 25, at 831-32; Merritt, *Changing Marital Rights and Duties By Contract: Legal Obstacles in North Carolina*, 13 WAKE FOREST L. REV. 85, 99 (1977).

37. Sharp, *supra* note 25, at 830.

38. *See infra* notes 60-66 and accompanying text.

39. *See* Sharp, *supra* note 25, at 826-27.

40. *See id.* at 826.

41. *Id.*; 2 R. LEE, *supra* note 25, § 187.

42. *See* 2 R. LEE, *supra* note 25, § 187, at 463-64; Sharp, *supra* note 25, at 826; 24 AM. JUR. 2D, *Divorce and Separation* § 817 (1983); *see also* Shoaf v. Shoaf, 282 N.C. 287, 192 S.E.2d 299 (1977) (lower courts misled by assuming that support payments and property settlement fell into same category); Stanley v. Cox, 253 N.C. 620, 117 S.E.2d 826 (1961) (noting clear distinction between consideration of property settlement and alimony provisions).

43. *See* 2 R. LEE, *supra* note 25, § 186; 1 A. LINDEY, *supra* note 19, §§ 3-4. Antenuptial agreements—agreements in which prospective spouses fix their respective rights in each other's property prior to their marriage—fall under the same policy guidelines as postnuptial agreements. *See* 2 R. LEE, *supra* note 25, §§ 179, 186; Note, *supra* note 20, at 737.

circumstances.[44]

Although the substance and analysis of a separation agreement and a property settlement should be distinct, the provisions often are confused when contained in a single document.[45] Usually the parties will refer to the entire document as a "separation agreement," even though its provisions cover both support rights and property rights.[46] Gradually, North Carolina courts have developed rules distinguishing between the support provisions and the property settlement provisions found in most separation agreements. These distinctions have been particularly important with regard to issues of modification[47] and reconciliation.[48] The North Carolina Supreme Court has recently addressed both issues.[49]

Prior to 1983 North Carolina courts had a settled approach to dealing with the modifiability of provisions in a separation agreement.[50] First, courts distinguished between court-approved agreements, which they treated as contracts, and court-adopted agreements, which they treated as judgments.[51] If a court-

44. *See* Shoaf v. Shoaf, 282 N.C. 287, 192 S.E.2d 299 (1972); Stanley v. Cox, 253 N.C. 620, 117 S.E.2d 826 (1961). The major technical distinctions between the effect of a separation agreement and a property settlement are as follows: (1) Tax Consequences—support payments made pursuant to a separation agreement are considered as alimony and are deductible for supporting spouse, but payments in property settlement are not; (2) Support payments in separation agreement normally will not survive past the death of either spouse, but payments or conveyances in property settlement usually will survive either party's death; (3) Alimony payments in a separation agreement will not be discharged in bankruptcy but property settlement liabilities may be discharged; (4) Reconciliation and resumed cohabitation of parties will rescind executory provisions of a separation agreement but will have no effect on property settlements. *See* 1 A. LINDEY, *supra* note 19, § 3, at 15-17; Sharp, *supra* note 25, at 826 n.38; 24 AM. JUR. 2D *Divorce and Separation* § 817 (1983).

45. *See* Sharp, *supra* note 25, at 826-27; *see also* 2 R. LEE, *supra* note 25, § 187, at 461 (common practice upon marriage breakup for parties to make contract covering every subject upon which they can agree).

46. 2 R. LEE, *supra* note 25, § 187, at 462. The Buffingtons' agreement covered everything from a waiver of alimony to property division to custody of their golden retriever. Record at 4-14, *Buffington*.

47. *See infra* notes 56-59 and accompanying text.

48. *See infra* notes 60-66 and accompanying text.

49. Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983) (modifiability of separation agreements); Murphy v. Murphy, 295 N.C. 390, 245 S.E.2d 693 (1977) (effect of reconciliation on separation agreements).

50. *See* 2 R. LEE, *supra* note 25, § 187, at 462-63. *But cf.* Walters v. Walters, 307 N.C. 381, 386, 298 S.E.2d 338, 341-42 (1983) (recognizing "great confusion" in area of family law dealing with separation agreements presented to the court). Until the *Walters* decision, a "consent judgment" in North Carolina was "basically nothing more than a private contract between [spouses] that ha[d] been entered upon the records of, and received the stamp of approval from a court." Sharp, *supra* note 25, at 826.

51. Rowe v. Rowe, 305 N.C. 177, 183, 287 S.E.2d 840, 844 (1982); White v. White, 296 N.C. 661, 665, 252 S.E.2d 698, 700-01 (1979); Bunn v. Bunn, 262 N.C. 67, 69-70, 136 S.E.2d 240, 243 (1964); Britt v. Britt, 36 N.C. App. 705, 708, 245 S.E.2d 381, 383 (1978). In general, the relationship between a separation agreement and the divorce decree of a court produces one of three results. First, the agreement may survive the decree as a private contract. The parties can enforce the agreement as they would enforce any contract and can modify the terms of the agreement only if both parties consent. Second, the parties can present their agreement to the court for approval. These court-approved agreements also leave the parties with basic contract rights. The court cannot modify the agreement without consent of both parties, but court approval does have res judicata effect as to the absence of fraud and the fairness of the agreement. Last, the agreement may be adopted by the court so that the parties' contract rights are extinguished and the court replaces the contract provisions with its own judgment. Merger or adoption are the common terms used to describe this relationship. Support provisions that are merged or adopted by the court are subject to modification

adopted agreement contained separable and independent provisions, a court could not modify the property division terms, but could modify the alimony provisions.[52] If the support provisions and the property distribution provisions constituted reciprocal consideration for each other, the court-adopted agreement became "integrated."[53] No provision of an integrated agreement was subject to modification without the parties' consent.[54] Last, if a court could not determine whether the parties intended that their agreement be integrated, the court would presume that the provisions were separable.[55]

The North Carolina Supreme Court recently modified these well-settled rules. In *Walters v. Walters*[56] the supreme court turned settled law on its head in an attempt to "simplify" the issues surrounding the modifiability of separation agreements.[57] The decision in *Walters* established a new rule: Any separation agreement brought before a court loses its status as a private contract and becomes a judgment of the court.[58] Thus, all provisions of court-approved and court-adopted separation agreements are now subject to modification regardless of whether the support and property division sections are reciprocal.[59]

Another shift in the law governing marital agreements involved the effect of reconciliation and the effect of cohabitation by separated spouses on the validity of separation agreements. The well-established rule in North Carolina had been that "where a husband and wife enter into a separation agreement and thereafter become reconciled and renew their marital relations, the agreement is termi-

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by the court without the consent of both parties. *See* W. WADLINGTON & M. PAULSEN, DOMESTIC RELATIONS 560 (3d ed. 1978); Sharp, *supra* note 25, at 848.

52. White v. White, 296 N.C. 661, 666, 252 S.E.2d 698, 701 (1979); Holsomback v. Holsomback, 273 N.C. 728, 732, 161 S.E.2d 99, 102-03 (1968); Bunn v. Bunn, 262 N.C. 67, 70, 136 S.E.2d 240, 243 (1964); Britt v. Britt, 36 N.C. App. 705, 708-09, 245 S.E.2d 381, 383 (1978); 2 R. LEE, *supra* note 25, § 187, at 462-63; Sharp, *supra* note 25, at 863. *See* Rowe v. Rowe, 305 N.C. 177, 183-84, 287 S.E.2d 840, 844 (1982).

53. *See* Sharp, *supra* note 25, at 851-52.

54. White v. White, 296 N.C. 661, 666-67, 252 S.E.2d 698, 701 (1979); Bunn v. Bunn, 262 N.C. 67, 70, 136 S.E.2d 240, 243 (1964); Britt v. Britt, 36 N.C. App. 705, 711, 245 S.E.2d 381, 384 (1978); *see* Sharp, *supra* note 25, at 851-52, 863.

55. White v. White, 296 N.C. 661, 672, 252 S.E.2d 698, 704 (1979); *see* Rowe v. Rowe, 305 N.C. 177, 184, 287 S.E.2d 840, 845 (1982); Walters v. Walters, 54 N.C. App. 545, 550, 284 S.E.2d 151, 155 (1981), *rev'd*, 307 N.C. 381, 298 S.E.2d 338 (1983); *see also* Sharp, *supra* note 25, at 863-64 (Although it is easy to indicate that provisions in a separation agreement are intended to be separable, "[u]nfortunately these distinctions are frequently not made.").

56. 307 N.C. 381, 298 S.E.2d 338 (1983).

57. *Id.* at 386, 298 S.E.2d at 342.

58. *Id.*

59. *Id.* The court explained that this was not a harsh rule because parties could protect the contract status of their separation agreement by not bringing it before the court. *Id.* In a case decided the same day as *Walters*, the supreme court made it clear that the enforceability of a separation agreement through the court's contempt power depended on its inclusion in a court-ordered judgment. Henderson v. Henderson, 307 N.C. 401, 407, 298 S.E.2d 345, 349 (1983). Even a separation agreement kept out of court initially could become part of a court order for specific performance and could then be enforced by contempt proceedings. *Id.* at 407 n.1, 298 S.E.2d at 350 n.1; *see also* Harris v. Harris, 307 N.C. 684, 300 S.E.2d 369 (1983) (court can hold person in contempt for past violation of specific performance order); Moore v. Moore, 297 N.C. 14, 252 S.E.2d 735 (1979) (wife given remedy of specific performance for husband's failure to make payments required by separation agreement); Erhart v. Erhart, 67 N.C. App. 189, 312 S.E.2d 534 (1984) (court cannot alter terms of private agreement between spouses but it can alter amount ordered in specific performance remedy).

nated for every purpose insofar as it remains executory."[60] In practice, reconciliation affects property settlement provisions differently from support provisions in a separation agreement. Because the parties usually execute a property settlement provision or a conveyance of property shortly after signing the separation agreement, a subsequent reconciliation will not affect such "executed" provisions.[61] In a 1976 case, *In re Estate of Adamee*,[62] the North Carolina Supreme Court held that "reconciliation" occurred when the couple resumed living together in their marital home and held themselves out as husband and wife.[63] Two years after *Adamee*, in *Murphy v. Murphy*,[64] the supreme court reaffirmed a 1932 case holding that sexual intercourse between separated spouses will have the effect of a reconciliation "whether the resumption of sexual relations was 'casual', 'isolated', or otherwise."[65] The *Murphy* holding made North Carolina the only state to define reconciliation in terms of either living together or engaging in sex.[66]

While the North Carolina courts struggled to deal with the definition and effects of separation agreement provisions, the North Carolina General Assembly made a major change in property division law by passing an equitable distribution act.[67] Section (d) of the act allows parties to make their own property distribution agreement "before, during and after marriage."[68] Such property settlements bar application of the equitable distribution act so long as the parties

60. Jones v. Lewis, 243 N.C. 259, 261, 90 S.E.2d 547, 549 (1955); *see* Murphy v. Murphy, 295 N.C. 390, 394, 245 S.E.2d 693, 696 (1978); *In re* Estate of Adamee, 291 N.C. 386, 391, 230 S.E.2d 541, 545 (1976); Tilley v. Tilley, 268 N.C. 630, 634, 151 S.E.2d 592, 594 (1966); Joyner v. Joyner, 264 N.C. 27, 31, 140 S.E.2d 714, 717-18 (1965); Archbell v. Archbell, 158 N.C. 409, 415, 74 S.E. 327, 330 (1912); Williamson v. Williamson, 66 N.C. App. 315, 317, 311 S.E.2d 325, 327 (1984); Whitt v. Whitt, 32 N.C. App. 125, 129, 230 S.E.2d 793, 796 (1977); Potts v. Potts, 24 N.C. App. 673, 674, 211 S.E.2d 815, 816 (1975); 2 R. LEE, *supra* note 25, § 200; Sharp, *supra* note 25, at 839.

61. *See* Tilley v. Tilley, 268 N.C. 630, 634, 151 S.E.2d 592, 594 (1966); Joyner v. Joyner, 264 N.C. 27, 31, 140 S.E.2d 714, 718 (1965); Jones v. Lewis, 243 N.C. 259, 261, 90 S.E.2d 547, 549 (1952); Whitt v. Whitt, 32 N.C. App. 125, 129, 230 S.E.2d 793, 795-96 (1977); Potts v. Potts, 24 N.C. App. 673, 674, 211 S.E.2d 815, 816 (1975); 2 R. LEE, *supra* note 25, § 200, at 518. The court of appeals has held that a spouse cannot change an otherwise fully executed property provision into an executory provision simply by avoiding compliance with the executed agreement. Whitt v. Whitt, 32 N.C. App. 125, 130, 230 S.E.2d 793, 796 (1977).

62. 291 N.C. 386, 230 S.E.2d 541 (1976).

63. *Id.* at 392-93, 230 S.E.2d at 546. The wife had returned to the home and lived there continuously from January through August 1974. *Id.*; *see also* Dudley v. Dudley, 225 N.C. 83, 33 S.E.2d 489 (1945) (no separation occurred when spouses ceased sexual relations but continued to live together in the same house for two years).

64. 295 N.C. 390, 245 S.E.2d 693 (1978).

65. *Id.* at 397, 245 S.E.2d at 698. In support of its ruling, the court stated, " 'otherwise, the separation agreement would degenerate into a mere cloak or device by means of which the husband would escape the responsibilities imposed by the marital status and yet be free to partake of such privileges as he chose to enjoy.' " *Id.* at 396-97, 245 S.E.2d at 698 (quoting State v. Gossett, 203 N.C. 641, 644, 166 S.E. 754, 755 (1932)).

66. Sharp, *supra* note 25, at 842. Professor Sharp points out that the result of North Carolina's unique "either/or" standard is to discourage attempted reconciliation and to raise suspicions that such an attempt is a pretext for trying to terminate the agreement. *Id.* at 842 & n.129.

67. *See supra* notes 3-4 and accompanying text.

68. The original draft of this section read "[b]efore and during marriage." Act of July 3, 1981, ch. 815, § 1, 1981 N.C. Sess. Laws 1184, 1185. The change may indicate the general assembly's intent to protect property settlements made after separation or divorce.

deem that the agreement is equitable.[69] Integrating this breakthrough in statutory law[70] with the ever shifting case law on property settlements and separation agreements was the task faced by the court of appeals in *Buffington*.

The most critical mistake made by the court in *Buffington* was perpetuating the semantic confusion that has plagued domestic law for some time.[71] The opinion repeatedly interchanged the terms "property settlement" and "separation agreement" without distinguishing between them.[72] Through its casual use of language, the court misstated the common-law rule as requiring "actual separation of the parties to a marriage in order for a *property settlement* to be effective."[73] The rule actually applies to separation agreements which may or may not include property settlement provisions.[74] In addition, the court failed to address how the equitable distribution statute, governing "property distribution" agreements, affected *Buffington*, which involved a "separation agreement."[75]

Assuming that the court of appeals meant to apply its holding only to pure property settlements or to independent property settlement provisions within a separation agreement, the *Buffington* decision makes sense.[76] By interpreting section 50-20(d) as not requiring immediate separation for a property settlement agreement to be valid, the court complied with several well-known common-law principles. These principles—upholding postnuptial settlements without a separation,[77] upholding property division provisions in separation agreements as nonmodifiable without the consent of both parties,[78] and upholding executed property division provisions after the parties have reconciled[79]—reflect the more modern policy in favor of allowing parties to determine their property rights without court intervention. The court's interpretation also was consistent with the basic purpose of equitable distribution—to recognize marriage as a partnership.[80] Absent any requirement of immediate separation, section 50-20(d) simply gives spouses the freedom to make property division contracts as equal partners at any point in their relationship. Thus, under a generous reading, the

69. N.C. GEN. STAT. § 50-20(d) (1984). The section made no allowance for judicial review of the parties' agreement. *See infra* notes 93-97 and accompanying text.

70. Before the advent of equitable distribution statutes, common-law states simply divided property based on which spouse held the title. This title system completely ignored contributions made by the homemaker. 24 AM. JUR. 2D *Divorce and Separation* § 870 (1983).

71. *See supra* notes 39-44 and accompanying text.

72. *Buffington*, 69 N.C. App. at 486-88, 317 S.E.2d at 99-100.

73. *Id.* at 455, 317 S.E.2d at 100 (emphasis added).

74. *See supra* note 29 and accompanying text.

75. The court consistently referred to "property settlements" when discussing the statute or the common law and to "separation agreement[s]" when discussing the facts of the case. *Buffington*, 69 N.C. App. at 486-88, 317 S.E.2d at 99-100.

76. In McArthur v. McArthur, 68 N.C. App. 484, 487, 315 S.E.2d 344, 346 (1984), the court of appeals held that the equitable distribution act "did not purport to change the general validity of separation agreements."

77. *See supra* note 43 and accompanying text.

78. This was the understanding prior to 1983. *See supra* notes 51-54 and accompanying text. *But cf. supra* notes 56-59 and accompanying text (*Walters* decision leaves all provisions in court-approved separation agreement open to modification.).

79. *See supra* notes 60-61 and accompanying text.

80. *See supra* note 4 and accompanying text.

Buffington case holds that a separation agreement not followed by actual separation is valid only to the extent that its provisions qualify as a property settlement.[81]

Unfortunately, the *Buffington* decision was not clearly articulated. A literal interpretation of the inaccurate language used by the court, combined with recent North Carolina case law on separation agreements, only confuses this area of domestic law. Major problems surface as possible consequences of a strict reading of *Buffington*.

Given the court's loose terminology, one could interpret *Buffington* as removing the immediate separation requirement from both property settlements and separation agreements.[82] The court refused to void a separation agreement even though the parties had continued to live together for eighteen days. This holding conflicts with the North Carolina definition of "reconciliation" and its effect on separated parties.[83] Under *Buffington*, a court would enforce a separation agreement despite the continued cohabitation of the parties. Under *Murphy*, however, a court would void a separation agreement if the parties lived apart but engaged in occasional sexual relations,[84] and under *Adamee*, a court would strike a separation agreement if the parties held themselves out as married even if they never engaged in sex.[85] Such absurd results probably cut directly against the parties' intentions.[86] The *Murphy* decision has prompted criticism for discouraging attempted reconciliations between separated parties.[87] By following *Buffington*, an attorney might advise parties who actually intend to separate and want an agreement enforceable if attempts at reconciliation fail to continue living together for a few weeks after signing the agreement.[88] The *Buffington* opinion leaves unanswered the question of when North Carolina law requires separation for a valid separation agreement.

The *Buffington* decision, combined with the *Walters* rule,[89] encourages parties to keep their property distribution agreements out of the court's reach.[90] As

81. *See* 24 AM. JUR. 2D *Divorce and Separation* § 817 (1983); *see also* Cator v. Cator, 70 N.C. App. 719, 321 S.E.2d 36 (1984) (equitable distribution act will not modify binding separation agreement).

82. Both parties raised the issue and argued against this result. Brief for Defendant-Appellant at 18; Brief for Plaintiff-Appellee at 9-10.

83. *See supra* notes 60-66 and accompanying text.

84. *See supra* notes 64-66 and accompanying text.

85. *See supra* note 63 and accompanying text.

86. In *Buffington*, defendant argued that she and her husband did not intend to separate immediately and permanently, despite the language in the agreement. Brief for Defendant-Appellant at 11. In *Murphy*, plaintiff claimed that he never agreed to a resumption of marital relations although he did have occasional sex with the defendant. *Murphy*, 295 N.C. at 393-94, 245 S.E.2d at 695-96.

87. *See* Sharp, *supra* note 25, at 842.

88. On the other hand, the same attorney would advise a separated client to stay away from his or her spouse to avoid any encounter that might lead to an absolutely void separation agreement under the *Murphy* rule. *See supra* note 66.

89. *See supra* note 58 and accompanying text.

90. The *Walters* court stated that parties could keep a property settlement enforceable and modifiable under traditional contract methods by not presenting it to a court for approval. *Walters*, 307 N.C. at 387, 298 S.E.2d at 342. Judge Copeland writing for the majority in *Walters* clearly intended to encourage parties to contract outside the courtroom. *See id.* at 386-87, 298 S.E.2d at 342; *see also* Rowe v. Rowe, 305 N.C. 177, 190-92, 287 S.E.2d 840, 848-49 (1982) (Copeland, J.,

a private contract, the terms of the property settlement would be modifiable only by the parties[91] and enforceable by contract remedies, including specific performance.[92] So long as the parties agree that the property settlement is equitable, North Carolina General Statutes section 50-20(d) will operate to bar equitable distribution by the court.[93] This process, however, ignores the potential for overreaching and unfairness in marital contracts negotiated wholly outside the courtroom.[94] Despite occasional references in cases to a fairness standard for separation agreements,[95] North Carolina courts rarely have given more than perfunctory review to marital agreements.[96] *Walters*, *Buffington*, and North Carolina General Statutes section 50-20(d) all encourage freedom of contract between spouses for both property settlement and support provisions in a separation agreement. Simultaneously, these decisions limit judicial review of the agreement's ultimate fairness. At some point, North Carolina courts must consider whether contract remedies alone provide sufficient protection for spouses negotiating a separation agreement or whether some type of judicial review is necessary to ensure fair terms for spousal support.[97]

In its efforts to clarify North Carolina domestic law, the court of appeals produced even more confusion with its *Buffington* decision. Confined to its specific holding that section 50-20(d) "permits spouses to execute a property settlement at any time, regardless of whether they separate immediately thereafter or not,"[98] the *Buffington* case advances the concept of marriage as a partnership[99] and retreats further from archaic rules against agreements contemplating divorce.[100] The ambiguous language used throughout the opinion, however, only contributes to the list of unanswered questions presently facing the drafter of separation agreements. For instance, when, if at all, are parties required to live

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dissenting in part) (parties should be able to agree on final alimony settlement without interference by court).

91. *See Walters*, 307 N.C. at 387, 298 S.E.2d at 342.

92. *See supra* note 59.

93. *See supra* notes 68-69 and accompanying text.

94. *See* Sharp, *supra* note 3, at 1405-07. Professor Sharp argues that separation agreements are fundamentally different from other contracts because they deal with issues of highest personal significance, such as child custody and support rights. Thus, conditions for negotiating separation agreements are highly stressful. *Id.*

95. *See, e.g.*, Eubanks v. Eubanks, 273 N.C. 189, 195-96, 159 S.E.2d 562, 567 (1968) (separation agreement must be fair, reasonable, and just and must be untainted by fraud or undue influence); Archbell v. Archbell, 158 N.C. 409, 415, 74 S.E. 2d 327, 330 (1912) (separation agreement must be fair and reasonable to the wife in light of all circumstances of execution); Johnson v. Johnson, 67 N.C. App. 250, 255, 313 S.E.2d 162, 165 (1984) ("[R]elief will be granted if the [separation agreement] is manifestly unfair to a spouse because of the other's overreaching.").

96. Sharp, *supra* note 3, at 1409. Until 1977, North Carolina required a private examination of the wife to ensure the fairness of the separation agreement. These "privy exams," however, were little more than rubber stamps of the parties' agreement. *See* Sharp, *supra* note 25, at 828-29, 833-34.

97. "Husbands and wives are not strangers, and to subject them to contract principles governing negotiations between strangers undermines the very heart of the concept of marriage as a sharing enterprise and ignores the psychological and economic realities of most spousal relationships." Sharp, *supra* note 3, at 1459.

98. *Buffington*, 69 N.C. App. at 488, 317 S.E.2d at 100.

99. *See supra* note 4 and accompanying text.

100. *See supra* notes 29-37 and accompanying text.

separate and apart for a court to consider their separation agreement valid? When, if ever, will North Carolina courts recognize the danger of blindly moving toward total contractual freedom for spouses without some concern for the ultimate fairness of the agreement? If nothing more, North Carolina courts must explicitly distinguish between a "property settlement" and a "separation agreement." Otherwise, the equitable distribution statute will become hopelessly entangled in the semantic web of domestic case law.

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