Campbell Law Review

Volume 1
Issue 1 *1979*

Article 5

February 2012

Domestic Relations - Separation Agreements: Effect of Resumed Marital Relations

Donald R. Teeter

NOTES

DOMESTIC RELATIONS—SEPARATION AGREEMENTS: EFFECT OF RESUMED MARITAL RELATIONS—*Murphy v. Murphy*, 295 N.C. 390, 245 S.E.2d 693 (1978).

Supreme Court Drops *Adamee's* Other Shoe

INTRODUCTION

Since 1890, the settled law of North Carolina has been that the "resumption of marital relations" will void a separation agreement to the extent that such an agreement remains executory.[1] However, the definition of resumption of marital relations has remained uncertain. The North Carolina Supreme Court has held that a husband and wife resuming cohabitation and holding themselves out as living together as man and wife had resumed the marital relationship even without their engaging in sexual intercourse.[2] The North Carolina Court of Appeals has held that resumption of sexual activity between estranged spouses does not void a separation agreement without a finding that both parties intended to resume marital relations.[3] In *Murphy v. Murphy*[4] the North Carolina Supreme Court rejected the court of appeals' requirement of intent and held that "sexual intercourse between a husband and wife after the execution of a separation agreement avoids the contract."[5] This note will examine the rationale behind and implications of the *Murphy* decision.

THE CASE

In August of 1973, plaintiff-husband filed an action for absolute divorce based on one year's separation. He alleged the facts required by the statute and the execution of a separation agreement settling the custody and support of the children born of the marriage.[6] Praying for the denial of the divorce, defendant-wife admitted the marriage and separation but alleged that the separation agreement was void on the grounds, *inter alia*, that "after June of 1972 and continu-

1. Smith v. King, 107 N.C. 273, 12 S.E. 57 (1890).
2. *In re* Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).
3. Cooke v. Cooke, 34 N.C. App. 124, 237 S.E.2d 323, *cert. denied*, 293 N.C. 740, 241 S.E.2d 513 (1977); Newton v. Williams, 25 N.C. App. 527, 214 S.E.2d 285 (1975).
4. Murphy v. Murphy, 295 N.C. 390, 245 S.E.2d 693 (1978).
5. *Id.* at 397, 245 S.E.2d at 698.
6. *Id.* at 390, 245 S.E.2d at 694.

ing through April or May of 1973, plaintiff and defendant 'resumed their marital relationship' by having intercourse with one another."[7] The wife also counterclaimed for custody of the children, alimony without divorce and child support.

The trial judge allowed the husband's motion to sever the wife's counterclaim to set aside the separation agreement and to try that issue to a jury prior to the husband's action for divorce.[8]

The wife testified that she and her husband had entered into a separation agreement; but that during the time set forth in her answer, they had engaged in sexual intercourse "certainly at least two dozen [times], probably more."[9] The husband admitted the resumption of sexual activity but estimated that sexual intercourse occurred on six or eight occasions. He further testified that "I did not ever agree with her we would resume our marital relation. I always told her there was no way . . . we could resume our relationship."[10]

The issue submitted to the jury was: "If [the separation agreement was valid when executed], was the separation agreement and property settlement . . . terminated by the acts and conduct of the plaintiff and defendant?"[11] The trial judge then charged the jury:

> Now in this connection I charge you that where a husband and wife enter into a separation agreement and thereafter become reconciled and renew the marital relations, the agreement is terminated for every purpose insofar as it remains executory. And the words 'become reconciled and renew their marital relations' means not just a mere reconciliation or making up of the parties, but it means renewal and resumption of the marital relations, *and this would require something more than sexual intercourse alone.* It's essential that there be a mutual intent to resume cohabitation. The word cohabitation in our law means something more than sexual intercourse between the parties. Cohabitation ordinarily contemplates establishment of a home in which the parties live in the married relationship, normal relationship of husband and wife.[12]

The jury found that the separation agreement had not been terminated and judgment was entered on the verdict.[13] The defendant appealed, assigning the charge as error.

---

7. *Id.* at 391, 245 S.E.2d at 694.
8. Murphy v. Murphy, 34 N.C. App. 677, 679, 239 S.E.2d 597, 599 (1977).
9. 295 N.C. at 393, 245 S.E.2d at 695.
10. *Id.* at 393, 245 S.E.2d at 696.
11. *Id.* at 391, 245 S.E.2d at 694-95.
12. *Id.* at 394-95, 245 S.E.2d at 696-97 (emphasis added by court).
13. *Id.* at 391, 245 S.E.2d 694-95.

BACKGROUND

In 1890 the North Carolina Supreme Court adopted the rule of law voiding separation agreements upon the resumption of marital relations.[14] Prior to that time, separation agreements were void as against public policy.[15] However, where a husband had placed property in trust to secure an annuity in consideration of separation, the court held that assuming the separation were otherwise valid, the parties' resumption of living together as man and wife had voided the contract.[16]

While the supreme court continued to follow this rule, it did not undertake to define "resumption of marital relations" before 1977. An examination of the way in which the court articulated the rule, however, does shed some light on the problem. Cases from 1912 to 1955 stated the rule in terms of "resumption of conjugal relations"[17] or "resumption of conjugal cohabitation."[18] Manifestly, the court considered resumption of sexual activity important, if not decisive. In 1955 the court began to use the phrase "resumption of marital relations,"[19] though a few cases did advert to other terms.[20] While the entire line of cases establishes sexual intercourse as an element of resumed marital relations, the facts of those cases, almost without exception, imply or state an attempted reconciliation by mutual consent. The signal exception is *State v. Gossett.*[21]

In *Gossett,* the husband separated from his wife pursuant to a separation agreement providing for the support of the wife. When the husband failed to provide this support, he was charged with non-support under the criminal statutes. The husband pleaded the separation agreement as a defense. The wife testified that she and

14. Smith v. King, 107 N.C. 273, 12 S.E. 57 (1890).

15. Collins v. Collins, 62 N.C. 514 (1867).

16. 107 N.C. at 276, 12 S.E. at 57.

17. Reynolds v. Reynolds, 210 N.C. 554,187 S.E. 768 (1936); State v. Gossett, 203 N.C. 641, 166 S.E. 754 (1932); Moore v. Moore, 185 N.C. 332, 117 S.E. 12 (1923); Archbell v. Archbell, 158 N.C. 408, 74 S.E. 327 (1912) (citing *Smith v. King* as using "conjugal relations" although the term "cohabitation" was used by the *Smith* court.)

18. Turner v. Turner, 242 N.C. 533, 89 S.E.2d 245 (1955); Campbell v. Campbell, 234 N.C. 188, 68 S.E.2d 672 (1951).

19. Whitt v. Whitt, 32 N.C. App. 125, 230 S.E.2d 793 (1976); Joyner v. Joyner, 264 N.C. 29, 140 S.E.2d 714 (1965); Williams v. Williams, 261 N.C. 48, 134 S.E.2d 277 (1964); Hutchins v. Hutchins, 260 N.C. 628, 133 S.E.2d 459 (1963); Jones v. Lewis, 243 N.C. 259, 90 S.E.2d 574 (1955).

20. Potts v. Potts, 24 N.C. App. 673, 211 S.E.2d 815 (1975) ("cohabitation"); Bass v. Mooresville Mills, 11 N.C. App. 631, 182 S.E.2d 246 (1971) ("conjugal relations").

21. 203 N.C. 641, 166 S.E. 754 (1932).

her husband engaged in sexual intercourse during the interval between the execution of the separation agreement and the issuance of the warrant. The trial judge instructed the jury to regard the agreement as void if they found the wife's testimony to be true. The North Carolina Supreme Court upheld the conviction on appeal. Although no intent to reconcile existed, at least one author felt that *Gossett* was limited to its facts since it arose in a criminal context.[22]

In *Newton v. Williams*[23] the North Carolina Court of Appeals defined "resumption of marital relations." The court held that, notwithstanding the stipulations of the parties that for over two years they had lived together one week out of each month and had engaged in sex during those weeks, no resumption of marital relations could have occurred without proof of the "essential element" of mutual intent.[24] Because the evidence concerning intent was in conflict, the court held that the granting of summary judgment was error.[25] As authority for its requirement of mutual intent, the court quoted Lee's *North Carolina Family Law*:

> Mere proof that isolated acts of sexual intercourse have taken place between the parties is not conclusive evidence of a reconciliation and resumption of cohabitation. There must ordinarily appear that the parties have established a home and that they are living in it in the normal relationship of husband and wife.[26]

Lee's treatise makes clear that he was stating the general rule in other jurisdictions.[27] Worthy of note is that other authorities on which the *Newton* court relied cite *Gossett* as contra this rule.[28] In several subsequent cases, including *Murphy*, the court of appeals adhered to its requirement of intent.[29]

Although the North Carolina Supreme Court had not addressed the precise issue presented in *Murphy* until it considered that case, it decided an analogous issue in *In re Estate of Adamee*.[30] In *Adamee* the husband and wife separated under an agreement in which the wife waived her right to administer her husband's estate. The wife later moved back into the husband's house where she remained

22. 1 R. LEE, NORTH CAROLINA FAMILY LAW § 35 at 153, n. 105 (3d ed. 1963).
23. 25 N.C. App. 527, 214 S.E.2d 285 (1975).
24. *Id.* at 532, 214 S.E.2d at 288.
25. *Id.*
26. *Id.* at 531, 214 S.E.2d at 287 (quoting 1 R. LEE, *supra* note 22, at 153).
27. 1 R. LEE, *supra* note 22.
28. *See, e.g.*, 42 C.J.S. *Husband and Wife* § 601 (1975).
29. *E.g.*, Cooke v. Cooke, 34 N.C. App. 124, 237 S.E.2d 323, *cert. denied*, 293 N.C. 740, 241 S.E.2d 513 (1977).
30. 291 N.C. 740, 241 S.E.2d 513 (1977).

until his death eight months later. When the wife filed for letters of administration, the clerk of court found the agreement void because of the resumption of marital relations and therefore held that the wife was entitled to be administratrix. The husband's relatives appealed to superior court and moved for summary judgment on the basis of their affidavits that the wife's return to Adamee's house had been solely for economic convenience, that the husband and wife had had no intention to resume marital relations and that they had slept in separate bedrooms. The wife answered by affidavit that she and her husband had made a full reconciliation. The superior court denied summary judgment and ordered a jury trial on the issue of reconciliation. The wife appealed and the court of appeals affirmed. The supreme court, by Chief Justice Sharp, reversed, stating that "the heart of a separation agreement is the parties' intention and agreement to live separate and apart forever, and . . . they void the separation agreement if they re-establish a matrimonial home."[31] The court held that "when separated spouses who have executed a separation agreement resume living together in the home which they occupied before the separation, they hold themselves out as man and wife 'in the ordinary acceptation of the descriptive phrase.' . . . [I]n contemplation of law, their action amounts to a resumption of marital cohabitation which rescinded their separation agreement."[32] After reviewing the evidence before the superior court, the *Adamee* court found that "no issue arose for either judge or jury to decide as to their resumption of marital relations. As a matter of law they had done so."[33]

This holding brought into sharp focus the disparate theories of the supreme court and the court of appeals. On the one hand, the court of appeals held fast to its requirement that admitted reconciliatory acts notwithstanding, mutual intent to resume marital relations was essential. On the other hand, the supreme court held in *Adamee* that intent notwithstanding, the fact of resumed cohabitation effected a resumption of marital relations as a matter of law. The supreme court recognized this dichotomy by stating in *Adamee:*

> In its consideration of this case the Court of Appeals began with the assumption that the appeal involved a disputed fact, that is, whether a reconciliation and resumption of marital relations had actually occurred between Adamee and Mrs. Adamee. We,

31. *Id.* at 391, 230 S.E.2d at 545.
32. *Id.* at 392-93, 230 S.E.2d at 546.
33. *Id.* at 393, 230 S.E.2d at 546.

> however, have viewed and decided the case as presenting a question of law arising upon undisputed facts.[34]

Eighteen months later the North Carolina Supreme Court took up *Murphy*.

ANALYSIS

After reviewing the evidence adduced at trial in *Murphy*, the supreme court by Chief Justice Sharp, restated the general rule of termination of executory separation agreements by resumption of marital relations. As sole authority, the court cited *Adamee* and reviewed its holding that resumed cohabitation, irrespective of sexual activity, was a resumption of marital relations as a matter of law.[35]

The court then addressed itself to the trial judge's charge, in particular his statement that "something more than sexual intercourse alone" is necessary to effectuate a resumption of marital relations and his instruction that a mutual intent to resume the marital relationship must be proved by the defendant to avoid the contract.[36] The court acknowledged that the charge was supported by two decisions of the court of appeals and the opinion of Professor Lee on which those decisions were based.[37] Likewise, the court recognized that the general rule in most jurisdictions is that "mere casual acts of sexual intercourse are not conclusive evidence that the parties have ceased to live separate within the meaning of a separation agreement." However, the court continued, "this rule—be it 'general' or limited—is not the law of North Carolina."[38] The court held that the law of North Carolina was the rule of *State v. Gossett* as stated in the charge of the trial judge:

> When a husband and wife enter into a deed of separation the policy of the law is that they are to live separate, that they are not to keep up the sexual relation and continue that, but that they are to live separate and apart and if after the deed of separation is entered into a man goes to see his wife and child, and every time he goes to see her he has sexual intercourse with her, the deed of separation is of no validity at all . . . and the court instructs you, if you find that this man visited his wife and child after this deed of separation was entered into and before this indictment or warrant was

34. *Id.*
35. 295 N.C. at 394, 245 S.E.2d at 696 (1978).
36. *Id.*
37. *Id.* at 395, 245 S.E.2d at 697.
38. *Id.*

> taken out . . . and that every time he came to see her they had sexual intercourse, then the court instructs you to disregard entirely the evidence about the deed of separation because, if that would be true, the parties themselves would disregard it and cannot expect the court to regard it if they did not regard it, and . . . the rights of husband and wife and the duties and obligations would be reimposed upon the parties.[39]

The *Murphy* court appears to have read *Gossett* to hold that once the acts of sexual intercourse are proved, the separation agreement is void as a matter of law. This is evidenced by the *Murphy* court's stated presumption that the wife would move, on remand, for a summary judgment on the basis of the husband's admissions during testimony.[40]

Citing *Young v. Young,* the court addressed in passing the truism that marriage involves "many duties and responsibilities . . . other than sex,"[41] but was constrained to hold that "whether the resumption of sexual relations [is] 'casual', 'isolated' or otherwise . . . severance of marital relation by separation agreement and continued sexual intercourse . . . 'are essentially antagonistic and irreconcilable notions'."[42]

CONCLUSION

The apparent North Carolina rule emerging from *Murphy* and *Adamee* is that when it is proved that an estranged husband and wife have executed a separation agreement and subsequently engaged in sexual intercourse or resumed cohabitation; the executory portions of that separation agreement are void as a matter of law.

The *Murphy* case raises questions as to both its extent and its conflict with public policy.

The first and most obvious question is whether a *single* act of intercourse will void a separation agreement. As noted in another context, few cases exist involving a single act of sex.[43] However, in one North Carolina case, an attempt was made to void a separation agreement on the basis of one night spent in a Charlotte motel room by estranged spouses.[44] The supreme court upheld the agreement

---

39. *Id.* at 396, 245 S.E.2d at 697 (quoting State v. Gossett, 203 N.C. 641, 643-44, 166 S.E.2d 754, 755 (1932)).

40. 295 N.C. at 398, 245 S.E.2d at 698.

41. *Id.* at 397, 245 S.E.2d at 698.

42. *Id.* (quoting 1 A. LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS 8-13 (1977)).

43. 1 R. LEE, *supra* note 22, § 74 at 288, n. 141.

44. Jones v. Lewis, 243 N.C. 259, 90 S.E.2d 547 (1956).

because the provision in issue was fully executed, but made no comment on the isolated nature of the sexual contact ameliorating the force of the general rule. This, coupled with the language of the *Murphy* court that the isolated nature of sexual activity is immaterial, leads one to believe that a single act would suffice.

Some doubt also might remain regarding the status of the "intent to reconcile" requirement of the court of appeals in view of the fact that *Murphy* did not expressly overrule that court's prior cases. While it is true that the supreme court did not overrule the lower court cases in so many words, the flat statement that the rule requiring a finding of mutual intent was not the law of North Carolina appears too strong to support any doubt.

While surely the public policy of North Carolina is to discourage "illicit intercourse and promiscuous assignation,"[45] an even more important public policy in North Carolina is to encourage reconciliation of estranged spouses.[46] Indeed, Justice Exum, a dissenter in *Murphy*, recently spoke for a unanimous court: "[W]e recognize and adhere, in this state, to a policy which within reason favors maintenance of the marriage."[47] The *Murphy* decision is at cross purposes with this policy. Estranged spouses, in the wake of *Murphy*, now face the prospect of losing the protection and assurance provided by separation agreements when they attempt to determine if full reconciliation is possible, should this attempt involve sexual contact. This is particularly unfortunate considering the significant percentage of marital failure involving sexual problems.[48]

Similarly, the rule announced in *Murphy*, if strictly applied, is easily abused. For example, a supporting spouse who wishes to rescind a separation agreement could feign, for one night, an attempted reconciliation for the sole purpose of avoiding the contract. For one night's trust and an honest attempt at mending a ruptured marriage, the dependent spouse must choose between re-negotiation or litigation.

The shortcomings of the *Murphy* rule flow largely from the *Murphy* court's disregard of the contractual nature of separation agreements. Though "marriage is not a private affair, involving the contracting parties alone,"[49] the court ignored the wisdom of this statement found in one of the court's cited authorities:

45. State v. Gossett, 203 N.C. 641, 644, 166 S.E. 754, 755 (1932).
46. *See* 1 R. LEE, *supra* note 22.
47. Gardner v. Gardner, 294 N.C. 172, 180, 240 S.E.2d 399, 405 (1978).
48. *See* H. LOCKE, PREDICTING ADJUSTMENT IN MARRIAGE 125-57 (3d ed. 1968).
49. Dudley v. Dudley, 225 N.C. 83, 86, 33 S.E.2d 489, 491 (1945).

> It is frequently said that reconciliation and resumption of the marital relations will render a contract void. This is a loose and inaccurate statement of a supposed rule. Courts cannot make or unmake contracts, but can only determine the effect of express or implied agreements made by those competent to act for themselves. Rescission or abrogation is as volitional as the act of contracting . . . The truth is, and the law is, that having entered into a valid separation agreement the courts cannot and will not deem such contract avoided unless the conduct of the parties impels to the conclusion that they themselves so regarded it.[50]

The above quote, a compromise between the positions of the court of appeals and the supreme court, is superior to both. Being in harmony with the objective theory of contracts, it would allow a court to find, on a case to case basis, the resumption of marital relations where the conduct of the parties *evidences* an intent to permanently reconcile, without the difficulty of proof implicit in the more subjective approach of the court of appeals. Indeed, one could argue that *State v. Gossett* should be read as stating this rule.[51] To adopt a contract-based rule would allow the North Carolina courts to guard against "illicit intercourse" and at the same time allow enough flexibility to discourage abuse and remove the disincentive to renewed contact preparatory to reconciliation. Alternatively, such a rule could be brought closer to the *Murphy* rule by erecting a rebuttable presumption of resumed marital relations when acts of sexual intercourse are proved. However stated, a rule which takes into account both the reasonable expectations of the parties to the agreement and the demands of public policy is preferable to the *Murphy* rule that ignores intentions and expectations.

While the *Murphy* decision was concerned solely with the effect of resumed sexual activity on a separation agreement, the rationale of the case probably will extend to the tolling of the one-year period of separation required for divorce under N.C. Gen. Stat. § 50-6. North Carolina case law,[52] though fragmentary, indicates that this state follows the general rule obtaining in most jurisdictions that resumed sexual relations will bar a divorce based on a period of separation.[53] While this leaves open the question of the effect of

50. 1 A. LINDEY, *supra* note 42, at 8-14.

51. The language of the Judge's charge cited at note 39 *supra* is to the effect that sexual intercourse by the parties is conclusive evidence of reconciliation because an intent to abrogate the agreement is the only conclusion inferable from that conduct.

52. Mason v. Mason, 226 N.C. 740, 40 S.E.2d 204 (1946); Reynolds v. Reynolds, 210 N.C. 554, 187 S.E. 768 (1936).

53. See 1 R. LEE, *supra* note 43, § 74 at 288, n. 141.

single or isolated acts, strong dicta in *Adamee* indicates that the standards for voiding separation agreements and for tolling a period of separation are identical:

> [T]he heart of a separation agreement is the parties' intention and agreement to live separate and apart forever, and when a husband and wife enter into a deed of separation the policy of the law is that they are to live separate. Therefore, they void the separation agreement if they re-establish a matrimonial home.
>
> The same public policy which will not permit spouses to continue to live together in the same home—holding themselves out to the public as husband and wife—to sue each other for an absolute divorce on the ground of separation or to base the period of separation required for a divorce on any time they live together, will also nullify a separation agreement if the parties resume marital cohabitation. Whether used in a separation agreement or a divorce statute, the words "live separate and apart" have the same meaning.[54]

With obvious approval, the *Murphy* court cited *Adamee* as its only authority for the rule that resumed marital relations voids separation agreements as a matter of law. The above quoted dictum, when read together with the implication in *Murphy* that isolated acts of sex void a separation agreement,[55] indicates a likelihood that, as a matter of law, isolated or single acts of sexual intercourse will be held to toll any period of separation required by the divorce statutes.

In summary, while the edict of *Murphy* is undoubtedly the law of North Carolina, the supreme court appears to have made its decision not so much out of consideration for the changing demands of public policy or the expectations of the parties or the realities of modern life as out of the oft-quoted fear that the parties might "litigate by day and copulate by night."[56]

Donald R. Teeter

---

54. *In re* Estate of Adamee, 291 N.C. 386, 391, 230 S.E.2d 541, 545 (1976).
55. 295 N.C. at 398, 245 S.E.2d at 698.
56. Holt v. Holt, 77 F.2d 538, 540 (D.C. Cir. 1935).