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Family Law - Modifying Arbitrator's Awards - A Nod to "Judges of the Parties' Own Choosing"

Gene B. Tarr

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FAMILY LAW—MODIFYING ARBITRATOR'S AWARDS—A NOD TO "JUDGES OF THE PARTIES' OWN CHOOSING"—*Crutchley v. Crutchley*, 53 N.C. App. 732, 281 S.E.2d 744 (1981).

INTRODUCTION

Arbitration is a time-tested, relatively inexpensive tool for easing the avalanche of business coming before state and federal courts.¹ Chief Justice Burger recently suggested that domestic matters are especially well-suited to voluntary, binding arbitration.² In addition to reduced court congestion,³ proponents of arbitration in domestic disputes cite the advantages of informal resolution of highly sensitive matters, minimized polarization of the parties, speed, economy and finality.⁴ Opponents of arbitration in domestic disputes point to the lack of judicial safeguards afforded the parties,⁵ particularly the limited ability of the court to modify the arbitrator's award.⁶ Contending that domestic matters belong in the courts, opponents urge that the expediency of arbitration does not justify abandoning the protections of detailed domestic statutes which provide readily available modifications.⁷ Furthermore, opponents argue that domestic arbitration awards are sufficiently "domestic" in nature to be governed not by arbitration statutes, but by domestic statutes.

The North Carolina Court of Appeals recently decided that the Uniform Arbitration Act⁸ controls the modification of an arbi-

1. Warren E. Burger, Address to the American Bar Association (Jan. 24, 1982).

2. *Id.*

3. Sarpy, *Arbitration as a Means of Reducing Court Congestion*, 41 NOTRE DAME L. REV. 182, 184 (1965).

4. Comment, *The Enforceability of Arbitration Clauses in North Carolina Separation Agreements*, 15 WAKE FOREST L. REV. 487, 490 (1979).

5. *Id.* at 492.

6. N.C. GEN. STAT. § 1-567.14(a) (Cum. Supp. 1981).

7. N.C. GEN. STAT. §§ 50-13.7(a) and 50-16.9(a) (1976).

8. N.C. GEN. STAT. § 1-567.1 (Cum. Supp. 1981). The Uniform Act does not expressly exclude domestic disputes from its comprehensive procedure for the arbitration of "any controversy."

(a) Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating

trator's award of spousal support. In *Crutchley v. Crutchley*,⁹ the Court held that a judicially confirmed award of spousal support could not be modified by a motion in the cause.¹⁰ The Court's message is clear—if parties choose to arbitrate spousal support, the validity and effect of the agreement¹¹ and the arbitrator's award are measured against the criteria of the Uniform Arbitration Act.¹² On appeal, the practical question before the North Carolina Supreme Court is whether parties in a domestic dispute can agree to let someone other than a judge determine issues traditionally reserved for the courts, spousal support and child support,¹³ and to what extent the courts are bound by that agreement and the subsequent award.¹⁴

THE CASE

Plaintiff filed an action in 1976, seeking divorce from bed and board, permanent alimony, alimony *pendente lite*, child custody and support and other relief. Defendant denied the material allegations, set up several affirmative defenses as a bar to plaintiff's action and counterclaimed for divorce from bed and board and custody of the children. Prior to trial, the parties and their counsel agreed to arbitration of the entire matter. The court entered an order confirming the parties' consent to arbitration in October,

to such contract or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid, enforceable, and irrevocable except with the consent of all the parties, without regard to the justiciable character of the controversy.

N.C. GEN. STAT. § 1-567.2(a) (Cum. Supp. 1981).

9. 53 N.C. App. 732, 281 S.E.2d 744, *discretionary review granted*, ___ N.C. ___, ___ S.E.2d ___ (1981).

10. N.C. GEN. STAT. § 50-16.9(a) (1976).

11. For a discussion of arbitration clauses in domestic disputes, see 15 WAKE FOREST L. REV. 487 (1979). Prior to *Crutchley*, North Carolina had not passed upon the validity and effect in a domestic case of either

- 1) an agreement to arbitrate or
- 2) the subsequent arbitrator's award.

12. 53 N.C. App. 732, 747, 281 S.E.2d 744, 747 (1981). N.C. GEN. STAT. § 1-567.1 *et seq.* (Cum. Supp. 1981).

13. Appellant briefed and argued the issue of arbitration of child support, but the Court of Appeals ruled that only the issue of spousal support had been properly preserved on appeal. 53 N.C. App. 732, 737, 281 S.E.2d 744, 747 (1981).

14. The Supreme Court of North Carolina heard oral argument April 6, 1982, just prior to submission of this Note for publication.

1976.¹⁵ In December, 1977, the court granted defendant's motion for confirmation¹⁶ of the award.¹⁷ Two years later, plaintiff filed a

15. Record at 13, 14, *Crutchley v. Crutchley*, 53 N.C. App. 732, 281 S.E.2d 744 (1981).

CONSENT ORDER

PRESENT, HIS HONOR, GRAFTON C. BEAMAN, DISTRICT JUDGE PRESIDING:

This cause coming on to be heard and being heard, and the following disposition being made by consent:

(1) Dr. B. C. West, Jr. is hereby appointed arbitrator in this cause, and he shall be guided by the following procedure:

(a) He shall review the pleadings appearing in this cause in order to familiarize himself with the contentions of the parties.

(b) The arbitrator's report in this case shall be final and binding on all parties.

(c) The arbitrator shall file his report in the office of the Clerk of Superior Court of Pasquotank County within a reasonable time after he has had opportunity to make review and study of the matter.

(d) The arbitrator shall have full power and authority to require each of the parties to appear before him as he may deem advisable, to offer to him such evidence as he deems necessary, including documents, reports, checks, bookkeeping entries, income tax returns, and any and all other evidence that the parties desire to present to said arbitrator, it being the intent and purpose hereof that the said arbitrator shall have the opportunity to receive and consider, and the parties shall have the opportunity to present to the arbitrator, full and complete evidence pertaining to the case. The arbitrator shall interview any witnesses which the parties may bring before him and consider all other relevant evidence, and he shall have full subpoena power.

(e) The arbitrator is authorized and empowered to interview the parties and their witnesses, and review their documentary and oral evidence in conference, in an informal manner, open and formal hearing not being necessary.

(2) It is the intent and purpose hereof that the said arbitrator is fully authorized and empowered to bring this controversy to a conclusion and, as aforesaid, his report shall constitute the final and binding decision with respect to this case.

(3) After filing his report, the arbitrator shall suggest to the Court the amount of his compensation and a determination with respect to the same shall be made by the Court.

WHEREUPON, it is ORDERED, ADJUDGED AND DECREED

that the foregoing consent of the parties with respect to arbitration is approved and so ordered.

This 18th day of October, 1976.

(The order was also signed by the parties and their attorneys.)

16. *Id.* at 19, 20.

motion in the cause requesting:

- 1) modification of the order confirming the arbitration award, and
- 2) modification of the award to increase the amounts of alimony and child support and to strike the cohabitation restriction.

Plaintiff did not attack the validity of the agreement to arbitrate.¹⁸ Defendant argued that the arbitration award was final and binding. The court denied plaintiff's motion, ruling that the remedy of motion in the cause was unavailable to plaintiff.¹⁹

On appeal, plaintiff assigned as error²⁰ that the arbitrator's award and the order confirming the award failed to comply with the procedure in actions for alimony and alimony *pendente lite*²¹

The undersigned District Court Judge, upon receiving a motion for a confirmation of the award of arbitrator in this case, and having first reviewed the record and making a finding that an arbitrator's award has been made; that the award is made under proper authority and that the same is fair and in the best interest of the children and the parties, and further finding that each party by consent order dated October 18, 1976, agreed that the arbitrator's decision shall be final and binding and it appearing that the arbitrator's award is now subject to confirmation;

It is hereby ORDERED that the award of arbitrator is hereby CONFIRMED, and that this case therefore be removed from the docket as having been settled by arbitration.

This 1st day of December, 1977.

s/GRAPTON C. BEAMAN
District Court Judge

17. *Id.* at 15-19. The arbitrator's award granted plaintiff custody of the two oldest children; child support of \$200.00 per month per child; payment of 75% of their medical, dental and college expenses by defendant; and visitation rights with the youngest child, of whom defendant was given custody. The support awards were made subject to a yearly cost of living increase. Plaintiff was also awarded \$500,000 per month as alimony and possession of the residence until her death, remarriage or cohabitation. It made other property dispositions.

The award did not contain a recitation of facts or reasons for the decision.

18. *Id.* at 20-23.

19. *Id.* at 25-26.

20. *Id.*

That the court below committed error in dismissing the plaintiff's motions in the cause for the reason that the arbitrator's award entered on December 1, 1977, and the subsequent order of the court confirming said award dated December 1, 1977, on its face failed to comply with the procedure in actions for alimony and alimony *pendente lite* as provided by G.S. § 50-16.8(f) and for modification as provided by G.S. § 50-16.9(a).

21. N.C. GEN. STAT. § 50-16.8(f) (1976).

because all of "said orders" were subject to modification.²² Plaintiff also argued in her brief²³ that child support may be modified by a motion in the cause,²⁴ and alternatively, that arbitration of domestic disputes was against public policy in North Carolina. Defendant maintained that spousal support is arbitrable under the broad language of the Uniform Arbitration Act, and that the Uniform Arbitration Act provides the exclusive procedure for modifying an arbitrator's award.²⁵ Limiting its decision to the issue of spousal support,²⁶ the Court held that the arbitration of spousal support is not contrary to public policy in North Carolina and that the Uniform Act provides the only procedure for modifying a judicially confirmed arbitrator's award. Since the appellant had allowed the statutory time period for modification to pass, the spousal support could not be modified without the consent of the parties.²⁷

BACKGROUND

The Court held that an agreement to arbitrate and a judicially confirmed arbitrator's award for spousal support are given the same effect as a separation agreement.²⁸ A history of arbitration in North Carolina helps explain this holding. At common law, parties selected an arbitrator by mutual consent to determine controverted matters of law and fact.²⁹ Arbitrators were a "law unto themselves," deciding not according to law, but according to their own notions of justice.³⁰ Arbitrators were not, and are not, bound by the rules of evidence or procedure,³¹ nor required to assign rea-

22. N.C. GEN. STAT. § 50-16.9(a) (1976).

23. Brief for Appellant at 11-13, *Crutchley v. Crutchley*, 53 N.C. App. 732, 281 S.E.2d 744 (1981). Rule 10(a), Rules of Appellate Procedure, provides that an assignment of error is not required if the brief raises the question whether "the judgment is supported by the . . . findings of fact and conclusions of law. . . ." See *infra* note 101.

24. *Id.* at 4, 5.

25. Brief for Appellee at 4, 7, *Crutchley v. Crutchley*, 53 N.C. App. 732, 281 S.E.2d 744 (1981).

26. 53 N.C. App. 732, 737, 281 S.E.2d 744, 747 (1981).

27. *Id.* at 738, 281 S.E.2d at 748.

28. *Id.* at 740, 281 S.E.2d at 748.

29. *Crisp v. Love*, 65 N.C. 126 (1871).

30. *Poe and Sons v. University of North Carolina*, 248 N.C. 617, 624, 104 S.E.2d 189, 195 (1958), citing *Patton v. Garrett*, 116 N.C. 848, 21 S.E. 679 (1895).

31. *Calvine Cotton Mills v. Textile Workers Union*, 238 N.C. 719, 79 S.E.2d 181 (1953).

sons for their actions.³² Even today, though the record discloses no evidence upon which the arbitrator bases his decision, the court will assume there was evidence for the action.³³ Mistakes of law or fact are the parties' misfortune, for "the court has no power to revise the decisions of 'judges who are of the parties' own choosing.'"³⁴ If mistakes were a sufficient ground for setting aside awards, arbitration would tend to increase litigation, thereby undercutting its purpose.³⁵

North Carolina's strong policy of freedom to contract³⁶ complements arbitration's goal of allowing parties to settle disputes among themselves without resort to the expense and delay of litigation.³⁷ To encourage the private settlement of property rights, North Carolina recognizes an agreement to arbitrate as a contract.³⁸ Consideration is found in the mutual promises³⁹ and the remedy for breach of an agreement to arbitrate is an action for breach of contract.⁴⁰

The Uniform Arbitration Act as adopted in North Carolina⁴¹ is an enlargement of the common law rules.⁴² At common law, only existing controversies could be arbitrated,⁴³ but the current statute allows arbitration of existing or future disputes, without regard to the justiciability of the controversy.⁴⁴ The three statutory grounds

32. *Poe and Sons v. University of North Carolina*, 248 N.C. 617, 104 S.E.2d 189 (1958).

33. *Bryson v. Higdon*, 222 N.C. 17, 21 S.E.2d 836 (1942).

34. *Carolina Virginia Fashion Exhibitors, Inc. v. Gunter*, 41 N.C. App. 407, 415, 255 S.E.2d 414, 420 (1979).

35. *Id.*

36. *North Carolina Assoc. of Licensed Detectives v. Morgan, Attorney General*, 17 N.C. App. 701, 195 S.E.2d 357 (1973); *Spencer v. Spencer*, 37 N.C. App. 481, 488, 246 S.E.2d 805, 810, *appeal dismissed*, 296 N.C. 106 (1978), *cert. denied*, 441 U.S. 958 (1979).

37. *Poe and Sons v. University of North Carolina*, 248 N.C. 617, 625, 104 S.E.2d 189, 195 (1958).

38. *Tobacco Workers Local 317 v. Lorillard Corp.*, 448 F.2d 949, 957 (4th Cir. 1971); *City Coach Lines v. Brotherhood of R.R. Trainmen*, 254 N.C. 60, 67, 118 S.E.2d 37, 43 (1961); *Skinner v. Gaither Corp.*, 234 N.C. 385, 387, 67 S.E.2d 267, 269 (1951), *citing* *Sprinkle v. Sprinkle*, 159 N.C. 81, 83, 74 S.E. 739, 739-40 (1912).

39. *Mayo v. Gardner*, 49 N.C. 359 (1857).

40. *McDonough Constr. Co. v. Hanner*, 232 F. Supp. 887 (M.D.N.C. 1964).

41. N.C. GEN. STAT. § 1-567.1 *et seq.* (Cum. Supp. 1981).

42. *Thomasville Chair Co. v. United Furniture Workers*, 233 N.C. 46, 62 S.E.2d 535 (1950), *construing* N.C. GEN. STAT. § 1-544 (repealed 1973).

43. *Skinner v. Gaither Corp.*, 234 N.C. 385, 67 S.E.2d 267 (1951).

44. The text of N.C. GEN. STAT. § 1-567.2(a) appears *supra* at note 8.

for modification of the arbitrator's award are:

- 1) the arbitrator made an evident miscalculation of figures or an evident mistake in the description of any person or property referred to in the award;
- 2) the arbitrator awarded on a matter not submitted to him;
- 3) the award is imperfect in a matter of form, not affecting the merits of the controversy.⁴⁵

Absent these grounds, the court is not permitted to modify or correct an arbitrator's award.⁴⁶ An appeal from an order confirming an award may be taken in the same manner as from orders or judgments in other civil actions.⁴⁷

The broad language of the Uniform Arbitration Act impliedly invites parties to arbitrate domestic matters, but few courts have considered whether arbitration of domestic matters is against public policy.⁴⁸ In North Carolina, a dependent spouse's right to support is a property right.⁴⁹ Spousal support may be made the subject of a contract⁵⁰ within a separation agreement.⁵¹ A New York court has stated that if spouses may contract for spousal support in a separation agreement, no objection should be raised as to the right of the parties to agree upon another tribunal to do the same thing.⁵² Therefore, a judicially confirmed⁵³ arbitrator's award of spousal support may be likened to a separation agreement⁵⁴ or, by

45. N.C. GEN. STAT. § 1-567.14 (Cum. Supp. 1981).

46. *Carolina Virginia Fashion Exhibitors, Inc. v. Gunther*, 41 N.C. App. 407, 415, 255 S.E.2d 414, 420 (1979).

47. N.C. GEN. STAT. § 1-567.18 (Cum. Supp. 1981).

48. *Wertlake v. Wertlake*, 137 N.J. Super. 476, 349 A.2d 552 (1975) (Trial judge expressed the view that arbitration was ill-adapted to matters concerning the children, but appellate court expressly left "for another day the important issue of the enforceability of an arbitration provision in a property settlement agreement between husband and wife incident to a suit for divorce.").

For a discussion of New York's view of arbitration clauses in domestic disputes, see generally 15 WAKE FOREST L. REV. 487 (1979). See also Annot., 18 A.L.R.3d 1264 (1968).

49. *Kiger v. Kiger*, 258 N.C. 126, 128, 128 S.E.2d 235, 237 (1962).

50. *Fuchs v. Fuchs*, 260 N.C. 635, 639, 133 S.E.2d 487, 491 (1963); *Holden v. Holden*, 245 N.C. 1, 6, 95 S.E.2d 118, 123 (1956), citing *Brown v. Brown*, 205 N.C. 64, 70, 169 S.E. 818, 821 (1933).

51. R. LEE, 2 NORTH CAROLINA FAMILY LAW, § 145 (4th ed. 1980).

52. *Robinson v. Robinson*, 186 Misc. 974, 61 N.Y.S.2d 859 (Sup. Ct. 1945), *rev'd*, 271 A.D. 98 (1946), *rev'd*, 296 N.Y. 778, 71 N.E.2d 214 (1947).

53. N.C. GEN. STAT. § 1-567.12 (Supp. 1981) requires that all arbitration awards be confirmed by the court.

54. *Crutchley v. Crutchley*, 53 N.C. App. 732, 740, 281 S.E.2d 744, 748 (1981).

extension, to a consent judgment.⁵⁵

The procedure for modifying an arbitrator's award for spousal support, like the procedure for modifying consent judgments and separation agreements, may depend upon whether the consent order confirming the award is interpreted as merely the court's sanction of the parties' contract, or the court's adoption of the award as its own determination of the rights and obligations of the parties. Consent judgments for the payment of spousal support are of two kinds.⁵⁶ When the court merely approves the amounts the husband has agreed to pay to the wife, the judgment results in an ordinary contract.⁵⁷ The agreement is enforceable only as an ordinary contract and cannot be changed or set aside without the consent of the parties.⁵⁸ Because the court does not order the payments, the spousal support is technically not alimony.⁵⁹ When the court adopts the agreement as its own determination of the rights and obligations of the parties, its order supersedes the agreement of the parties.⁶⁰ The spousal support is transformed into alimony.⁶¹ Alimony may be modified or vacated at any time by a motion in the cause and a showing of changed circumstances.⁶² The statute grants no similar provision for modifying spousal support. "The judgment must be an order, and the order must be for alimony."⁶³ Therefore, a consent judgment which merely approves the agreement of the parties does not award alimony within the accepted definition of the term⁶⁴ and is not subject to modification. The lan-

55. *White v. White*, 296 N.C. 661, 672, 252 S.E.2d 698, 704 (1979).

56. *Bunn v. Bunn*, 262 N.C. 67, 69, 136 S.E.2d 240, 242 (1964). This distinction has been adopted in a number of cases: *Holsomback v. Holsomback*, 273 N.C. 728, 161 S.E.2d 99 (1968); *Sayland v. Sayland*, 267 N.C. 378, 148 S.E.2d 218 (1966); *Seaborn v. Seaborn*, 32 N.C. App. 556, 233 S.E.2d 67 (1977). It is now also embodied in N.C. GEN. STAT. § 50-16.9(a) (1976).

57. *Bunn v. Bunn*, 262 N.C. 67, 69, 136 S.E.2d 240, 242 (1964); *Moore v. Moore*, 297 N.C. 14, 16, 252 S.E.2d 735, 737 (1979); *Holden v. Holden*, 245 N.C. 1, 8, 95 S.E.2d 118, 122 (1956); *Bailey v. Bailey*, 26 N.C. App. 444, 446, 216 S.E.2d 394, 396 (1975).

58. *Id.*

59. *Id.*; *White v. White*, 296 N.C. 661, 666, 252 S.E.2d 698, 701 (1979).

60. *Rowe v. Rowe*, 52 N.C. App. 646, 660, 280 S.E.2d 182, 190 (1981). "The alimony provision of a court-adopted consent judgment is modifiable and enforceable by the court's contempt power because the court's order supersedes the parties agreement."

61. N.C. GEN. STAT. § 50-16.9(a) (1976).

62. *Id.*

63. *Jones v. Jones*, 42 N.C. App. 467, 470, 256 S.E.2d 474, 476 (1979).

64. N.C. GEN. STAT. § 50-16.1(1) (1976) states: "Alimony means payment for

guage of a consent judgment⁶⁵ is construed to ascertain the intent of the parties.⁶⁶ Imprecise drafting of the order confirming the arbitrator's award may lead to an unintentional preservation or obliteration of a party's future rights in the cause.⁶⁷

ANALYSIS

In *Crutchley v. Crutchley*,⁶⁸ a unanimous Court⁶⁹ held that spousal support is arbitrable.⁷⁰ The Court noted that spousal support is not listed as one of the two statutory exceptions to the general rule of subsection (a) providing for the arbitration of "any controversy."⁷¹ Since spousal support is not expressly excluded, the Court felt compelled to conclude that the legislature's intent⁷² was for "any controversy," including a spousal support controversy, to be arbitrable.⁷³ After deciding that spousal support is a proper subject for arbitration, the Court said the Uniform Arbitration

the support and maintenance of a spouse, either in lump sum or on a continuing basis, *ordered* in an action for divorce, whether absolute or from bed and board, or an action for alimony with divorce." (Emphasis added).

65. *White v. White*, 296 N.C. 661, 664, 252 S.E.2d 698, 700 (1979) (consent judgment in which court "adopt[ed] the agreement of the parties as its own determination of their respective rights and obligations" and held it to be an order of the court for alimony and modifiable by a motion in the cause); *Levitch v. Levitch*, 294 N.C. 437, 439, 241 S.E.2d 506, 507 (1978) ("... in the usual case in which we have found approval rather than adoption, the court has stated merely that the agreement was approved, reviewed the subject matter of the agreement in a narrative form without further order, or expressly excluded the agreement from any prejudice under the terms of the judgment."); *Fuchs v. Fuchs*, 260 N.C. 635, 636, 133 S.E.2d 487, 489 (1963) (consent judgment in which lower court accepted the liability of the husband concerning support of the wife "as though determined by a court without the consent of either party" held to be an order of the court for alimony and modifiable by a motion in the cause); *Britt v. Britt*, 49 N.C. App. 463, 464, 271 S.E.2d 921, 923 (1980) (consent judgment in which court "retained jurisdiction of the cause" was subject to modification by the trial court).

66. *Bland v. Bland*, 21 N.C. App. 192, 195, 203 S.E.2d 639, 641 (1974).

67. *Mitchell v. Mitchell*, 270 N.C. 253, 258, 154 S.E.2d 71, 75 (1967).

68. 53 N.C. App. 732, 281 S.E.2d 744 (1981).

69. Judge Martin wrote the opinion. *Id.* at 736, 281 S.E.2d at 745. Judges Clark and Hill concurred. *Id.* at 740, 281 S.E.2d at 749.

70. 53 N.C. App. 732, 737, 281 S.E.2d 744, 747.

71. *Id.*

72. *Id.* The omission of domestic disputes from the statutory exceptions implies that the legislature did not intend to except domestic disputes from arbitration.

73. *Id.*

Act⁷⁴ supplied the sole method⁷⁵ of modifying and appealing an award. Since appellant did not seek either modification or appeal of the award until two years after the delivery of the award, she had waived her right to modify or appeal the award.⁷⁶

The Court rejected appellant's contention that either the consent judgment ordering arbitration or the order confirming the award must comply with North Carolina General Statute § 50-16.8(f). (North Carolina General Statutes hereafter referred to as G.S.) Subsection (f) requires the judge to make findings of fact and conclusions of law, but is inapplicable to a situation where the parties agree under the Uniform Arbitration Act to arbitrate spousal support.⁷⁷ The Uniform Arbitration Act contemplates the informal private settlement of disputes rather than the judicial proceeding envisioned in subsection (f). The purpose of the Act would be emasculated if the arbitrator were required to make findings of fact and conclusions of law. Subsection (f) modification would also undercut the plain intent of the parties to make a final, binding settlement of their rights and obligations. The order approving the agreement to arbitrate stated: "(i)t is the intent and purpose hereof that the said arbitrator is fully authorized and empowered to bring this controversy to a conclusion and . . . his report shall constitute the final and binding decision with respect to this case."⁷⁸ The order stated in subsection (b), "The arbitrator's report in this case shall be final and binding on all parties."⁷⁹ And finally, the order concluded, "It is hereby ORDERED that the award of the arbitrator is hereby CONFIRMED, and that this case therefore be removed from the docket as having been settled by arbitration."⁸⁰

The Court analogized an agreement to arbitrate the issue of spousal support to a separation agreement, which cannot be set aside or changed without the consent of the parties.⁸¹ A spouse's right to support is a property right which may be released by con-

74. N.C. GEN. STAT. §§ 1-567.14 and 1-567.18 (1973) (Cum. Supp. 1981).

75. 53 N.C. App. 732, 738, 281 S.E.2d 744, 748 (1981).

76. *Id.*

77. *Id.* at 739, 281 S.E.2d at 748.

78. *Id.* at 733, 281 S.E.2d at 745.

79. *Id.*

80. *Id.* at 735, 281 S.E.2d at 746.

81. *Id.* at 740, 281 S.E.2d at 748. The analogy is not perfect. A separation agreement does not require the court's front-end approval, while an agreement to arbitrate requires the judge to delegate his authority to the arbitrator in advance.

tract, and a separation agreement is a contract.⁸² North Carolina policy, reflected in other legislative enactments, supports the Court's conclusion that spousal support should be arbitrable. North Carolina's "no-fault" divorce provision⁸³ was enacted to enable a husband and wife to terminate their marriage without the sensationalism and public airing of dirty linen which necessarily accompany a divorce based on fault.⁸⁴ Arbitration seeks also to avoid the sensationalism that often accompanies domestic disputes. The repeal of the privy exam statute⁸⁵ reflects both the legislature's high regard for the freedom of contract and a trend away from protecting married women. North Carolina's statute allowing a separation agreement to bar a subsequent action for alimony,⁸⁶ indicates the legislature's preference for freedom of contract even in a domestic dispute context. Similarly, arbitration enhances the freedom to contract by recognizing husband and wife as bargaining equals.

The Court's assumption that the legislature intended domestic matters to be subject to the Uniform Arbitration Act merely because domestic matters were not expressly excluded from the Act,⁸⁷ however, may be too broad. Child support and custody are not expressly excluded from the Uniform Arbitration Act either, but North Carolina courts have not allowed parties to contract in separation agreements to withdraw children from the protective custody of the court.⁸⁸ Rather, failure to exclude domestic matters from the Act may indicate the legislature did not contemplate the Act would be used for domestic matters.⁸⁹ Continued legislative silence, following the holding in *Crutchley v. Crutchley*, will be more significant.

Appellant argued that the language in the confirmation order that the award "is fair and in the best interests of the children and

82. R. LEE, 2 NORTH CAROLINA FAMILY LAW, § 201 (3d ed. 1963).

83. N.C. GEN. STAT. § 50-16.6(b) (1976).

84. *Harrington v. Harrington*, 22 N.C. App. 419, 206 S.E.2d 742, *rev'd on other grounds*, 286 N.C. 260, 210 S.E.2d 190 (1974).

85. N.C. GEN. STAT. § 52-6 (1973) (repealed 1978).

86. N.C. GEN. STAT. § 50-6 (1965).

87. 53 N.C. App. 732, 737, 281 S.E.2d 744, 747 (1981).

88. *Bunn v. Bunn*, 262 N.C. 67, 69, 136 S.E.2d 240, 243 (1964); *Fuchs v. Fuchs*, 260 N.C. 635, 639, 133 S.E.2d 487, 491 (1963); *see also Holden v. Holden*, 245 N.C. 1, 6, 95 S.E.2d 118, 122 (1956).

89. The legislative history of the Uniform Arbitration Act is silent concerning the Act's applicability to domestic matters.

the parties"⁹⁰ demonstrated the trial judge had adopted the agreement as his own determination of the rights and liabilities of the parties. Thus, appellant argued, the spousal support would become technical alimony,⁹¹ modifiable by a motion in the cause under G.S. § 50-16.9(a).⁹² The Court answered by citing *Ellis v. Ellis*⁹³ for the broad proposition that consent judgments, being the judgments of the parties, cannot be set aside without the consent of the parties.⁹⁴ The Court did not discuss the well-recognized⁹⁵ distinction between a consent judgment which merely approves the agreement of the parties and a consent judgment in which the court adopts the agreement as its own determination.⁹⁶ If a judicially confirmed arbitration award is equivalent to a judicially confirmed separation agreement, the nature of the consent judgment should be equally determinative in both situations. The bench's practice of giving a dual meaning to "consent judgments" leads to confusing results. For example, an order for alimony whether "contested or entered by consent," is made modifiable by the statute.⁹⁷ Nevertheless, if a court finds that the order was merely the "approval" of the court, the court does not allow modification. One should compare this non-modifiable situation with the courts' treatment of G.S. § 50-13.7(a). Under this statute, consent orders are not specifically made modifiable, but the order for child support remains subject to modification. Treating all consent orders as approvals, as the Court did in *Crutchley v. Crutchley*, is less confusing—but a great deal of judge-made law must be reconciled to that treatment. Therefore, until the courts abandon the "approval/adoption" distinction, a workable solution would be to allow modification of consent orders that "adopt" an arbitrator's award for spousal support. If the order merely "approves" the arbitrator's award for spousal support the award would not be modifiable. The effect of a consent order with respect to an arbitration award and a separation agreement would then be consistent.

90. 53 N.C. App. 732, 735, 281 S.E.2d 744, 746 (1981).

91. See *supra* note 64.

92. N.C. GEN. STAT. § 50-16.9(a) (1976).

93. 193 N.C. 216, 136 S.E.2d 350 (1926).

94. 53 N.C. App. 732, 739, 281 S.E.2d 744, 748 (1981).

95. *Holsomback v. Holsomback*, 273 N.C. 728, 161 S.E.2d 99 (1968); *Sayland v. Sayland*, 267 N.C. 378, 148 S.E.2d 818 (1966); *Bunn v. Bunn*, 262 N.C. 67, 136 S.E.2d 240, 242 (1964).

96. *Bunn v. Bunn*, 262 N.C. 67, 69, 136 S.E.2d 240, 242 (1964).

97. N.C. GEN. STAT. § 50-16.9(a) (1976).

The Court did not answer appellant's contention that child support is not a proper subject for arbitration. The Court carefully limited its decision to the issue of spousal support, appellant's sole assignment of error:⁹⁸ "Thus, the *only* question before this Court on this appeal concerns the validity and effect of the portion of the arbitrator's award concerning support of the plaintiff-appellant."⁹⁹ Appellant argued¹⁰⁰ that the question of child support was properly raised in her brief, thus qualifying for review under the proviso to Rule 10(a), Rules of Appellate Procedure.¹⁰¹ In *State v. Samuels*,¹⁰² the North Carolina Supreme Court said of the proviso, "(i)t is clear that a defendant may properly present on appeal the questions enumerated in Rule 10(a), without taking any exceptions or making any assignments of error in the record"¹⁰³ Narrowing the decision to the arbitration of spousal support enabled the Court to avoid the more difficult problem of fusing North Carolina's policy of *parens patriae* with the benefits of arbitration. An agreement by the parents with respect to child support and custody does not permanently bind the court.¹⁰⁴ But arbitration of domestic disputes is attractive largely because it may supply an antidote to clogged court calendars. Court congestion will not be reduced, however, unless the arbitrator's award is final and binding on the parties. Furthermore, the Court found spousal support to be a proper subject for arbitration because it read the Uniform Arbi-

98. The entire assignment of error is set out *supra* in note 20.

99. 53 N.C. App. 732, 737, 281 S.E.2d 744, 747 (1981). (Emphasis in original).

100. Brief for Appellant, Petition for Rehearing, at 4, 5, *Crutchley v. Crutchley*, 53 N.C. App. 732, 281 S.E.2d 744 (1981). The Court of Appeals denied appellant's petition for re-hearing.

101. No exception not so set out may be made the basis of an assignment of error; and no exception so set out which is not made the basis of an assignment of error may be considered on appeal. Provided, that upon appeal duly taken from a final judgment any party to the appeal may present for review, by properly raising them in his brief, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law, notwithstanding the absence of exceptions or assignments of error in the record on appeal.

Rule 10(a), Rules of Appellate Procedure (Cum. Supp. 1981). In *Peoples Service Drug Stores, Inc., v. Mayfair*, 50 N.C. App. 442, 274 S.E.2d 365 (1981), the Court invoked Rule 2 to suspend Rule 10 altogether.

102. 298 N.C. 783, 260 S.E.2d 427 (1979).

103. *Id.* at 786, 260 S.E.2d at 430.

104. *See* cases cited *infra* note 107.

tration Act as allowing arbitration in all matters not specifically excluded, yet North Carolina courts have not surrendered continuing jurisdiction over matters involving the welfare of the minor children.¹⁰⁵ The tangle created by superimposing the slightly overbroad arbitration statute onto well-settled case law concerning the modification of child support should be resolved permanently by the Legislature. Until the Legislature clarifies the desirability, validity and effect of arbitrating child support, the Supreme Court has available a middle position that is consistent with earlier case law and the benefits offered by the present arbitration statute.

The Court of Appeals' sound reasoning with respect to the arbitration of spousal support should be extended to the arbitration of child support. In *Crutchley v. Crutchley*, the Court gave a judicially confirmed arbitrator's award for spousal support the same validity and effect as a separation agreement.¹⁰⁶ While a separation agreement may be final on the issue of spousal support, it is not necessarily binding on matters of child welfare. Regardless of whether a separation agreement is "approved" or "adopted" by the court, "neither agreements nor adjudications for the custody or support of a minor child are ever final. Parties may never withdraw children from the protective supervision of the court."¹⁰⁷ Because an arbitrator's award must be confirmed by the court to comply with G.S. § 1-567.12, the court would always establish jurisdiction over any child support agreement contained in the award just as it does in a separation agreement. G.S. § 50-13.7(a) provides that "(a)n order of a court of this State for support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances . . ." Therefore, the child support provision of a judicially confirmed arbitrator's award would be modifiable by a motion in the cause. As in separation agreements, child support provisions should be presumed to be "just and reasonable,"¹⁰⁸ but they would not withdraw the children from the protective custody of the court.¹⁰⁹ Analogizing child support and custody provisions in an arbitrator's award with child support and custody provisions in a judicially confirmed separation

105. *Id.*

106. 53 N.C. App. 732, 740, 281 S.E.2d 744, 748 (1981).

107. *Bunn v. Bunn*, 262 N.C. 67, 69, 136 S.E.2d 240, 243 (1964). *See also Fuchs v. Fuchs*, 260 N.C. 635, 139 S.E.2d 487 (1963); *Holden v. Holden*, 245 N.C. 1, 95 S.E.2d 118 (1956).

108. *Fuchs v. Fuchs*, 260 N.C. 635, 639, 133 S.E.2d 487, 491 (1963).

109. *Id.*

agreement accommodates arbitration without offending the deeply held *parens patriae* policy of North Carolina.¹¹⁰ If judicially confirmed arbitrator's awards were this closely aligned with separation agreements and consent judgments, one may inquire what advantage would remain for arbitration of domestic disputes. In the often strained atmosphere of marital dissolution, parties are likely to disagree on nearly everything, thus making the separation agreement process expensive and time consuming. By using arbitration, the parties need only to agree upon an acceptable arbitrator. The parties can thereby avoid the expense, frustration and bitterness that will often accompany prolonged negotiations.

The Court's decision to bind the parties to the agreement to arbitrate and the arbitration award is the more fair decision. Appellee contracted to support the children after their eighteenth birthdays and to increase automatically his monthly payments to reflect changes in the cost of living.¹¹¹ Allowing appellant to modify those portions of the award with which she was dissatisfied, while locking appellee into the portions of the award appellant preferred, would be inequitable. Moreover, the parties have since obtained an absolute divorce and the divorce decree made no reference to either spousal support, child support, or the arbitrator's award. An action for spousal support cannot be maintained after a decree of absolute divorce.¹¹² If the Court were now to invalidate the arbitrator's award, conceivably appellant would be left without any spousal support whatsoever.

If the Supreme Court of North Carolina wishes to postpone entirely its consideration of the use of arbitration in domestic disputes, technical grounds exist to provide a way. The Uniform Arbitration Act requires that "upon the granting of an order confirming, modifying or correcting an award, judgment or decree shall be entered in conformity therewith and be docketed and enforced as any other judgment or decree"¹¹³ The record does not show that judgment was ever entered and docketed. While this indicates the trial judge indeed meant to remove the case from the docket as having been settled by arbitration,¹¹⁴ nevertheless the Uniform Arbitration Act technically was not complied with. The Court of Ap-

110. R. LEE, 2 NORTH CAROLINA FAMILY LAW, § 152 (4th ed. 1980).

111. 53 N.C. App. 732, 735, 281 S.E.2d 744, 746 (1981). This portion of the award is set out *supra* note 17.

112. *McCarley v. McCarley*, 289 N.C. 109, 221 S.E.2d 490 (1976).

113. N.C. GEN. STAT. § 1-567.15 (Cum. Supp. 1980).

114. See *supra* note 16.

peals did not address this issue.

CONCLUSION

The Court of Appeals opened the door to arbitration of domestic disputes in *Crutchley v. Crutchley*, holding that the Uniform Arbitration Act governs the procedure for initiation, modification and appeal of arbitrator's awards to the exclusion of the domestic statutes. By reaching this conclusion, the Court validates both agreements to arbitrate domestic matters and judicially confirmed arbitrator's awards. Because arbitration is potentially less expensive than litigation and affords the parties more privacy, arbitration would almost certainly be used frequently. Special care in drafting the confirmation order is necessary to minimize the possibility that spousal support will be transformed into alimony, subjecting the award to later modification through a motion in the cause.

Although the Court did not address the issue of arbitration and child support, a suitable solution must accommodate the advantages of arbitration without offending North Carolina's policy of *parens patriae*. This can be accomplished by granting child support provisions in a judicially confirmed arbitrator's award a presumption of reasonableness, while not foreclosing later modification by the court; the same method the North Carolina courts presently employ with respect to separation agreements.

From a practical point of view, the Supreme Court will be deciding whether the advantages of reduced court congestion, privacy and economy outweigh the disadvantage of at least partially foreclosing the trial judge from modifying an award granted not by the court, but by "judges of the parties' own choosing."

Gene B. Tarr