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A New Rule for Consent Judgments in Family Law - Walters v. Walters

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NOTES

A NEW RULE FOR CONSENT JUDGMENTS IN FAMILY LAW — *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983).

INTRODUCTION

In the process of obtaining a divorce, the husband and wife frequently enter into a consent judgment which outlines the rights and obligations of the parties. The agreement commonly deals with both the alimony and property provisions of the settlement and is incorporated into the court's decree.[1] Consent judgments are commonly designated as one of two types.[2] The first is treated as a contract between the parties and is not modifiable without their consent.[3] The second is treated as a court ordered judgment and is both modifiable and enforceable by the court's contempt power.[4] The language of the agreement and the intent of the parties determines the type.[5]

The North Carolina Supreme Court in *Walters v. Walters*[6] attempted to bring some clarity to this area by holding prospectively that all separation agreements brought before the court for the court's approval will no longer be treated as contracts between the parties but, rather, will be treated as court ordered judgments, modifiable and enforceable by the contempt powers of the court.[7]

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1. R. LEE, NORTH CAROLINA FAMILY LAW, § 149 (4th ed. 1980).

2. For a discussion of the two types *see*, White v. White, 296 N.C. 661, 252 S.E.2d 698 (1979); Holsomback v. Holsomback, 273 N.C. 728, 161 S.E.2d 99 (1968); Bunn v. Bunn, 262 N.C. 67, 136 S.E.2d 240 (1964).

3. Holden v. Holden, 245 N.C. 1, 95 S.E.2d 118 (1956); Stanley v. Stanley, 226 N.C. 129, 37 S.E.2d 118 (1946); Brown v. Brown, 224 N.C. 556, 31 S.E.2d 529 (1944); Davis v. Davis, 213 N.C. 537, 196 S.E. 819 (1938).

4. Stancil v. Stancil, 255 N.C. 507, 121 S.E.2d 882 (1961); Smith v. Smith, 247 N.C. 223, 100 S.E.2d 370 (1957); Edmundson v. Edmundson, 222 N.C. 181, 22 S.E.2d 576 (1942); Davis v. Davis, 213 N.C. 537, 196 S.E. 819 (1938); Dyer v. Dyer, 212 N.C. 620, 194 S.E. 278 (1937).

5. White v. White, 296 N.C. 661, 667-68, 252 S.E.2d 698, 702 (1979).

6. 307 N.C. 381, 298 S.E.2d 338 (1983).

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

Although the parties now know with certainty the court's power over their agreement, the holding will create problems in drafting agreements acceptable to both parties.

In its opinion the majority made two errors. The first was the failure to recognize that a consent judgment may have attributes of both contracts and judgments.[8] The second was a misstatement of the prior law regarding the modifiability of consent judgments.[9] These errors led to the adoption of the new rule. The majority added to the confusion by discussing the problem in terms of consent judgments, then stating that the new rule applies to separation agreements. If the prior law had been as the majority stated, the new rule would not have been a drastic change. However, the new rule, if applied as stated, will create problems in the drafting of consent judgments.

THE CASE

Cecil Jeanette Walters, the plaintiff, and Melvin Royce Walters, the defendant, separated in December of 1977.[10] Mrs. Walters filed for and was awarded alimony *pendente lite,* and at trial a jury awarded her permanent alimony.[11] Prior to the court's issuance of a judgment on the amount of permanent alimony, the parties entered into a consent judgment.[12] As requested by the parties, this consent judgment was placed within an order of the court.[13] In

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8. *Id.* at 384-385, 298 S.E.2d at 341.

9. *Id.* at 385-386, 298 S.E.2d at 341.

10. *Id.* at 382, 298 S.E.2d at 339.

11. *Id.*

12. *Id.* A consent judgment is the contract of the parties entered upon the court records with the approval and sanction of a court of competent jurisdiction. It depends for its validity upon the consent of both parties. R. Lee, *supra* note 1.

13. 307 N.C. at 382-383, 298 S.E.2d at 339-340. The consent judgment as it appeared in the court's order was as follows:

> NOW, THEREFORE, by and with the consent of the parties as evidenced by their signatures affixed hereto, it is by consent, ORDERED, ADJUDGED and DECREED, as follows:
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> 1. The defendant, Melvin Royce Walters, is hereby ordered and directed to pay to the plaintiff, Cecil Jeanette Walters, said payment to constitute alimony, the sum of One Thousand ($1,000.00) Dollars per month, beginning October 1978, and continuing for sixty-two (62) months, thereafter, for a total of sixty-three (63) payments, said payments to be made quarterly in advance, commencing October 1st, 1978, and the quarterly payments thereafter to be payable on January 1st, April 1st and July 1st, and October 1st of each successive year until all of

June of 1979, the plaintiff filed a motion requesting the court to find the defendant in contempt of court for unilaterally reducing the monthly payments. The parties then mutually agreed to modify their original consent judgment by decreasing the monthly payments while lengthening the payment period.[14] In April of 1980, the plaintiff remarried and the defendant ceased making any payments. Again, the plaintiff asked the court to enforce the agreement through its contempt power. At the same time, the defendant moved to terminate the alimony payments pursuant to North Carolina General Statute 50-16.9(b).[15] After a hearing, the trial court dismissed the plaintiff's motion to hold Mr. Walters in contempt but allowed the defendant's motion to terminate the alimony payments.[16]

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the payments shall have been made, provided, however, the defendant, Melvin Royce Walters, shall be allowed six (6) weeks following the due date of any payment in which to make the same without being in default of the provisions of this Order.

2. The defendant, Melvin Royce Walters, will simultaneously with the entry of this Judgment execute a fee simple warranty deed for all of his right, title and interest in and to that real estate located in Burnsville Township, that was conveyed to the parties to this action by deed dated January the 23rd, 1968, and recorded in Deed Book 160, page 636, Registry of Anson County. This conveyance, however, shall be subject to any outstanding liens and ad valorem taxes existing at the time of the conveyance.

3. It is further ORDERED that the provisions of this Judgment shall be enforceable by contempt proceedings.

4. It is further ORDERED that the plaintiff, Cecil Jeanette Walters, be permitted to use and enjoy that certain motor vehicle heretofore provided her by her husband until the first periodic payment as herein provided is made.

5. It is understood that the payments as herein provided shall be made by the defendant to the plaintiff regardless of whether or not the parties are divorced or the plaintiff should remarry during said period of time.

14. 307 N.C. at 383, 298 S.E.2d at 340. The principal sum to be paid remained the same after the modification.

15. "If a dependent spouse who is receiving alimony under a judgment or order of a court of this state shall remarry, said alimony shall terminate." N.C. GEN. STAT. § 50-16.9(b) (1976).

16. 307 N.C. at 383, 298 S.E.2d at 340. The trial court found that the consent judgment was ambiguous on the issue of whether the provisions of the agreement were reciprocal. Accordingly, it was determined that the plaintiff had failed to rebut the presumption of separability of provisions established in White v. White, 296 N.C. 661, 252 S.E.2d 698 (1979). *See generally,* Note, *Presumed Separability of Support and Property Provisions In Ambiguous Separation Agreements,* 16 WAKE FOREST L. REV. 152 (1980). The trial court's finding of ambiguity in *Wal-*

On appeal, the plaintiff argued that she was entitled to the payments regardless of her remarriage in accordance with the express provisions of the consent judgment.[17] She also contended that the alimony and property settlement provisions constituted reciprocal consideration for each other so that any modification of the alimony provision would destroy the entire agreement.[18] The defendant contended that the agreement contained separable alimony and property settlement provisions.[19] If independent and separable, North Carolina General Statute 50-16.9(b) would operate to terminate the alimony payments upon the dependent spouse's remarriage.[20] The North Carolina Court of Appeals reversed and remanded, holding that the consent judgment could neither be modified nor terminated by the court.[21] Despite the agreement labelling the payments as alimony, they were not alimony within the meaning of the statute.[22] The parties' labelling of the payments in the consent judgment as alimony was done only for tax purposes.[23] The court concluded that the agreement was intended as a complete property settlement between the parties with the alimony and property settlement provisions serving as reciprocal consideration for each other.[24] The plaintiff had overcome

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ters can be attributed to the fact that the consent judgment labelled the payments alimony and provided that they shall be made regardless of the plaintiff's remarriage. For the text of consent judgment, *see supra* note 13. These provisions of the agreement directly conflict with G.S. 50-16.9(b) which provides for termination of alimony upon the remarriage of the dependent spouse. *See supra* note 15.

17. Walters v. Walters, 54 N.C. App. 545, 284 S.E.2d 151 (1981).

18. 54 N.C. App. at 547-548, 284 S.E.2d at 153. The plaintiff was relying on *Bunn* for this contention.

19. 54 N.C. App. at 547, 284 S.E.2d at 153.

20. *Id. See supra* note 15.

21. 54 N.C. App. at 551, 284 S.E.2d at 155. The court listed several factors which indicated the consent judgment was intended to be a complete property settlement, and its provisions reciprocal consideration for each other rather than separate alimony and property settlement provisions as the trial court concluded. The main factors listed by the court were the express language of the agreement and the intention of the parties.

22. 54 N.C. App. at 550, 284 S.E.2d at 154-55.

23. *Id.* The payments were treated as alimony for federal income tax purposes. 54 N.C. App. at 546, 284 S.E.2d at 153. Despite the fact they were treated as alimony, the payments were not alimony for income tax purposes. Treas. Reg. 1.71-1(d)(3) (1957). The monthly payments lasted for a period less than ten years and were not subject to any contingency.

24. 54 N.C. App. at 551, 284 S.E.2d at 155.

the presumption of separability established in *White v. White*;[25] therefore, the consent judgment was neither modifiable nor terminable.[26]

The North Carolina Supreme Court reversed[27] and established a rule that:

> Whenever the parties bring their separation agreements before the court for the court's approval, it will no longer be treated as a contract between the parties. All separation agreements approved by the court as judgments of the court will be treated similarly, to wit, as court ordered judgments. These court ordered separation agreements, as consent judgments, are modifiable, and enforceable by the contempt powers of the court, in the same manner as any other judgment in a domestic relations case.[28]

A vigorous dissent argued for an affirmance of the Court of Appeals decision, reasoning that the express provision regarding nonmodifiability of the consent judgment was controlling.[29] The new rule announced by the majority was pronounced by the dissent as "unwise if not practically unworkable."[30]

BACKGROUND

Prior to *Walters v. Walters*,[31] North Carolina recognized two distinct types of consent judgments.[32] Basically, one was court approved[33] and the other was court ordered.[34] The distinction becomes important when determining the enforceability and modifiability of a particular agreement.[35]

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25. 296 N.C. 661, 252 S.E.2d 698 (1979).
26. 54 N.C. App. 551, 284 S.E.2d at 155.
27. 307 N.C. 381, 298 S.E.2d 338 (1983).
28. *Id.* at 386, 298 S.E.2d at 342.
29. *Id.* at 387, 298 S.E.2d at 342.
30. *Id.* at 392, 298 S.E.2d t 345.
31. *Id.* at 381, 298 S.E.2d at 338.
32. For a discussion of the two types *see* White v. White, 296 N.C. 661, 252 S.E.2d 698 (1979); Holsomback v. Holsomback, 273 N.C. 728, 161 S.E.2d 99 (1968); Bunn v. Bunn, 262 N.C. 67, 136 S.E.2d 240 (1964).
33. Holden v. Holden, 245 N.C. 1, 95 S.E.2d 118 (1956); Stanley v. Stanley, 226 N.C. 129, 37 S.E.2d 118 (1946); Brown v. Brown, 224 N.C. 556, 31 S.E.2d 529 (1944); Davis v. Davis, 213 N.C. 537, 196 S.E. 819 (1938).
34. Stancil v. Stancil, 255 N.C. 507, 121 S.E.2d 882 (1961); Smith v. Smith, 247 N.C. 223, 100 S.E.2d 370 (1957); Edmundson v. Edmundson, 222 N.C. 181, 22 S.E.2d 576 (1942); Davis v. Davis, 213 N.C. 537, 196 S.E. 819 (1938); Dyer v. Dyer, 212 N.C. 620, 194 S.E. 278 (1937).
35. R. LEE, *supra* note 1. *Quoting* from Bunn v. Bunn, 262 N.C. 67, 69, 136

A "pure" (court approved) consent judgment is merely the contract of the parties entered upon the court records with the approval and sanction of a court of competent jurisdiction. It may not be modified without the consent of the parties, and it is not enforceable by the court's contempt power.[36]

The technical form of a consent judgment will affect its modifiability and enforceability.[37] Limitations on the court's power to enforce and modify an agreement are present only in the case of a purely contractual consent judgment.[38] All court ordered consent judgments are enforceable by the court's contempt powers.[39] Modifiability by the court is not a prerequisite to the court's power of enforcement by contempt. Modifiability is determined by the terms of the consent judgment.[40]

S.E.2d 240, 242-43 (1964):

> In one, [consent judgment] the court merely approves or sanctions the payments which the husband has agreed to make for the wife's support and sets them out in a judgment against him. Such a judgment constitutes nothing more than a contract between the parties made with the approval of the court. Since the court itself does not in such case order the payments, the amount specified there is not technically alimony. In the other, the court adopts the agreement of the parties as its own determination of their respective rights and obligations and orders the husband to pay the specified amount as alimony.
>
> A contract-judgment of the first type is enforceable only as an ordinary contract. It may not be enforced by contempt proceedings and, insofar as it fixes the amount of support for the wife, it cannot be changed or set aside except with the consent of both parties in the absence of a finding that the agreement was unfair to the wife or that her consent was obtained by fraud or mutual mistake. Of course, 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.
>
> A judgment of the second type, being an order of the court, may be modified by the court at any time changed conditions make a modification right and proper. The fact that the parties have agreed and consented to the amount of the alimony decreed by the court does not take away its power to modify the award or to enforce it by attachment for contempt should the husband wilfully fail to pay it.

36. *Id.*

37. R. LEE, *supra* note 1, citing Note, 35 N.C.L. REV. 405 (1957); "the subtleties of the form of the judgment play a major role in determining the subsequent rights of the parties."

38. White v. White, 296 N.C. 661, 665, 252 S.E.2d 698, 700-01 (1979).

39. *See supra* note 34.

40. Walters v. Walters, 307 N.C. 381, 391, 298 S.E.2d 338, 344 (1983) (Exum, J. dissenting). *See also* Henderson v. Henderson, 307 N.C. 401, 410, 298 S.E.2d

The determination of the type of consent judgment is critical to ascertaining the rights and obligations of the parties. This determination has caused considerable confusion in North Carolina.[41] "When called upon to alter the terms of a consent judgment, or to enforce its provisions by contempt proceedings, the question for the court in each case is whether the provision for the wife contained therein rests only upon contract or is an adjudication of the court."[42] Both enforceability and modifiability of each type are discussed below.

A. Enforceability

The difference in the enforceability of the two types of consent judgments is very straightforward. The court approved or contract judgment is enforceable as an ordinary contract, whereas the court ordered judgment is enforceable through the court's contempt powers.[43] The remedy for breach of a court approved judgment is a breach of contract action.[44] This remedy applies to both the alimony and property settlement provisions of a particular agreement.[45] Since the court has not ordered any payments, but merely approved them, any payments designated as alimony are that in name only.[46] To qualify as true alimony, the payments must be court ordered. This distinction makes North Carolina

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345, 351 (1983) (Exum J., concurring).

41. *See* quote from *Bunn, supra* note 35.

42. R. LEE, *supra* note 1.

43. *See* quote from *Bunn, supra* note 35.

44. Davis v. Davis, 213 N.C. 537, 538, 196 S.E. 819, 820 (1938).

45. Bunn v. Bunn, 262 N.C. 67, 69, 136 S.E.2d 240, 242 (1964) *citing* Fuchs v. Fuchs, 260 N.C. 635, 133 S.E.2d 487 (1963); Holden v.Holden, 245 N.C. 1, 95 S.E.2d 118 (1956); Howland v. Stitzer, 236 N.C. 230, 72 S.E.2d 583 (1952); Davis v. Davis, 213 N.C. 537, 196 S.E. 819 (1938).

46. Bunn v. Bunn, 262 N.C. 67, 69, 136 S.E.2d 240, 242 (1964). Since the court itself does not in such case order the payments, the amount specified therein is not technically alimony. N.C. GEN. STAT. § 50-16.1 provides:

> As used in the statutes relating to alimony and alimony pendente lite unless the contest otherwise requires, the term:
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> (1) "Alimony" means payment for 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 without divorce.
>
> (2) "Alimony *pendente lite*" means alimony ordered to be paid pending the final judgment of divorce in an action for divorce, whether absolute or from bed and board, or in an action for annulment, or on the merits in an action for alimony without divorce.

General Statute 50-16.9 (a) and (b) inapplicable to court approved judgments.[47]

The remedy for breach of a court ordered consent judgment is a contempt proceeding.[48] The party seeking to enforce the agreement asks the court to hold the breaching party in contempt of court. Failure to comply with the court's order frequently results in a jail term for the breaching party.[49] With court ordered judgments, the parties' contract is superseded by the court's decree.[50] Because it is the judgment of the court and not a contract between the parties which is being enforced, both alimony and property settlement provisions are enforceable through the court's contempt powers.[51]

B. Modifiability

Most of the problems with the recognition of two types of consent judgments concern the issue of their modifiability by the court. A "pure" (court approved) consent judgment cannot be modified without the consent of the parties.[52] A court approved consent judgment is not modifiable by the court because it is a contract between the parties which has merely been approved by

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47. N.C. GEN. STAT. § 50-16.9 (1976):

(a) An order of a court of this state for alimony or alimony *pendente lite*, whether contested or entered by consent may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested. This section shall not apply to orders entered by consent before October 1, 1967.

(b) If a dependent spouse who is receiving alimony under a judgment or order of a court of this state shall remarry, said alimony shall terminate.

48. Bunn v. Bunn, 262 N.C. 67, 69, 136 S.E.2d 240, 243 (1964) *citing* Stancil v. Stancil, 255 N.C. 507, 121 S.E.2d 882 (1961); Smith v. Smith, 247 N.C. 223, 100 S.E.2d 370 (1957); Edmundson v. Edmundson, 222 N.C. 181, 22 S.E.2d 576 (1942); Davis v. Davis, 213 N.C. 537, 196 S.E. 819 (1938); Dyer v. Dyer, 212 N.C. 620, 194 S.E. 278 (1937).

49. N.C. GEN. STAT. § 50-16.7(j) (1976). In *Walters*, the defendant was ordered jailed until he complied with the court ordered consent judgment. The consent judgment in *Walters* expressly provided that the provisions of the consent judgment were enforceable by contempt proceedings. *See supra* note 13 for text of the consent judgment.

50. Mitchell v. Mitchell, 270 N.C. 253, 256, 154 S.E.2d 71, 73 (1967), *quoted* in *Walters*, 307 N.C. at 385, 298 S.E.2d at 342.

51. Rowe v. Rowe, 305 N.C. 177, 183, 287 S.E.2d 840, 844 (1982); Bunn v. Bunn, 262 N.C. 67, 69, 136 S.E.2d 240, 243 (1964).

52. *See* quote from *Bunn, supra* note 35.

the court.[53] On the other hand, the court ordered judgment is generally modifiable by the court because it is the court's order and not the parties' contract which is being modified.[54]

A consent judgment may purport to be a complete settlement between the parties of all property and marital rights, including the dependent spouse's claim for alimony.[55] Problems arise regarding the status of payments designated as alimony when the dependent spouse remarries, because under North Carolina General Statute 50-16.9 (b) alimony automatically terminates upon remarriage.[56] However, where the consent judgment is a complete settlement of all property and marital rights, the supporting spouse's obligation to the dependent spouse survives any remarriage.[57] The nominal alimony payments are not true alimony but consideration for the dependent spouse's release of marital rights.[58] Because the payments are not alimony within the meaning of the statute, they are not modifiable or terminable.[59]

The court ordered consent judgment may only be modified in appropriate situations. The North Carolina Supreme Court in *Bunn v. Bunn*[60] held that alimony provisions were modifiable any time changed conditions made a modification appropriate.[61] This holding was codified by the legislature in North Carolina General Statute 50-16.9.[62] Under the statute there are two prerequisites for the modification of a consent judgment. The first is that the consent judgment must be an order of the court. The second is that the consent judgment must order the payment of alimony. After satisfying these prerequisites, the party seeking modification must prove a change of circumstances.[63]

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53. White v. White, 296 N.C. 661, 665, 252 S.E.2d 698, 700 (1979), *citing* Davis v. Davis, 213 N.C. 537, 196 S.E.2d 118 (1956).

54. White v. White, 296 N.C. 661, 665, 252 S.E.2d 698, 701 (1979), *citing* Bunn v. Bunn, 262 N.C. 67, 70, 136 S.E.2d 240, 243 (1964).

55. Bunn v. Bunn, 262 N.C. 67, 70, 136 S.E.2d 240, 243 (1964).

56. *See supra* note 47.

57. R. LEE, *supra* note 1 at § 154, *citing* Annot., 48 A.L.R.2d 318, 323 (1956).

58. *Id.* Designating the alimony payments as consideration for the defendant spouse's release of her marital rights is equivalent to the concept of reciprocal consideration expressed in *Bunn*.

59. *See supra* note 47.

60. 262 N.C. 67, 136 S.E.2d 240 (1964).

61. *Id.* at 69.

62. *See supra* note 47.

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

Regarding this second prerequisite, the court in *White* said, "even though denominated as such, periodic support payments to a dependent spouse may not be alimony within the meaning of the statute and thus modifiable if they and other provisions for a property division between the parties constitute reciprocal consideration for each other."[64] Consequently, if the alimony and property settlement provisions do serve as reciprocal consideration for one another, modification of the alimony provision would destroy the entire agreement.[65] Agreements in which the alimony and property settlement provisions serve as reciprocal consideration for each other are said to be inseparable.

Prior to *Walters* a consent judgment could contain separable alimony and property settlement provisions.[66] The court could modify the alimony provision but could not modify the property settlement provision.[67] In resolving the question of modifiability, the separability or inseparability of the alimony and property settlement provisions must be determined. The court in *White* said that the answer to this question depends upon the construction of the consent judgment as a contract.[68] If the provisions are found to be separable, the alimony provisions are modifiable under North Carolina General Statute 50-16.9.[69] The property settlement provisions are not modifiable by statute or under case law.[70]

In *White,* the court tried to clarify the problem of determining the separability or inseparability of provisions in a particular agreement.[71] The case established a presumption in North Carolina of the separability of alimony and property settlement provisions in an ambiguous agreement.[72] The party opposing modification of the agreement has the burden of proof on the issue of

64. 296 N.C. at 666, 252 S.E.2d at 701.

65. *Id., citing* Bunn v. Bunn, 262 N.C. 67, 70, 136 S.E.2d 240, 243 (1964).

66. 262 N.C. at 70, 136 S.E.2d at 243.

67. *Id.*

68. 296 N.C. at 667-68, 252 S.E.2d at 702; "The heart of a contract is the intention of the parties. The intention of the parties must be determined from the language of the contract, the purposes of the contract, the subject matter and the situation of the parties at the time the contract is executed." (*quoted* from Adder v. Holman & Moody, Inc., 288 N.C. 484, 492, 219 S.E.2d 190, 196 (1975).

69. *See supra* note 47.

70. Holsomback v. Holsomback, 273 N.C. 728, 732-33, 161 S.E.2d 99, 103 (1968) (Provisions in a consent judgment relating to a division of property could be modified or set aside only for fraud or mistake in an independent action).

71. 296 N.C. 661, 252 S.E.2d 698 (1979).

72. *Id.* at 672, 252 S.E.2d at 704.

separability. *White* did not change the law regarding the nonmodifiability of property settlement provisions.[73]

Prior to *Walters* the Supreme Court's last examination of the North Carolina law regarding consent judgments came in the case of *Rowe v. Rowe*.[74] In that case a court ordered consent judgment expressly provided that the alimony provision was not subject to modification under North Carolina General Statute 50-16.9.[75] The court held that this provision was void as against public policy if the payments were true alimony.[76] However, the court concluded that if the alimony and property settlement provisions are shown to constitute reciprocal consideration for each other, the alimony provision may not be modified.[77] In so holding, the court reaffirmed the principles established in *Bunn* and *White*.[78]

ANALYSIS

The issue in *Walters*, as stated by the majority, was whether a consent judgment within a court order could be modified.[79] Writing for a four to three majority, Justice Copeland sought to clarify this area of family law by abolishing the continued recognition of two types of consent judgments:

> Instead of following this dual consent judgment approach in family law, we now establish a rule that whenever the parties bring their separation agreements before the court for the court's approval, it will no longer be treated as a contract between the parties. All separation agreements approved by the court will be treated similarly, to-wit, as court ordered judgments. These court ordered separation agreements, as consent judgments, are modifiable and enforceable by the contempt powers of the court, in the same manner as any other judgment in a domestic relations case.[80]

The opinion correctly points out the confusion that exists in this area. For the majority, this confusion was symbolized by the differ-

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73. *Id.*
74. 305 N.C. 177, 287 S.E.2d 840 (1982).
75. *Id.* at 179, 287 S.E.2d at 841.
76. *Id.* at 183, 287 S.E.2d at 844.
77. *Id.* at 188, 287 S.E.2d at 847. Justice Copeland, who wrote the majority opinion in *Walters*, wrote a dissent in *Rowe* which directly contradicts his *Walters* opinion. This is discussed further in the Analysis Section; *see infra* note 114.
78. 262 N.C. 67, 136 S.E.2d 240 (1964); 296 N.C. 661, 252 S.E.2d 698 (1979).
79. 307 N.C. at 384, 298 S.E.2d at 341.
80. *Id.* at 386, 298 S.E.2d at 342.

ing analyses employed by the trial court and court of appeals.[81] Justice Copeland stated that in law, the court approved consent judgment creates nothing but a contract, while in actual practice it creates great confusion in family law.[82]

In reversing the court of appeals, the Supreme Court may have added to, rather than reduced, the confusion in family law. The majority opinion contains two distinct errors. The first is the failure to recognize that a consent judgment may be both a contract and a judgment.[83] The second involves a misstatement of the prior law dealing with the modifiability of consent judgments.[84] In his well reasoned dissent, Justice Exum explicitly recognizes the first of these errors and by implication, the second.[85]

North Carolina has recognized that a consent judgment may be both a contract and a judgment.[86] Consequently, consent judgments do not have to be either one or the other but can have attributes of both.[87] As a contract, the agreement may not be modified without the consent of the parties, but as a judgment it may be enforced by the court's contempt power.[88] The majority opinion fails to distinguish between the power to enforce and the power to modify. According to the majority opinion in *Walters*, under North Carolina law a consent judgment is either wholly within or wholly beyond the control of the court.[89] If a particular consent judgment is enforceable then it must be modifiable. This was an erroneous reading of prior North Carolina law. Enforceability and modifiability are two separate issues.[90] The enforceability of a consent judgment is determined by whether or not the court has ordered its performance.[91] Modifiability is determined by what is being modified, the alimony or property settlement provisions.[92]

The majority in *Walters* ignores a long line of North Carolina cases which held that consent judgments can have attributes of

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81. *Id.* at 384, 298 S.E.2d at 341.
82. *Id.* at 386, 298 S.E.2d at 342.
83. *Id.* at 384-85, 298 S.E.2d at 341.
84. *Id.* at 385-86, 298 S.E.2d at 341.
85. *Id.* at 387, 298 S.E.2d at 342 (Exum, J., dissenting).
86. 262 N.C. at 70, 136 S.E.2d at 243.
87. 307 N.C. at 389, 298 S.E.2d at 343 (Exum, J., dissenting).
88. *Id.*
89. *Id.* at 384-85, 298 S.E.2d at 341.
90. *Id.* at 391, 298 S.E.2d at 344; *See also* Henderson v. Henderson, 307 N.C. 401, 410, 298 S.E.2d 345, 351 (1983) (Exum, J., concurring).
91. 262 N.C. at 70, 136 S.E.2d at 243.
92. *Id.*

both a contract and a judgment.[93] The opinion fails to recognize there is a middle ground between the "pure" contract consent judgment and the court ordered consent judgment. The court in *Stancil v. Stancil*[94] explicitly recognized that a court ordered consent judgment may be enforced by contempt proceedings.[95] Justice Sharp in *Bunn* summarized the history of the two types of consent judgments and outlined how a particular consent judgment may have attributes of each type.[96]

Justice Exum, dissenting in *Walters,* concluded that the analysis used by the court of appeals was correct, and he would vote to affirm their decision. The analysis used by the court of appeals was as follows.[97] First, the court must determine if the consent judgment is court ordered or court approved. In *Walters,* the consent judgment was court ordered.[98] Since the consent judgment was court ordered, it is enforceable by the court's contempt power. The court must then determine the agreement's modifiability. If alimony, the agreement is modifiable under North Carolina General Statute 50-16.9. However, payments nominally designated as alimony may not be alimony within the meaning of the statute if they and other provisions for a property settlement constitute reciprocal consideration for one another. If the provisions do serve as reciprocal consideration for one another, neither is modifiable by the court.

Viewing the prior law as the majority did contributed to the confusion they found in this area of family law. Ironically, the new rule put forth in *Walters*[99] may cause that same type of confusion in the future. Under the majority's view of the prior law, a consent judgment was either wholly within or wholly beyond the control of the court. This is the effect of the majority's new rule. Consent judgments are either wholly within or wholly beyond the control of the court. From the majority's view, they were not changing this part of existing North Carolina law. In actuality, the majority abol-

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93. 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); Mitchell v. Mitchell, 270 N.C. 253, 256, 154 S.E.2d 71, 73 (1967); Bunn v. Bunn, 262 N.C. 67, 70, 136 S.E.2d 240, 243 (1964); Stancil v. Stancil, 255 N.C. 507, 509, 121 S.E.2d 882, 884 (1961).

94. 255 N.C. 507, 121 S.E.2d 882 (1961).

95. *Id.* at 509, 121 S.E.2d at 884.

96. 262 N.C. at 69-71, 136 S.E.2d at 242-44.

97. 54 N.C. App. at 547-548, 284 S.E.2d at 153-54.

98. *See supra* note 13.

99. 307 N.C. at 386, 298 S.E.2d at 342.

ished all the contract attributes a court ordered consent judgment could possess.

The prior law concerning the modifiability of consent judgments also gave the majority problems. The majority correctly pointed out the confusion concerning the modifiability of consent judgments;[100] however, their new rule did nothing to lessen this confusion. The new rule announced in *Walters* is based on a misstatement of the prior law dealing with the modifiability of consent judgments.[101] The majority opinion correctly stated the prior law dealing with modification of alimony[102] but misstated the prior law dealing with modification of property settlement provisions.[103] Regarding the modification of property settlement provisions, the majority recited prior law as holding that property settlement provisions which have not been satisfied may be modified.[104] This is not what North Carolina law had held. Justice Copeland cites two cases[105] for the proposition that "an action in court is not ended by the rendition of a judgment, but in certain respects is still pending until the judgment is satisfied."[106] Neither of the two cases was a family law case and neither is analogous to *Walters*. *Abernethy Land and Finance Co. v. First Security Trust Co.*[107] was an action to restrain a levy and sale under an execution and to have the judgment cancelled. *Walton v. Cagle*[108] was similar in that it involved a proceeding to sell real estate upon execution of a judgment. It is ironic that in the *Walton* case, the court recognized the basic nonmodifiability of consent judgments.[109] Quoting from *Johnson v. Futrell Bros. Lumber Co.*,[110] the *Walton* court stated "if the original order of sale was a consent decree . . . the court had no power to change its terms without consent of all parties, except on the ground of fraud or mistake."[111] This has been the

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100. *Id.*

101. *Id.* at 385-86, 298 S.E.2d at 341.

102. *Id.* at 385, 298 S.E.2d at 341.

103. *Id.*

104. *Id.* at 385-86, 298 S.E.2d at 341.

105. Walton v. Cagle, 269 N.C. 177, 183-84, 152 S.E.2d 312, 317 (1967); Abernethy Land and Finance Co. v. First Security Trust Co., 213 N.C. 369, 371-72, 196 S.E. 340, 341 (1938).

106. *Id.*

107. 213 N.C. 369, 196 S.E. 340 (1938).

108. 269 N.C. 177, 152 S.E.2d 312 (1967).

109. *Id.* at 180, 152 S.E.2d at 315.

110. 225 N.C. 595, 35 S.E.2d 889 (1945).

111. 269 N.C. at 180, 152 S.E.2d at 315.

North Carolina law regarding all consent judgments, family law or otherwise.[112] The law prior to *Walters* clearly held that the property settlement provisions of a consent judgment, whether court approved or court ordered, were not modifiable by the court.[113] Justice Copeland, himself, dissenting in *Rowe*, less than a year prior to *Walters*, correctly applied the applicable North Carolina law.[114] His dissenting opinion in *Rowe* directly contradicts his majority opinion in *Walters*.[115]

Although Justice Exum in his dissenting opinion does not explicitly state that the majority erroneously analyzed the prior law, he implicitly recognizes this by reciting the correct law.[116] The second requirement of modifiability under North Carolina General Statute 50-16.9 (that the payments be alimony) was not present in *Walters*.[117] Relying on *Bunn*, Justice Exum concluded the alimony and property settlement provisions were reciprocal consideration for one another, and therefore could not be modified.[118] Justice Exum correctly applied the relevant law in *Walters*, and therefore his dissent is better reasoned than the majority opinion.

The majority's misstatement of the prior law regarding the

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112. Rowe v. Rowe, 305 N.C. 177, 287 S.E.2d 840 (1982); Holsomback v. Holsomback, 273 N.C. 728, 161 S.E.2d 99 (1968); Bunn v. Bunn, 262 N.C. 67, 136 S.E.2d 240 (1964); Armstrong v. Aetna Insurance Co., 249 N.C. 352, 106 S.E.2d 515 (1959); Holden v. Holden, 245 N.C. 1, 95 S.E.2d 118 (1956); Spruill v. Nixon, 238 N.C. 523, 78 S.E.2d 323 (1953); Lee v. Rhodes, 227 N.C. 240, 41 S.E.2d 747 (1947); King v. King, 225 N.C. 639, 35 S.E.2d 893 (1945).

113. *Id.*

114. 305 N.C. at 190-91, 287 S.E.2d at 848 (Copeland, J., concurring in part, dissenting in part).

> As a general matter, I agree that where, as here, a consent judgment is adopted by a court order, its alimony provisions *may be* judicially modified upon a subsequent demonstrated change in circumstances." G.S. 50-16.9; Holsomback v. Holsomback, 273 N.C. 728, 161 S.E.2d 99 (1968); Bunn v. Bunn 262 N.C. 67, 136 S.E.2d 240 (1964). Even so, it must be remembered that a consent judgment, regardless of its legal setting, is still contractual in nature; consequently, its terms should be interpreted according to: (1) the parties' expressed intent in light of the surrounding circumstances existing at the time of entry and (2) the obvious purposes intended to be accomplished by its entry. *Any* consent judgment should be construed as it is written, and our courts should refrain from actions which effectively ignore or nullify the language or provisions included therein.

115. *Id.*

116. 307 N.C. at 387-88, 298 S.E.2d at 342-43.

117. *Id.* at 388, 298 S.E.2d at 343.

118. *Id.*

modifiability of property settlement provisions helped form the rationale for the new rule announced in *Walters*.[119] If the prior law in North Carolina was as the majority stated, the new rule would not be a very drastic change. However, because of the majority's erroneous analysis of the prior law, the new rule will alter how consent judgments are drafted.

The majority opinion asserts that the new rule is not harsh, and that any of the planning options previously available may still be used.[120] However, if the language in the opinion is read literally, this cannot possibly be true. Under the new rule, consent judgments will be either completely within or completely beyond the court's control. Previously, the parties could agree to have their consent judgment incorporated into a court order so that the court could enforce the provisions through its contempt powers, with the understanding that the court had no power to modify the property settlement provisions of the agreement. Under the new rule, any unexecuted provisions of the judgment are modifiable by the court.[121] Such a rule can only create uncertainty regarding the terms of the agreement. The parties will likely attempt to keep as much of their agreement as possible out of court and, thus, beyond the court's supervision. If kept out of court and in contract, the provisions will not be enforceable through the court's contempt power. With these competing interests, neither the dependent nor supporting spouse will know whether to have a particular provision of their agreement incorporated into the court's order or left in contract.

The probable result of the new rule announced in *Walters* will be a greater number of agreements kept out of court and beyond the court's supervision. The remedy for breach of such an agreement will be a suit for breach of contract and not the more effective contempt of court proceeding. In his dissenting opinion, Justice Exum proposed an alternative holding.[122] Justice Exum would hold that "enforceability by contempt is an attribute of a judgment that the parties may not change by agreement."[123] The parties' agreement would be enforceable by the court's contempt pow-

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119. *Id.* at 385. No other state has adopted a *Walters* type rule regarding the modifiability of property settlements. *See* 24 AM. JUR. 2D *Divorce and Separation* § 846 (1983); Annot., 48 A.L.R.2d 270, 302 (1956).

120. *Id.* at 386-87, 298 S.E.2d at 342.

121. *Id.* at 385, 298 S.E.2d at 341.

122. *Id.* at 387, 298 S.E.2d at 342.

123. *Id.* at 391, 298 S.E.2d at 344.

ers, yet it would only be modifiable under the limited conditions of North Carolina General Statute 50-16.9. If Justice Exum's holding were adopted, the parties would not be put to the difficult choice of having their agreement either wholly within or wholly beyond the court's power. Once the majority's new rule is tried in actual practice, the court may have to adopt Justice Exum's proposal.

A further problem with the new rule adopted in *Walters* was the court's phrasing of the issue in terms of the modifiability[124] of consent judgments, while stating the new rule in relation to separation agreements.[125] This inconsistency in wording adds to the confusion already present in the opinion. All of the discussion in both the majority and dissenting opinions refers to consent judgments. It is only the statement of the rule itself which mentions separation agreements. Further clarification by the court is needed to determine the applicability of the *Walters* rule to both consent judgments and separation agreements.

CONCLUSION

The *Walters* rule provides that all separation agreements brought before the court are both modifiable and enforceable by the court. This solution to the problem of recognizing two types of consent judgments will cause more problems than it solves. The new rule deprives the attorney of the flexibility he previously enjoyed in drafting agreements. No longer can agreements be drafted to provide for enforceability, but not modifiability by the court.

Justice Exum's well reasoned dissent correctly applied the prior applicable North Carolina law to the case. His prediction that the new rule is unwise if not unworkable will likely prove true and the majority will have to reevaluate its position.

H. William Palmer, Jr.

124. *Id.* at 384, 298 S.E.2d at 341.
125. *Id.* at 386, 298 S.E.2d at 342.