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DOMESTIC RELATIONS — POST-SEPARATION SEXUAL INTERCOURSE PRECLUDES ENFORCEMENT OF AGREEMENT REQUIRING PARTIES TO LIVE SEPARATE AND APART — *Higgins v. Higgins*

INTRODUCTION

“There comes a time in some relationships when no matter how sincere the attempt to reconcile the differences or how strong the wish to re-create a part of the past once shared, the struggle becomes so painful that nothing else is felt and the world and all its beauty only add to the discomfort by providing cruel contrast.”¹

Public policy in most states regards separation agreements as acceptable contracts.² The parties to a separation agreement covenant that they will live separate and apart.³ A century ago, such agreements were not only disfavored by the North Carolina Supreme Court, but vehemently rejected as being void and contrary to public policy.⁴ Separation agreements in North Carolina today are both acceptable and legally binding.⁵ Upon establishing the validity of a separation agreement, it becomes imperative to ascertain those actions which will terminate the contract. Over the years, the North Carolina Supreme Court has vacillated over the impact isolated acts of sexual intercourse between husband and wife have on an executed separation agreement.⁶

1. D. VISCOTT, *HOW TO LIVE WITH ANOTHER PERSON* 183 (1974).

2. 1 A. LINDEY, *LINDEY ON SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS* § 3.02, at 3-5 (1988) [hereinafter *LINDEY*]; 2 R. LEE, *NORTH CAROLINA FAMILY LAW* § 188, at 467 (4th ed. 1980) [hereinafter *LEE*].

3. N.C. GEN. STAT. § 50-6 (1987) (permits a couple to dissolve their marriage and execute a divorce by application of either party when husband and wife have lived separate and apart for one year); 2 *LEE*, *supra* note 2, § 187 at 459.

4. *See, e.g.*, *Collins v. Collins*, 62 N.C. (Phil. Eq.) 153, 159 (1867).

5. N.C. GEN. STAT. § 52-10.1 (1984) (any married couple is authorized to execute a separation agreement consistent with public policy and that agreement will be both valid and binding); 2 *LEE*, *supra* note 2, § 188, at 466.

6. N.C. GEN. STAT. § 50-6 (1987) (the 1987 amendment to this section states that isolated acts of sexual intercourse shall not toll the statutory period for divorce predicated on one year separation); N.C. GEN. STAT. § 52-10.2 (Supp. 1988) (resumption of marital relations is defined as a voluntary renewal between husband and wife of the marriage as shown by the totality of circumstances. Isolated acts of sexual intercourse between the couple shall not constitute a resumption of

In *Higgins v. Higgins*⁷ the North Carolina Supreme Court held that an agreement written in 1983 requiring the transfer of property if the husband and wife lived "separate and apart," was invalidated by their resumption of sexual relations.⁸ The supreme court in *Higgins* relied on the rule of law in *Murphy v. Murphy*⁹ to interpret the legal meaning of the term "separate and apart."¹⁰ The rule in *Murphy* stated that a married couple who executed a separation agreement terminated the agreement by engaging in acts of sexual intercourse during the separation period.¹¹ The *Higgins* Court failed, however, to properly articulate how the decision of *Murphy* provided semantic meaning to the term "separate and apart" when *Murphy* never contained such a provision.¹²

This Note will identify how the majority in *Higgins* analyzed prior case law to derive a legal definition for the term "separate and apart." This Note will also serve as a caveat to the legal community. The *Higgins* decision resulted from the couple's failure to abide by the terms of a condition precedent that had been inserted into a property settlement provision of the separation agreement. The decision should be confined to its narrow facts. The case does however deserve close scrutiny. Application by subsequent courts of the *Higgins* ruling as precedent for the proposition that isolated acts of sexual intercourse destroy an entire separation agreement would seriously undermine legislative enactments and wreak havoc with regard to executed provisions of separation agreements.

THE CASE

Mr. and Mrs. Higgins married on March 10, 1979.¹³ The couple entered into a legal separation agreement on December 13,

marital relations). These two statutes in effect invalidated the rule of law set forth in *Murphy v. Murphy*, 295 N. C. 390, 245 S.E.2d 693 (1978), which held contrary to the general rule of law in the United States, that isolated acts of sexual intercourse between husband and wife voided the separation agreement.

7. 321 N.C. 482, 364 S.E.2d 426 (1988).

8. *Id.* at 484, 364 S.E.2d at 428 (only the provision in the separation agreement where Mrs. Higgins agreed to transfer her interest in the marital residence to her husband was rendered unenforceable).

9. 295 N.C. 390, 245 S.E.2d 693 (1978).

10. 321 N.C. at 484, 364 S.E.2d at 428.

11. 295 N.C. at 397, 245 S.E.2d at 698.

12. 321 N.C. at 491, 364 S.E.2d at 432. (Whichard, J., dissenting).

13. *Id.* at 482, 364 S.E.2d at 427.

1983.¹⁴ The Agreement and Deed of Separation stipulated that the property distribution was to be in accordance with N.C. Gen. Stat. § 50-20(d).¹⁵ Paragraph four of the agreement provided that after the one year separation period, Mrs. Higgins would transfer her interest in the marital residence over to Mr. Higgins if they lived continuously “separate and apart” during that time.¹⁶ Mr. and Mrs. Higgins mutually released their property rights and waived all rights to equitable distribution.¹⁷ Mrs. Higgins moved from the marital residence upon execution of the agreement.¹⁸

During the one year separation period, Mr. and Mrs. Higgins engaged in sexual relations with each other on a number of different occasions.¹⁹ At the end of the separation period, Mr. Higgins requested Mrs. Higgins to abide by the terms of the separation agreement and transfer her interest in the marital residence over to him.²⁰ Upon her refusal to do so, Mr. Higgins brought an action for declaratory judgment seeking her compliance with paragraph

14. *Id.*

15. *Id.* N.C. GEN. STAT. § 50-20(d) (1987) (permits a couple before, during or after marriage “by written agreement, duly executed and acknowledged in accordance with the provisions of N.C. GEN. STAT. §§ 52-10 and 52-10.1, or by a written agreement valid in the jurisdiction where executed,” to provide for distribution of their marital property in a manner deemed by the parties to be equitable).

16. 321 N.C. 482-83, 364 S.E.2d at 427. The fourth paragraph provided that: “It is agreed that the residence and lot located at 3207 Edgewater Drive, Greensboro, North Carolina, shall remain titled in the name of Larry N. Higgins and JoAnne Higgins for a period of one year from the date of this agreement and it is agreed that *if the parties have lived continuously separate and apart for that full period* that in that event Mrs. Higgins shall transfer her interest in the residence and lot to Mr. Higgins as part of the property settlement as provided herein. Mr. Higgins and Mrs. Higgins have agreed upon a division of all their personal property and Mrs. Higgins agrees to remove all the personal property that she shall be entitled to from the residence located at 3207 Edgewater Drive within a reasonable time after the execution of this agreement.” *Id.* (emphasis added).

17. *Id.* at 483, 364 S.E.2d at 427.

18. *Id.*

19. 321 N.C. at 483, 364 S.E.2d 427-28. The parties attended car shows on two separate occasions at which time they shared a hotel room for up to four days in January and again in March 1984. In March of 1984, Mrs. Higgins accompanied Mr. Higgins to the funeral of his brother at which point she spent two nights in the same room with him at the home of his parents. Mr. and Mrs. Higgins also engaged in sexual intercourse in February, 1984, when they took their daughter to the circus and in March, 1984, when Mrs. Higgins accompanied Mr. Higgins to the hospital.

20. 321 N.C. at 483, 364 S.E.2d at 427.

four of the separation agreement.²¹ Mrs. Higgins responded by bringing suit for absolute divorce and an equitable distribution of the marital estate and other personal effects.²² The trial court consolidated both actions.²³ Mrs. Higgins made a motion for summary judgment.²⁴ Testimony given by both parties to the action revealed a sharp contrast in how they construed the meaning of the contract language which required them to live continuously "separate and apart."²⁵ The trial court granted Mrs. Higgins' motion and dismissed her husband's action to enforce the provisions of paragraph four.²⁶

The issue facing the North Carolina Court of Appeals was "whether provision four was unambiguous, permitting the trial court to grant summary judgment for the plaintiff on the issue of the provision's enforceability, as a matter of law."²⁷ The court of appeals upheld the decision of the trial court to dismiss Mrs. Higgins' action.²⁸ A divided Supreme Court of North Carolina affirmed the decision of the court of appeals.²⁹ The majority held the specific provision of a property settlement agreement requiring the parties to live continuously "separate and apart" was unambiguous.³⁰ Consequently, the executory provision of the separation agreement providing for ownership of the marital residence was breached by subsequent acts of sexual intercourse between Mr. and Mrs. Higgins.³¹

21. *Id.*

22. *Id.*

23. *Id.*

24. 321 N.C. at 483, 364 S.E.2d at 427. Mrs. Higgins contended that the resumption of sexual relations between her and Mr. Higgins terminated her legal obligation to transfer her interest in the marital residence and thus she was entitled to summary judgment as a matter of law.

25. *Id.* at 491-92, 364 S.E.2d at 432-33 (Whichard, J., dissenting). Mrs. Higgins testified that it was her impression that any sexual relations between she and her husband would void their agreement. Mr. Higgins testified to the contrary stating that it was his belief that engaging in sex with his wife had nothing to do with her obligation to transfer her interest in the marital residence.

26. *Id.* at 484, 364 S.E.2d at 428.

27. 86 N.C. App. at 515, 358 S.E.2d at 554.

28. *Id.* at 518, 358 S.E.2d at 556.

29. 321 N.C. at 486, 364 S.E.2d at 429.

30. *Id.*

31. 321 N.C. at 485, 364 S.E.2d at 429.

BACKGROUND

A. *Separation Agreements*1. *Definition*

Simply put, a separation agreement is a contract between husband and wife reflecting a mutual agreement to live separate and apart.³² Typical provisions include arrangements for spousal support, child support, and custody.³³ A separation agreement is a postnuptial agreement.³⁴ It can be divided into three types: first, a property settlement agreement entered into for the purpose of adjusting property rights and interests with the intent of continued marital relations; second, a true separation agreement which does not contain a property settlement agreement; and third, a hybrid agreement combining a separation agreement and a property settlement agreement.³⁵

2. *Distinctions Between Separation Agreements and Property Settlements*

Legal distinctions exist between a separation agreement and a property settlement agreement.³⁶ These distinctions are often obscured by a tendency to lump both types of agreements into one document referred to as a separation agreement.³⁷ A property settlement agreement concerns solely the division of the property interests of the parties to the contract.³⁸ It defines who owns what.³⁹ Provisions contained in a property settlement agreement include a mutual release of claims as well as a timetable and method of transferring titles and possession of property.⁴⁰ A property settlement agreement can be entered into before, during, or after marriage.⁴¹ Absent an express provision, there is no requirement that

32. 2 LEE, *supra* note 2, § 187, at 459.

33. *Id.*

34. *Id.* at 461.

35. *Id.*

36. 2 LEE, *supra* note 2, § 187, at 460; 1 Lindey, *supra* note 2, § 3.01, at 3-3.

37. Annotation, *Reconciliation as Affecting Separation Agreement or Decree*, 35 A.L.R. 2D 707, 711 (1954).

38. 2 LEE, *supra* note 2, § 187, at 460; 24 AM. JUR. 2D *Divorce and Separation* § 883 (1983).

39. 2 LEE, *supra* note 2, § 187, at 463.

40. Annotation, *Reconciliation as Affecting Separation Agreement or Decree*, 35 A.L.R. 2D 707, 712 (1954).

41. N.C. GEN. STAT. § 50-20(d) (1987).

the parties separate after the execution of the property settlement agreement.⁴²

A separation agreement exists only when the parties to the contract have already separated or intend to effect a separation immediately upon execution of the document.⁴³ The act of living separate and apart has been held the source of consideration for separation agreements.⁴⁴ To be binding in North Carolina, a separation agreement must be in writing and properly acknowledged by the parties to the agreement before a notary public or other certifying official.⁴⁵

3. Interpretation of Separation Agreements

Separation agreements are contracts and therefore are subject to the same general rules of interpretation as any other contract.⁴⁶ Where the terms and conditions utilized in the separation agreement are plain and explicit, the trial court will determine the legal effect of the terms and enforce them as written by the parties.⁴⁷

Provisions in separation agreements are independent of each other.⁴⁸ As a result each provision can be defined as a distinct entity from the other provisions in the contract. Words utilized in the separation agreement must be accorded their common meaning and usage where they can be reasonably applied to the subject matter of the agreement.⁴⁹

A property settlement agreement is a contract containing certain terms and conditions.⁵⁰ Once a contractual term has been inserted into the agreement and mutually accepted, the parties to

42. 2 LEE, *supra* note 2, § 187, at 460.

43. *Id.*

44. Note, *Domestic Relations: Isolated Acts of Sexual Intercourse Void Separation Agreements: Murphy v. Murphy*, 16 WAKE FOREST L. REV. 137 (1980) [hereinafter Note, *Domestic Relations*].

45. N.C. GEN. STAT. § 52-10.1 (1984); 2 LEE, *supra* note 2, § 187, at 460.

46. *See, e.g., Cator v. Cator*, 70 N.C. App. 719, 321 S.E.2d 36 (1984) (because a separation agreement is a contract, the court applied the same rules used to interpret any other contract); *Case v. Case*, 73 N.C. App. 76, 325 S.E.2d 661 (1985) (a separation agreement is a contract and, as a result, its meaning will ordinarily be determined by the same rules used to interpret any other contract); 24 AM. JUR. 2D *Divorce and Separation* § 838 (1983).

47. *Blount v. Blount*, 72 N.C. App. 193, 195, 323 S.E.2d 738, 740 (1984), *disc. rev. denied*, 313 N.C. 506, 329 S.E.2d 389 (1985).

48. 2 LEE, *supra* note 2, § 198, at 509.

49. 24 AM. JUR. 2D *Divorce and Separation* § 904 (1966).

50. 24 AM. JUR. 2D *Divorce and Separation* § 883 (1966).

the agreement must abide by it.⁵¹ It is acceptable contract language for a property settlement agreement to require a couple to live "separate and apart."⁵² Having inserted a stipulation to agree to live "separate and apart" into the contract, Mr. and Mrs. Higgins were bound by its legal meaning.⁵³

B. Effects of a Resumption of Sexual Relations Between a Married Couple with Respect to Separation Agreements

1. Murphy v. Murphy

In *Murphy v. Murphy*,⁵⁴ the North Carolina Supreme Court held that, "sexual intercourse between a husband and wife after the execution of a separation agreement avoids the contract."⁵⁵ Mr. and Mrs. Murphy were married on May 23, 1958.⁵⁶ They separated on March 1, 1972 and executed a deed of separation three days later.⁵⁷ On August 8, 1973, Mr. Murphy instituted an action for divorce based on the one year separation period.⁵⁸ Mrs. Murphy counterclaimed alleging that the agreement had been rescinded because the couple had "reconciled" by engaging in sexual relations with each other during the separation period.⁵⁹

The trial judge instructed the jury that for a husband and wife to reconcile and renew marital relations, more was required than "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."⁶⁰ The trial judge also instructed the jury that, "the word cohabitation in our law means something more than sexual intercourse between the

51. *Williams v. McLean*, 220 N.C. 504, 506, 17 S.E.2d 644, 646 (1941) (the writing was held to be conclusive as to the terms of the bargain); *Oliver v. Hecht*, 207 N.C. 481, 486, 177 S.E. 399, 402 (1934) (when parties reduce their contract to writing, they are presumed to have inserted in it all provisions by which they intend to be bound); *Ray v. Blackwell*, 94 N.C. 38 (1887); 2 LEE, *supra* note 2, § 198, at 508.

52. See generally 321 N.C. 482, 364 S.E.2d 426 (1988).

53. See *supra* note 51.

54. 295 N.C. 390, 245 S.E.2d 693 (1978).

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

56. *Id.* at 390, 245 S.E.2d at 694.

57. *Id.* at 391, 245 S.E.2d at 694.

58. *Id.* at 390, 245 S.E.2d at 694.

59. *Id.* at 391, 245 S.E.2d at 694.

60. *Id.* at 394, 245 S.E.2d at 696.

parties.”⁶¹

The instructions given were based on two previously decided North Carolina Court of Appeals cases, *Cooke v. Cooke*⁶² and *Newton v. Williams*.⁶³ The North Carolina Court of Appeals in reaching those two decisions relied on a statement by Professor Robert E. Lee in his treatise *North Carolina Family Law* which stated that, “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.”⁶⁴ Professor Lee further stated that in order to conclusively prove that there is a resumption of cohabitation “[t]here 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.”⁶⁵

The majority rule was expounded by Professor Lee and utilized by the North Carolina Court of Appeals in *Cooke* and *Newton*.⁶⁶ The Supreme Court of North Carolina in *Murphy* overturned the prior decisions of *Cooke* and *Newton* and held that “sexual intercourse between a husband and wife after the execution of a separation agreement avoids the contract.”⁶⁷ The termination of the contract occurred “whether the resumption of sexual relations be casual, isolated, or otherwise.”⁶⁸

2. *State v. Gossett*

The North Carolina Supreme Court based its holding in *Murphy* on the case of *State v. Gossett*.⁶⁹ In 1932, the North Carolina Supreme Court, in *Gossett*, stated that a separation agreement was void when the couple engaged in sexual intercourse with each other after the execution of a separation agreement.⁷⁰ The defendant,

61. *Id.*

62. 34 N.C. App. 124, 237 S.E.2d 323 (1977) (reconciliation required more than casual acts of sexual intercourse and more than a hope for resumption of the full marital relationship).

63. 25 N.C. App. 527, 214 S.E.2d 285 (1975) (the issue of the couple’s mutual intent is an essential element in deciding whether the parties were reconciled and resumed cohabitation).

64. 2 LEE, *supra* note 2, § 200, at 523.

65. *Id.*

66. 295 N.C. at 395, 245 S.E.2d at 697.

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

68. *Id.*

69. 203 N.C. 641, 166 S.E. at 754.

70. *Id.* at 644, 166 S.E. at 755.

Mr. Gossett, had entered into a separation agreement with his wife.⁷¹ After their separation, the defendant visited his wife on a number of occasions, engaging in sexual intercourse with her each time.⁷²

The rationale behind the decision of the North Carolina Supreme Court in *Gossett* was to prevent a separation agreement from acting as a tool for Mr. Gossett to “escape the responsibilities imposed by the marital status and yet be free to partake of such privileges as he chose to enjoy.”⁷³ The three foundations underlying the decision in *Gossett* were: first, moral certitude; second, the state’s interest in marriage; and third, judicial efficiency.⁷⁴

3. *Separate and Apart as Defined in Murphy and Gossett*

According to the decision of the North Carolina Supreme Court in *Gossett*, the foundation of the separation agreement entered into between Mr. and Mrs. Gossett was the declaration “[a]nd do hereby agree to live separate and apart.”⁷⁵ According to the instructions given by 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, and that they are not to keep up the sexual relation and continue that, but that they are to live separate and apart.”⁷⁶

In *Murphy*, the North Carolina Supreme Court in its approval of the rule in *Gossett*, held that “this court is still constrained to hold that sexual intercourse between a husband and wife after the execution of a separation agreement avoids the contract.”⁷⁷ The supreme court went on to state that “severance of marital relations by a separation agreement and continued sexual intercourse between the parties ‘are essentially antagonistic and irreconcilable notions.’ ”⁷⁸ According to the *Murphy* court, the term “separate and apart” was inconsistent with a resumption of sexual relations, isolated or otherwise, between a separated couple.

71. *Id.* at 642, 166 S.E. at 754.

72. *Id.*

73. *Id.* at 644, 166 S.E. at 755.

74. Note, *Domestic Relations*, *supra* note 44, at 144.

75. 203 N.C. at 643, 166 S.E. at 755.

76. *Id.*

77. 295 N.C. at 397, 245 S.E.2d at 698.

78. *Id.* (quoting 1 A. LINDEY, SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS § 8-13 (1977)).

C. Effects of a Resumption of Sexual Relations Between a Married Couple with Respect to Property Settlements

1. Equitable Distribution Act

On October 1, 1981, the North Carolina General Assembly enacted the Equitable Distribution Act.⁷⁹ One effect of the legislation was to allow a couple to execute a property settlement agreement at any time during marital relations.⁸⁰ The public policy in North Carolina prior to the passage of the Equitable Distribution Act was to allow property settlement agreements to be entered into only in those instances where the couple had separated previously or separated immediately upon execution of the document.⁸¹ The passage of the Equitable Distribution Act and specifically the passage of section 50-20(d), allowed a married couple to execute a binding property settlement agreement without requiring that they separate afterwards.⁸² Justice Whichard theorized in the *Higgins* decision, that the General Assembly may have passed section 50-20(d) in response to the resounding criticism from the legal community over the decision rendered in *Murphy*.⁸³

2. *Buffington v. Buffington*

*Buffington v. Buffington*⁸⁴ addressed the impact of section 50-20(d) upon North Carolina public policy. *Buffington* involved a situation where the couple executed a separation agreement containing provisions for the distribution of their property. No language in any of the provisions required the couple to live "separate and apart." Following the execution of the agreement, the couple remained living together at the marital residence for eighteen days.⁸⁵ The defendant, Mrs. Buffington, after failing to comply with the terms of the separation agreement, contended that the agreement was invalidated by her continued cohabitation with her husband for the eighteen day period following the execution of the agreement.⁸⁶ The North Carolina Supreme Court in *Buffington* stated

79. Act of July 3, 1981, ch. 815, 1981 N.C. Sess. Laws 1184 (codified as amended at N.C. GEN. STAT. § 50-20 (1987)).

80. See *Buffington v. Buffington*, 69 N.C. App. 483, 317 S.E.2d 97 (1984).

81. 69 N.C. App. at 488, 317 S.E.2d at 100.

82. *Id.*

83. 321 N.C. at 490, 364 S.E.2d at 432 (Whichard, J., dissenting).

84. 69 N.C. App. 483, 317 S.E.2d 97 (1984).

85. *Id.* at 484, 317 S.E.2d at 97.

86. *Id.* at 484, 317 S.E.2d at 98.

that the defendant could not avoid her responsibilities under the separation agreement simply because of her continued cohabitation with her husband after the execution of the contract.⁸⁷

In *Buffington*, the Court addressed the issue of "whether the passage of the Equitable Distribution Act, which permits property settlements executed '[b]efore, during or after marriage,' alters our state's former public policy, expressed in the prior decisional law of this state which permitted such agreements only where the parties had already separated or separated immediately after the execution of the agreement."⁸⁸ According to the Supreme Court, the new public policy in North Carolina was to allow a married couple to enter into a property settlement at any time.⁸⁹ The Supreme Court's decision resulted in a clear and unequivocal statement that the public policy of the state of North Carolina allowed spouses to execute a binding property settlement agreement at any time even if the execution was not followed by separation between the parties.

3. *Love v. Mewborn*

The North Carolina Supreme Court in *Love v. Mewborn*⁹⁰ held that a property settlement agreement executed before, during or after marriage was not necessarily terminated by reconciliation.⁹¹ Mr. and Mrs. Mewborn entered into a separation agreement and property settlement agreement whereby Mr. Mewborn agreed to provide his wife with monthly alimony payments of \$800.00 for a ten year period.⁹² The property settlement agreement did not stipulate that the parties were to live "separate and apart." The couple engaged in a short reconciliation of less than twenty-four hours at which time they engaged in sexual intercourse.⁹³ Mr. Mewborn stopped making payments to his wife following the period of reconciliation. Mrs. Mewborn who had since remarried, brought an action to recover unpaid payments up to the time of her remarriage.⁹⁴

87. *Id.* at 488, 317 S.E.2d at 100.

88. *Id.* at 485, 317 S.E.2d at 98.

89. *Id.* at 488, 317 S.E.2d at 100.

90. 79 N.C. App. 465, 339 S.E.2d 487 (1986), *disc. rev. denied*, 317 N.C. 704, 347 S.E.2d 43 (1986).

91. 79 N.C. App. at 466, 339 S.E.2d at 488.

92. *Id.*

93. *Id.*

94. *Id.*

In *Love*, the North Carolina Supreme Court cited *Buffington* along with section 50-20(d) as precedent for its decision.⁹⁵ The use of *Buffington* however was somewhat controverted. The decision in *Buffington* never mentioned the effects of reconciliation, instead it held that "the public policy of our state, as expressed by G.S. § 50-20(d), permits spouses to execute a property settlement at any time, regardless of whether they separate immediately thereafter or not."⁹⁶

ANALYSIS

The North Carolina Supreme Court in *Higgins* had to interpret the legal meaning of the term "separate and apart."⁹⁷ Distribution of the real property described in paragraph four of the property settlement agreement was contingent upon the condition that the parties were to live "separate and apart" for a one year period. The North Carolina Supreme Court in *Higgins* determined that previous case law had defined the term "separate and apart."⁹⁸ The definition in *Murphy*, which the *Higgins* court relied upon, stated that sexual relations between husband and wife were inconsistent with living "separate and apart".⁹⁹ Mr. and Mrs. Higgins had engaged in sexual relations with each other during the separation period.¹⁰⁰ As a result, the trial court held that provision which required the transfer of real property upon the condition that the parties lived continuously "separate and apart" to have been invalidated.¹⁰¹

A. *Separate and Apart Defined*

The most forceful argument the dissent made against the use of *Murphy* by the majority was the fact that *Murphy* never gave semantic meaning to the term "separate and apart."¹⁰² The majority in *Higgins* did fail to articulate how *Murphy* attached a legal meaning to the term "separate and apart" when the term was never explicitly defined by the North Carolina Supreme Court in

95. *Id.*

96. 69 N.C. App. at 488, 317 S.E.2d at 100.

97. 321 N.C. at 484, 364 S.E.2d at 428.

98. *Id.*

99. 295 N.C. at 397, 245 S.E.2d at 698.

100. *See supra* note 19.

101. 321 N.C. at 485, 364 S.E.2d at 428.

102. *Id.* at 491, 364 S.E.2d at 432 (Whichard, J., dissenting).

that decision. However, the assumption by the dissent that the *Murphy* decision did not attach a meaning to the term is incorrect.

Murphy involved a situation where the couple executed a valid separation agreement.¹⁰³ Separation agreements by their very nature require the parties to the contract to live "separate and apart" during the separation period in order to be effective.¹⁰⁴ Reconciliation between the parties voids a separation agreement.¹⁰⁵

Murphy adopted the rule in *Gossett*.¹⁰⁶ Whether such an adoption was either wise or laudable is insignificant. The decision of the *Murphy* court to reach back eighty years to adopt the rule in *Gossett* signaled the legal community that reconciliation in North Carolina could be effected either by cohabitation or a resumption of sexual relations.¹⁰⁷ *Gossett* explicitly defined "separate and apart" and the North Carolina Supreme Court in *Murphy* adopted that definition. Therefore, *Murphy* clearly stood for the proposition that living "separate and apart" was inconsistent with a resumption of sexual relations between parties to a separation agreement.

When Mr. and Mrs. Higgins executed their separation agreement, the language "separate and apart" had a clear legal definition.¹⁰⁸ Mr. and Mrs. Higgins engaged in sexual intercourse with each other on several occasions during the separation period.¹⁰⁹ Since the legal term of art stipulated that "sex" and "separate" were not bedfellows, the majority had no choice but to find the actions of Mr. and Mrs. Higgins in violation of the condition precedent to the contract.

The dissent focused great attention to the fact that Mr. and Mrs. Higgins had attached different meanings to the term "separate and apart."¹¹⁰ This onslaught over the apparent ambiguity of the term was unnecessary and impractical. The dissenting justices were overzealous in their desire to convince the rest of the supreme court that the interpretation the parties attached to the term "sep-

103. 295 N.C. at 391, 245 S.E.2d at 694.

104. See N.C. GEN. STAT. § 50-6 (1987).

105. 2 LEE, *supra* note 2, § 200, at 514; 1 LINDEY, *supra* note 2, § 9.05, at 9-10.

106. 295 N.C. at 397, 245 S.E.2d at 698.

107. See generally, Note, *Divorce and the Third Party: Spousal Support, Private Agreements and the State*, 59 N.C.L. REV. 819, 842 (1981).

108. See *supra* notes 75-78 and accompanying text.

109. 86 N.C. App. at 515, 358 S.E.2d at 554.

110. 321 N.C. at 488-931, 364 S.E.2d at 430-33.

arate and apart” was more important than its legal definition.

The majority in *Higgins* did not concern themselves with how Mr. and Mrs. Higgins construed the meaning of “separate and apart” since no ambiguity existed in that term. *Murphy* defined as a matter of law what it meant to live continuously “separate and apart.”¹¹¹ When the terms of a contract are plain and explicit the courts will determine the legal effect of that term and enforce it as written by the parties.¹¹²

B. *Higgins and the Equitable Distribution Act*

The use of *Buffington v. Buffington* and *Love v. Mewborn* by the dissent as support for their contention that sexual acts between a married couple do not void a provision requiring the couple to live “separate and apart,” was inappropriate. The recognition and lengthy discussion Justice Webb gave assuring the dissent that the majority opinion was consistent with section 50-20(d) as well as *Buffington* and *Love* was purely gratuitous. Recognition of those cases by the dissent was unfounded given the inappropriateness of their use as controlling law.

Neither *Love* nor *Buffington* used the contractual terminology “separate and apart” in their property settlement agreements. Had those cases contained that condition precedent and both courts still reached the same outcome, the dissent would have had a hook upon which to hang its hat. Since both cases were drafted in a dissimilar manner from the property settlement agreement in *Higgins*, there can hardly be a logical comparison drawn between those cases and *Higgins*.

The reliance by Mr. Higgins on the North Carolina Supreme Court decision in *Love* as controlling law was tenuous. The decision in *Love* stated that a property settlement agreement executed before, during or after marriage was not necessarily terminated by reconciliation.¹¹³ In that decision, the North Carolina Supreme Court cited *Buffington* as precedent for its position.¹¹⁴ However, the use of *Buffington* in the rationale was seriously flawed. The *Buffington* court never mentioned the effects of reconciliation but rather discussed whether a couple had to separate after executing a

111. See *supra* notes 72 and 78 and accompanying text.

112. 2 LEE, *supra* note 2, § 198, at 511.

113. 79 N.C. App. at 466, 339 S.E.2d at 488.

114. *Id.*

property settlement agreement.¹¹⁵ The impact of *Love* then as substantive case law in support of Mr. Higgins' contentions is weak given the lack of support for its own conclusions.

C. *Impact of Higgins*

The ultimate impact of the *Higgins* decision was to demonstrate the effect of a condition precedent that had been inserted into an executory provision of a separation agreement, prior to the passage of section 50-10.2, which required the parties to live "separate and apart." Legislative enactments by the North Carolina General Assembly presently allow a property settlement agreement to be entered into without being terminated by subsequent acts of sexual intercourse.¹¹⁶ The impact of *Higgins* is minimal given the subsequent enactment of section 52-10.2 which states that, "[r]esumption of marital relations shall be defined as a voluntary renewal of the husband and wife relationship, as shown by the totality of the circumstances. Isolated incidents of sexual intercourse between the parties shall not constitute a resumption of marital relations."¹¹⁷

Justice Webb in delivering the opinion in *Higgins* stated that the North Carolina Supreme Court was "advertent to section 52-10.2 which overrules *Murphy* and *Love*."¹¹⁸ Justice Webb went on to state that since the enactment of section 52-10.2 did not take effect until October 1, 1987, it did not factor into the resolution of the case.¹¹⁹ The rule set forth in *Murphy* that sexual intercourse voids a separation agreement continues to rest in the grave dug for it by the legislative enactment of section 52-10.2.¹²⁰

D. *Practice after Higgins*

If a married couple wishes to enter into a property settlement agreement and not have it or one of its provisions rendered void by subsequent acts of sexual intercourse, they need do nothing more than leave all language requiring them to live "separate and apart" out of the contract. A couple who wishes to execute a property settlement agreement and maintain sexual relations can certainly do

115. 69 N.C. App. at 485, 317 S.E.2d at 98.

116. N.C. GEN. STAT. § 50-20(d) (1987).

117. N.C. GEN. STAT. § 50-10.2 (Supp. 1987).

118. 321 N.C. at 486, 364 S.E.2d at 429.

119. *Id.*

120. *See supra* note 6.

so under authority of section 50-20(d).¹²¹ However in light of section 50-10.2 even if the couple were to include the language "separate and apart" in an executory provision of a separation agreement, as a condition precedent to the transfer of marital property, they could do so and continue to engage in acts of sexual intercourse.¹²² According to the language of section 50-10.2, isolated incidents of sexual relations are not alone sufficient enough to destroy the contract.¹²³

Caution should however be exercised by any attorney who might be inclined to insert a condition that the parties live "separate and apart" into an executory provision of a separation agreement. The courts in North Carolina have yet to decide the definition of the term "isolated incidents." To preclude a court from later interpreting a resumption of sexual relations between the couple as a reconciliation, it would be wise to counsel a separated couple on the possible effects that a resumption of sexual relations might entail. Prudence would dictate that absent any express desire to reconcile, the couple should refrain from sexual contact between themselves.

The language of the North Carolina Supreme Court in the majority opinion of *Higgins* seems to allude to the fact that the case would have been resolved differently had the separation agreement been drafted after October 1, 1987, the effective date of section 50-10.2.¹²⁴ If the North Carolina Supreme Court had been faced with appellate review of a situation identical to that in *Higgins*, but in which the contract had been entered into subsequent to October 1, 1987, the supreme court would have been statutorily bound separation to hold paragraph four of the separation agreement valid despite a resumption of sexual relations between the parties to the contract.

It would seem both illogical and absurd for the North Carolina Supreme Court to step back and resurrect the rule in *Murphy* when no clear need exists. The rule of *Murphy* was adopted by the North Carolina Supreme Court in *Higgins* in order to provide semantic meaning to the term "separate and apart" in light of the resumption of sexual relations between the separated couple. Given that an applicable statute, section 50-10.2, states that a re-

121. N.C. GEN. STAT. § 50-20(d) (1987).

122. N.C. GEN. STAT. § 50-10.2) (Supp. 1987).

123. *Id.*

124. 321 N.C. at 486, 364 S.E.2d at 429.

sumption of sexual relations does not constitute marital reconciliation, there is no reason today to dredge up the rule in *Murphy*.

The manner in which the North Carolina Supreme Court reached its legal conclusion in *Higgins* was sound, as was the Court's ultimate decision. To have decided the case in the same manner when the contract had been enacted subsequent to October 1, 1987 would have been incorrect. After October 1, 1987, a situation similar to that in *Higgins* would fall under the legislative enactment of section 50-10.2. Any outcome similar to that of the *Higgins* decision would be legally unsound in the face of controlling statutes and would effect a revival of the rule in *Murphy*.

CONCLUSION

In holding that a provision in a property settlement agreement which required the parties to live "separate and apart" was voided by a resumption of sexual relations, the North Carolina Supreme Court in *Higgins* simply applied the legal meaning to the term of the provision which had to be fulfilled before the contract could be carried out. The decision in *Higgins* did not act to resurrect the rule in *Murphy*. Provisions in separation agreements are independent of each other. A revitalization of the rule in *Murphy* would have resulted in the court holding the entire separation agreement void because the couple resumed sexual relations.

The law regarding the effect of subsequent sexual relations in regard to an executed property settlement agreement has been decided by virtue of section 50-10.2. A property settlement agreement can be executed before, during or after marriage without being destroyed as a result of a resumption of sexual relations between the parties.

Attorneys and future courts must exercise care in ensuring that the holding of *Higgins* is not given more credence than it deserves. The conclusion reached by the supreme court would be legally unsound if applied to separation agreements enacted after October 1, 1987. After the enactment of section 50-10.2 parties to a contract requiring them to live "separate and apart" can resume sexual relations and still live "separate and apart."

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