Volume 47 | Number 4 Article 4

6-1-1969

An Analysis of the Enforceability of Marital Contracts

Thomas W. Taylor

Sherman Act and section 7 of the Clayton Act. Certainly in the past it was somewhat intimidated by Congress into its passivity,[120] but it is not too much to say that the time has come for the FCC

> to show some intestinal fortitude and protect the linchpin of any democratic society from private domination by insuring a free, competitive, and independent multitude of voices in the communications industry.[121]

Furthermore, should the FCC not accept this responsibility, the Congress should formally amend the Communications Act thereby directing the Commission to dispose of licenses in light of the antitrust laws and decisions. Many may retort that the expense of such inquiries will be too great, but the reply must be that the cost cannot be too great if it insures the freedom of the press.

WILLIAM H. LEWIS, JR.

An Analysis of the Enforceability of Marital Contracts

I. INTRODUCTION

This comment will analyze the treatment of marital contracts by the North Carolina courts. The focus is upon contracts in the context of a marriage rather than upon either contracts or domestic relations alone. A broader question, however, is posed: Is the law of contracts the most meaningful method available for the analysis and expression of public policy concerning marital contracts?

A recent example of the judicial approach to marital contracts is found in *Matthews v. Matthews*.[1] The issue was the enforceability of an alleged marital contract entered into after twelve years of marriage. Fourteen years after the date of the purported contract an absolute divorce had been entered, and the plaintiff-husband had petitioned for a sale and partition of lands that he and his defendant-wife had held as tenants in common. She produced the alleged contract signed by plaintiff in which plaintiff

[120] In the early 1950's, Congress considered amending the Communications Act to prohibit discrimination against newspapers when considering applications for broadcast licenses. *See, e.g.*, H.R. Rep. No. 2326, 82d Cong. 2d Sess. (1952). Fortunately, no such law was ever enacted.

[121] Flynn, *Antitrust and the Newspapers: A Comment on S. 1312*, 22 VAND. L. REV. 103, 125 (1968). *See generally* Johnson, *The Media Barons and the Public Interest*, THE ATLANTIC MONTHLY, June 1968, at 43.

[1] 2 N.C. App. 143, 162 S.E.2d 697 (1968).

had declared "that if I ever leave Edith . . . everything I have or will have will be hers to have and hold for the benefit of our children and herself—I make no claim on anything we own jointly, and separately."[2] The court decided that the alleged contract was not enforceable in view of three traditional "tests"[3] for the existence of a contract—consideration, clarity, and public policy. Although concluding that the alleged promise of the plaintiff was without consideration and was vague and indefinite, the court held that even if the "tests" of consideration and clarity were met, the promise was "looking to a future separation, and would be in the nature of a property settlement or separation agreement. Articles or deeds of separation are permissible where the separation has already taken place or immediately follows: but agreements looking to a future separation of husband and wife will not be sustained."[4] The court explained that the central position of the home in the welfare of the community necessitates its perpetuation. If agreements such as the one alleged were enforced, disunity would be promoted because one spouse would be induced to make life miserable for the other, thus forcing effectuation of the agreement and stripping the other spouse of all property rights.[5]

Initially, care must be taken to distinguish marriage as a contractual relationship from marital contracts themselves. The marriage contract is the marriage itself with the rights and duties incident to that relationship; whereas, the marital contract is a contractual obligation between husband and wife that may bear upon the marital relationship but which is not the marriage itself. The idea that marriage is a civil contract has been traced to Blackstone insofar as the idea has affected American law.[6] Blackstone attributed common law notions of marriage to ecclesiastical and civil laws and said of marriage that

> the law treats it as it does all other contracts: allowing it to be good and valid in all cases, where the parties at the time of making it were, in the first place, willing to contract; secondly, able to contract; and lastly, actually did contract, in the proper forms and solemnities required by law.[7]

Even the common law did not recognize marriage as a true contract, however, because after marriage the parties could not enter valid contracts

[2] *Id.* at 145, 162 S.E.2d at 698.
[3] *See Id.* at 147, 162 S.E.2d at 699. "Tests" is the term used by the court.
[4] *Id.*
[5] *Id.*
[6] 1 R. LEE, NORTH CAROLINA FAMILY LAW § 1, at 5 (3d ed. 1963).
[7] J. EHRLICH, EHRLICH'S BLACKSTONE 78 (1959).

between themselves.[8] This disability was attributable to the common law fiction of the unity of the husband and wife and to the theory that the husband, as the dominating member of the household, was able to exercise a coercive influence upon his wife.[9] A further limitation upon marriage as a pure contract was found in those jurisdictions such as North Carolina[10] that do not recognize a "common law" (informal or non-ceremonial) marriage. North Carolina recognizes the necessity for expressed consent, but requires the presence of an officer or ordained minister for a marriage to be valid.[11] It is therefore apparent that the common law marriage was not an ordinary contract such as is found in a commercial setting.

The consequences of the common law notion that marriage is a contract have been modified by statutory enactments. The disabilities attaching at common law to the contracts between spouses[12] have been alleviated to a great extent.[13] Contracts between husband and wife that are neither subject to statutory limitations nor prohibibted by public policy are expressly declared valid.[14] But statutory conditions attach to certain transactions between spouses affecting the wife's real property or income accrued therefrom for more than three years. Such transactions are void unless there is a private examination of the wife by the officer certifying the acknowledgment[15] to ascertain that the contract is not "unreasonable or injurious to the wife."[16] Thus the statutory scheme abolishes the common law fiction of the unity of husband and wife but recognizes the possibility that a husband may exercise an undesirable coercive influence upon his wife. Subject to the above limitation and the rights of the surviving spouse to an elective life estate,[17] every married person is given by statute general authority to deal with his property, real and personal, as

[8] 2 R. LEE, NORTH CAROLINA FAMILY LAW § 107 (3d ed. 1963).

[9] *Id.*

[10] Fields v. Hollowell, 238 N.C. 614, 78 S.E.2d 740 (1953) (no recovery by common law wife under workman's compensation statute for death of common law husband); State v. Wilson, 121 N.C. 650, 28 S.E. 416 (1897).

[11] State v. Wilson, 121 N.C. 650, 28 S.E. 416 (1897); N.C. GEN. STAT. § 51-1 (1966).

[12] 2 R. LEE, *supra* note 8, § 107.

[13] *See* N.C. GEN. STAT. §§ 52-12 to -12 (1966) (Powers and Liabilities of Married Persons).

[14] N.C. GEN. STAT. § 52-10 (1966).

[15] Bolin v. Bolin, 246 N.C. 666, 99 S.E.2d 920 (1957) (separation contract); Davis v. Vaughn, 243 N.C. 486, 91 S.E.2d 165 (1955) (indirect conveyance to husband by deed to third party).

[16] N.C. GEN. STAT. § 52-6(b) (1966).

[17] N.C. GEN. STAT. § 39-7 (1966).

if unmarried.[18] This grant of authority presumably includes the power to contract with the spouse concerning property.

The statutes provide that a separation agreement of a married couple, both of whom are at least eighteen years of age, shall bind the parties as if they were of age if the contract is acknowledged before a superior court clerk with a private examination of the wife.[19] The necessity of this addition to the general provisions validating marital contracts has its source in contract theory. The law of contracts has given minors the power to disaffirm that which would otherwise be a binding duty arising from a contract.[20] The weight of a statute is added to a separation agreement in a prescribed form between the minors to eliminate the power to disaffirm which the minor would otherwise possess and to clarify the binding nature of the contract. This statutory analysis suggests the difficulty of dealing with marriage contracts in a manner consistent with traditional contractual principles. This difficulty becomes clearer if the concept that marriage itself is a contract is logically extended. If marriage were a true contract, then minors should be able to disaffirm at will before reaching majority. Yet, except to the extent permitted by divorce and annulment statutes, minors have no power to disaffirm the marriage.[21]

> Thus, it has been said that
> [t]he only element of a contract which marriage has is the consent of the parties. The law does not give to persons the complete freedom of control over their marriage which they are given over their ordinary contracts. Individuals have a free choice as to whether they will marry or not, but if they do marry, the state immediately becomes a party vitally interested in the new status which their marriage has created, and will not permit them, by agreement to modify or revoke the terms which the law attaches to their status, without the state's consent.[22]

The North Carolina court has stated that it will treat marriage as a contract only insofar as the consent of both parties must precede it.[23] Once the marriage exists it loses its identity as a contract and becomes a "relation" or "institution" affecting not only the parties but also society

[18] N.C. GEN. STAT. § 52-2 (1966).
[19] N.C. GEN. STAT. § 52-10.1 (1966).
[20] S. WILLISTON & G. THOMPSON, LAW OF CONTRACTS 269 (rev. ed. 1938) [hereinafter cited as WILLISTON].
[21] *Id.*
[22] 1 R. LEE, *supra* note 6, at 3-4.
[23] State v. Hairston, 63 N.C. 451, 453 (1869).

in general.[24] Marriage has been said to create a new status,[25] and the movement from the treatment of marriage as contract to the treatment of mirrage as a status poses questions concerning the future of marital contracts. Since courts refuse to analyze marriage in contractual terms, the status of the parties to a marital contract should influence the manner in which courts interpret such contracts.[26]

The practicing lawyer needs to be able to predict what the courts will find to be an enforceable marital contract.[27] Such predictability is crucial not only because of the potential effect of the particular contract on the stability of the marital relations, but also because of various other legal relationships affected by the validity of marital contracts. Tax consequences are obviously important considerations. One frequently recurring problem, for example, is the taxation of alimony payments to the husband or wife depending upon the terms and validity of a separation contract.[28] Another concern is the rights of creditors and other third parties. Marital contracts to defraud third persons are contrary to public policy and will not be enforced.[29] Finally, in the interpretation of marital contracts, courts always will be mindful of the welfare of the children.[30] They may be "third party beneficiaries" of interspousal contracts directly or by implication.[31]

II. The Predictive Factors

To help predict the types of marital contracts that courts will enforce, one must be aware of three recurring concepts in North Carolina case law. First, the influence of the statutes upon the powers of married persons to contract concerning their property is overriding. But, as will be discussed, the courts through a process of "inclusion and exclusion" have required the statutory safeguards for some transactions and not for others. Second, to determine whether a marital contract will be upheld one should examine the bargain factors inducing the marital contract. Bargain factors connote circumstances that "free traders" consider in

[24] *Id.*

[25] *See* Williams v. North Carolina, 325 U.S. 226, 230 (1944).

[26] An example of a similar inquiry outside the marital context is the scrutiny given contracts arising from the fiduciary relationship between a trustee and cestui que trust.

[27] *See* Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897).

[28] *See* Int. Rev. Code of 1954, § 71.

[29] 17 Am. Jur. 2d *Contracts* § 185 (1964).

[30] *See* M. Ernst & D. Loth, For Better or Worse 222-223 (1952).

[31] Note, *Rights of Enforcement in Third Party Beneficiary*, 19 N.C.L. Rev. 384 (1941).

determining whether a particular contract is advantageous or purposeful. One should analyze the transaction to ascertain whether the contract is the result of genuine bargain factors or, contrariwise, the result of the marriage itself without reference to bargain factors. If the former, then the contract should be honored if upon analysis a somewhat comparable contract in a non-marital setting would be enforced. If the latter, then because of the relationship or status of the parties, the contract should be suspect, and courts should impose statutory safeguards. In the latter event courts generally will be applying the language of bargain to an essentially non-bargain situation. There are several reasons for the minor importance of bargain factors in this context. "The semi-gift nature of the transaction softens the outlines of the bargain . . . . The evidence of the terms is often unsatisfactory. The persons interested may not have been parties to the bargain and may bear other relations to the parties that cannot be ignored."[32] Third, courts occasionally rely expressly upon public policy for their decisions, in spite of conclusions to which they otherwise may be led by applying contractual concepts.[33] The tendency is rationalized by the role of the courts as the ultimate arbiter of family relations, with the aim of protecting the legitimate interest of the state in the welfare of the family.[34]

Using these concepts most North Carolina cases dealing with marital contracts may be reconciled. Attention will be focused first upon the principal problem areas in marital contracts—antenuptial, postmarital and separation—to illustrate how the courts use contractual concepts to reach usually acceptable results. Attention then will be directed to the unique area of marital contracts to raise children in a particular religion, the validity of which is not only analyzed but also expressed chiefly in terms of public policy rather than contractual concepts.

A. Antenuptial Contracts

Antenuptial contracts are frequently employed by those facing marriage and owning a considerable amount of property. Often the contemplated marriage is a second marriage for one or both, and there are children by a previous marriage. To protect against opportunists or to provide for his

[32] *See* Havighurst, *Services in the Home—A Study of Contract Concepts in Domestic Relations*, 41 YALE L.J. 386, 405 (1932) [hereinafter cited as Havighurst].

[33] *See, e.g.*, Matthews v. Matthews, 2 N.C. App. 143, 162 S.E.2d 697 (1968).

[34] *See* M. ERNST & D. LOTH, *supra* note 30, at 216.

children, one may enter into a contract before marriage to regulate the subsequent rights of the spouses.[35] Consideration for the promise of one to forego certain rights may be in a variety of forms. Sufficient consideration has been found in mutual stipulations for the release of marital property rights otherwise possessed by each in the realty of the other.[36] Such contracts concerning property rights have been held not to violate public policy[37] and are generally enforceable according to their terms.[38] But such contracts are not without limitations. Courts will not enforce them unless "entirely satisfied" that the contracts were in fact made,[39] so that a party seeking to establish a marital contract has a burden of proof impliedly greater than proof sufficient to establish other contracts. Further, the language of the contract is scrutinized to ascertain that the intent is unequivocal if the power of the wife over property to be acquired in the future is restricted.[40] Antenuptial agreements have been declared void because contrary to public policy where the husband sought to relieve himself of his duty to support his wife[41] and where the agreement was to separate after marriage and obtain a divorce.[42] But the wife can agree to accept a share equal to that of an heir of her husband in lieu of her dower interest.[43] The execution of a bond by which the husband binds himself to give certain property to his future spouse becomes a lien upon his property.[44] As with other marriage settlements, however, it must be recorded to have priority over creditors.[45]

The above rules relate to bilateral contracts, contracts in which one promise is consideration for another promise.[46] A marital contract may be unilateral, however. It long has been recognized that marriage is sufficient consideration to support a promise and that a promise to marry is also sufficient consideration for another promise.[47] The impact of the latter principle, however, has been vitiated in jurisdictions that have abolished

[35] *See* F. KUCHLER, LAW OF ENGAGEMENT AND MARRIAGE 39 (1966).
[36] Turner v. Turner, 242 N.C. 533, 89 S.E.2d 245 (1955).
[37] *Id.*
[38] Stewart v. Stewart, 222 N.C. 387, 23 S.E.2d 306 (1942).
[39] Montgomery v. Henderson, 56 N.C. 113 (1856).
[40] Dunlap v. Hill, 145 N.C. 312, 59 S.E. 112 (1907).
[41] Motley v. Motley, 255 N.C. 190, 120 S.E.2d 422 (1961).
[42] McLean v. McLean, 237 N.C. 122, 74 S.E.2d 320 (1952).
[43] Brooks v. Austin, 95 N.C. 474 (1886).
[44] Freeman v. Hill, 21 N.C. 389 (1836).
[45] Latham v. Bowen, 52 N.C. 337 (1860).
[46] WILLISTON at § 13.
[47] *Id.* at § 110.

the once-common action for breach of contract to marry.[48] Having regarded marriage as valuable consideration, one still must inquire about the nature of the consideration in certain instances. Illustrative of the problem is *Whitley v. Whitley*,[49] a case not easily forgotten by those who have perused its facts. Plaintiff-husband brought an action on grounds of fraud to cancel a deed given defendant-wife. The defense was that marriage was valuable consideration for the deed and that no fraud was involved. Plaintiff described the circumstances pursuant to the agreement as follows:

> We had a marriage contract, which was not in writing. She agreed to marry me if I would give her the tract of land described in the deed, and I told her that I would give her the land if she would marry me and take care of me as long as she lived, or as long as I lived. We were in the cow shed. She was milking, and we shook hands across the cow's back. I gave her the land, and we were married the next day . . . . She lived with me six or seven months, and then left my home . . . .
>
> I had a conversation with her the day she left. I told her that I had an uncle who lived . . . until he was 105 years of age . . . . I told her that I believed I was going to live that long. When I said that she came up and struck me in the eye. . . . She left my house and has never been back or spoken to me since.[50]

With facts of this nature the problem of determining when consideration is given becomes crucial. If consideration is given once and for all at the time of the marriage no rescission should be allowed, absent fraud. But if defendant's promise to care for plaintiff so long as he lived involved her continuing peformance then there was a failure of consideration on her behalf. The view taken of the nature of the consideration thus may become determinative of the case. The court in *Whitley* held for defendant-wife without inquiring into the nature of the consideration other than to find that the voluntary deed was executed for a valuable consideration, marriage. Defendant's promise was said to be a condition subsequent at most, not affecting the validity of the deed even if wrongfully breached.

Courts have examined this problem of when consideration passes in an

[48] *See* F. KUCHLER, *supra* note 35, at 34-35. North Carolina is among the states that have not abolished actions for breach of promise to marry. 1 R. LEE, *supra* note 6, § 3.

[49] 209 N.C. 25, 182 S.E. 658 (1935), *noted in* 14 N.C.L. REV. 277 (1936).

[50] *Id.* at 25-26, 182 S.E. at 658.

antenuptial contract and have reached varying results.[51] Some have concluded that the general rule is that marital contracts will be enforced in spite of one party's having breached its terms because the agreements affect the rights of the children of the marriage as well as the parties.[52] This suggests that "performance of the ceremony constitutes complete performance."[53] Upon analysis of the facts, however, the doctrine of consideration fails as a meaningful test of whether an obligation will be enforced. The courts look not only to acts that may be labeled consideration but also to the conduct of the party seeking to enforce the agreement in terms of the severity of the breach.[54] Instead of relying upon the ordinary dictates of consideration, courts tend to reach results determined by the degree to which the parties are blameworthy or by the deserving character of the respective claimants.[55] Thus, where a wife abandoned her husband after only three and a half weeks of marriage because of his constant drunkenness, the Iowa court said that "[t]he consideration of the instrument is the marriage contract. If it be broken and violated, the antenuptial contract can not be enforced. It would be monstrous to hold that a woman could collect an annuity settled upon her by a contract in contemplation of marriage, when after the marriage, without cause, she utterly refused to live with her husband . . . ."[56] Courts also examine the status of the party actually seeking to enforce the contract, as where the children who were the "innocent objects of parental solicitude and care" were permitted to enforce a contract made by a defaulting, deceased parent.[57]

It thus seems that the complete performance versus continuing performance analysis of consideration entails an examination of who is seeking to enforce the contract, of how the plaintiff has conducted himself, and of who are to be the ultimate beneficiaries of the contract. At times the result is stated in terms of consideration, but the facts usually disclose the public policies being promoted—the welfare of the marriage and of

[51] It has been said that the majority of courts "adopt the view that performance of the ceremony constitutes complete performance, but there is respectable authority for the proposition that marriage comprises a continuing obligation, and that mere performance of the ceremony does not translate an antenuptial contract into a unilateral undertaking . . . ." Note, 14 N.C.L. REV. 277, 278-279 (1936).

[52] Schnepfe v. Schnepfe, 124 Md. 330, 341-42, 92 A. 891, 895 (1914).

[53] Note, 14 N.C.L. REV. 277, 278 (1936).

[54] Sidney v. Sidney, 24 Eng. Rep. 1060 (Ch. 1734).

[55] *See* Havighurst 401-02.

[56] York v. Ferner, 59 Iowa 487, 491, 13 N.W. 630, 632 (1882).

[57] Michael v. Morey, 26 Md. 239, 264 (1867).

the family unit. If the preservation of the family is involved, then the beneficiaries' rights will be enforced even though derived from the defaulting party. But the defaulting party's right to enforce the contract will not be recognized if the equities are not in its favor. Therefore, without upsetting already-established doctrine, the *Whitley* case could have been decided for the plaintiff by following the lead of the Iowa court and by finding that the consideration for the deed was a continually performed marriage. The only theoretical problem with this result is the tendency discussed earlier to treat marriage as a status and not as a contract. For purposes of analysis, however, the result still should have been in favor of the plaintiff since an examination of the relative positions of the parties reveals that no detriment had occurred to the wife except her realization that she would have the plaintiff for her husband for longer than she obviously had anticipated. Moreover, no children's interest were involved, and plaintiff had been duped to the extent of the value of the land deeded to defendant and apparently was not at fault.

Consideration is but one of the tests generally applied to determine the validity of antenuptial contracts. Of course, both parties must have contractual capacity or legal competency to contract,[58] and terms must not be ambiguous.[59] Antenuptial contracts are construed to effectuate the parties' intent existing at the time the agreement was executed, but "are to be construed liberally so as to secure the protection of those interests which from the very nature of the instrument it must be presumed were thereby intended to be secured."[60] Although the construction of marital contracts will be dealt with more fully in the treatment of separation contracts, one difference between the termination of antenuptial and separation agreements should be noted. Because of the nature of the relationship contemplated by the parties, separation agreements are voided by subsequent resumption of marital cohabitation. But antenuptial agreements are not affected by a separation and subsequent reconciliation of the parties, absent contrary contractual or statutory terms.[61] There is, however, great similarity between modification of separation agreements by consent and the rule that "[a]ntenuptial contracts may during coverture be modified or rescinded with the full and free consent of the parties thereto, provided the rights of third parties have not intervened."[62]

[58] *Cf.* Turner v. Turner, 242 N.C. 533, 89 S.E.2d 245 (1955).
[59] *Cf.* Stewart v. Stewart, 222 N.C. 387, 23 S.E.2d 306 (1942).
[60] *Id.* at 392, 23 S.E.2d at 309.
[61] Turner v. Turner, 242 N.C. 533, 538, 89 S.E.2d 245, 249 (1955).
[62] *Id.*

B. Postmarital Contracts

Postmarital contracts arise out of a relationship necessarily different in a legal sense from antenuptial contracts. Marriage is no longer simply contemplated but is an operative fact fully considered by the court. Generally courts will scrutinize the terms to satisfy themselves that there is no overreaching, or that no harsh undertakings are assumed by the wife. An attorney's problem frequently becomes one of ascertaining in advance of a court decree which inter-spousal transactions, by affecting or charging the wife's real estate or real estate income, require compliance with the previously mentioned statutory safeguard requiring private examination of the wife.[63] The problem arises from the informal nature of many marital agreements, as represented by the *Whitley* case and the cases that follow.[64] The purpose of the statute is twofold: the prevention of fraud upon the wife by the husband and the validation of transactions not recognized at all at common law.[65] The process of "inclusion and exclusion" is used to include certain transactions within, and exclude others from, the statutory requirements according to the policy underlying the statute.

The North Carolina court has required the private questioning of the wife in certain transactions that share common non-bargain elements. Thus, deeds by husband and wife of entirety property to a trustee for the husband's benefit,[66] and a conveyance to a third party by the wife with a subsequent conveyance by the third party to the spouses as tenants by the entirety[67] have been held to require the statutory safeguard. Once the estate of the wife loses its characterization as real estate or income accrued therefrom, however, the personalty may be disposed of by the wife as her separate property.[68] Further, the statute does not apply to contracts between the husband and wife as an entity and a third party,[69] loans to the husband for which security is taken,[70] and agreements guaranteeing payment of the husband's obligation.[71] Analyzed in terms of the existence of bargain factors, it seems that the absence of such factors in the cases

[63] N.C. GEN. STAT. § 52-6 (1966).

[64] In agreements drafted by an attorney the question should not often arise because the attorney should comply with the statute in borderline cases.

[65] Stout v. Perry, 152 N.C. 312, 67 S.E. 757 (1910).

[66] *See* Ingram v. Easley, 227 N.C. 442, 42 S.E.2d 624 (1947); Best v. Utley, 189 N.C. 356, 127 S.E. 337 (1925).

[67] Brinson v. Kirby, 251 N.C. 73, 110 S.E.2d 482 (1959).

[68] Bowling v. Bowling, 252 N.C. 527, 114 S.E.2d 228 (1960).

[69] Jackson v. Beard, 162 N.C. 105, 78 S.E. 6 (1913).

[70] Rencher v. Wynne, 86 N.C. 268 (1882).

[71] Arcady Farms Milling Co. v. Wallace, 242 N.C. 686, 89 S.E.2d 413 (1955).

involving entireties property, and the presence of them in more commercially oriented transactions (e.g., loan and guaranty), generally explain the result reached by the court in applying the protective statute. Contracts held to be included within the terms of the statute cannot be oral,[72] although those contracts "excluded" may be oral if not violative of the Statute of Frauds. Therefore, if the interest of the wife that is affected by an oral agreement is her real estate or income therefrom, the transaction will require the private examination and will be subject to the Statute of Frauds, either of which eliminates the possibility of an oral agreement. Since the protective statute applies only to the wife's interest in realty, its terms, if not its policy, may be outmoded, for vast wealth is held in the form of personalty today.

A frequently recurring postmarital contract problem is a claim by the wife against the husband or his estate for services rendered him during coverture. The general contracts rule is that "where services are rendered by one person for another, which are knowingly and voluntarily accepted, without more, the law presumes that such services are given and received in expectation of being paid for, and will imply a promise to pay what they are reasonably worth."[73] But this presumption may be rebutted by the relationship of certain parties in the absence of an express or implied contract evidencing an intention to give and receive payment for the services.[74] This presumption was first applied to the relationship of husband and wife in North Carolina in *Dorsett v. Dorsett*.[75] The court recognized that "[i]t may be essential justice, in many cases, that where a wife has rendered services outside the discharge of her household duties that she should receive compensation . . . ."[76] Nevertheless, it was held that in the absence of an express or implied promise of the husband to pay for such services, the wife could not recover for her services rendered to her husband's business during the course of the marital relationship. A slightly different situation was presented by *Ritchie v. White*.[77] Plaintiff-wife was expressly promised by her husband in his last years that he would pay for "services in providing for his nursing, care and support,"[78]

[72] N.C. GEN. STAT. § 52-6(a) (1966) expressly requires that the contract be in writing.

[73] Winkler v. Killian, 141 N.C. 575, 578, 54 S.E. 540, 541 (1906).

[74] Avitt v. Smith, 120 N.C. 392, 27 S.E. 91 (1897). *See also* Note, 22 N.C.L. REV. 53 (1943).

[75] 183 N.C. 354, 111 S.E. 541 (1922).

[76] *Id.* at 356, 111 S.E. at 542.

[77] 225 N.C. 450, 35 S.E.2d 414 (1945).

[78] *Id.* at 452, 35 S.E.2d at 415.

and she in fact did furnish all of his support and services. Recovery was denied on all of the theories advanced by plaintiff—express contract, implied *assumpsit* and quasi-contract—because of the marital relationship. The court emphasized that neither spouse could have sued for specific performance or for damages upon breach, seemingly contrasting a similar agreement outside the marital relation. The decision evidenced a policy of unwillingness to treat "domestic obligations incident to the marital status" as subjects of commerce.[79] Thus, contracts subjecting such marital duties to "barter and sale" treatment are said to be void because without consideration.[80] In the factual context of the *Ritchie* case the court probably would have found sufficient consideration if the contract had been between the decedent and a registered nurse who was not his wife. Instead of expressly basing the decision upon the salutary policy principles enunciated, however, the court simply ruled that no consideration existed. This example of the use of contractual language to express results of decisions cannot be severely criticized because the decision has a real foundation in the contractual principle of pre-existing legal duty. But when the contract calls forth services outside the scope of the wife's usual domestic obligations, there is no basis for denying the validity of consideration sufficient to enforce a contract.

Domestic obligations that are not the proper subject of payment are quite inclusive. Where the wife's agreement was to contribute assets from her own estate and to furnish her labor in improving the homestead in exchange for payment by the husband, she was denied recovery for performing, in addition to her ordinary household duties, certain services wherein she "worked tobacco, cut tobacco and helped make it, and made rugs, and milked cows and sold milk . . . ."[81] The court conceded that the performance of a contract requiring contributions from the separate estate of the wife and her services beyond ordinary domestic duties is valuable consideration but held that none of the wife's services were within the terms of the required performance.

The courts' reluctance to enforce an inter-spousal agreement to pay for services presents contracts law with theoretical problems. In Havighurst's classical analysis of services in the home he said that "[i]t is the attempt to apply here rules that were developed for the commercial world

[79] *Id.* at 454, 35 S.E.2d at 416.
[80] Ritchie v. White, 225 N.C. 450, 35 S.E.2d 414 (1945).
[81] Sprinkle v. Ponder, 233 N.C. 312, 318, 64 S.E.2d 171, 176 (1951).

that compels the courts to find many ways to minimize the effects of the promise."[82] At least five such minimizing techniques are indicated: (1) the Statute of Frauds and rules of evidence to vitiate the oral promise; (2) the doctrine of failure of consideration; (3) undue influence; (4) the doctrine that a conveyance cannot be fraudulent as against creditors; and (5) the doctrine of moral consideration.[83] It is apparent that the law of contracts can be used to great advantage as an instrument of social policy in the area of postmarital contracts for services, because the concepts available permit the courts to do substantial justice by using contract labels. Yet it is clear that courts do not regard a promise in a marital context as the equivalent of a similar promise in a commercial context. Several reasons have been advanced to explain the minor importance of a spouse's promise in a marital context. The "mutual exchange of services and support makes the benefit slight. There is doubtless a feeling against commercializing the marriage relation. The law having provided for the widow, a court is reluctant to increase her share of the husband's estate at the expense of the children."[84]

In the usual situation the wife is hindered in an attempt to collect for her services, just as the husband is hindered in an attempt to deprive his wife of property rights. The existence of bargain factors seems equally important both in enforcing contracts for services outside the scope of domestic duties and in enforcing contracts by which the property of the wife is affected. In either situation the parties should be considered "free traders" for the contracts to be enforced. When the contract is for services to which the spouse is already entitled, however, bargain factors theoretically must play no role because of the absence of a legal *quid pro quo*. It is consistent with the foregoing analysis that the former contracts are enforceable but the latter contract is not.

C. Separation Contracts

The question of enforceability or validity has long plagued separation contracts in North Carolina. Following the lead of England and upholding the common law fiction of the unity of husband and wife, the court declared in 1867 that "[a]rticles of separation between husband and wife, whether entered into before or after separation are against law and public

[82] Havighurst 395.
[83] *Id.* at 395-96.
[84] *Id.* at 397.

policy, and therefore void."[85] Not until 1912 was it finally decided that the deed of separation was no longer void as a matter of law.[86] In *Archbell v. Archbell*,[87] the court set forth certain conditions with which a separation agreement must comply. The separation must have already occurred or must immediately follow the contract. The agreement, in other words, must not look to a future separation. The parties not only must have adequate reasons for the separation but also must reach an agreement fair and just to the wife. This latter requirement is reflected in the protective statute previously discussed.[88] The certificate of the officer is deemed conclusive, except in cases of fraud,[89] that the agreement was fair and reasonable to the wife.[90] Although the statutory terms apply only to real estate and income therefrom, the court has extended the statutory coverage by requiring that separation agreements concerning the wife's right to support and maintenance comply with the statutory safeguard of a private examination to determine that the agreement is not unreasonable or injurious to her.[91] The rationale is that the wife's right to support is a property right in this jurisdiction, which may be released by contract, the implication being that such a property right is of sufficient value to deserve the protection afforded by the statute. The terms of a separation agreement must be reduced to writing, to the extent that property interests are affected.[92] Thus, evidence of an oral promise of additional payments to the wife upon a certain contingency was not admissible to vary the terms of a document purporting to be a complete property settlement.[93]

Separation agreements must withstand the usual tests of valid contracts: contractual capacity in the parties,[94] unambiguous terms,[95] and an objective meeting of the minds, evidenced by the signatures of the parties.[96]

[85] Collins v. Collins, 62 N.C. 153 (1867) (headnote). For a note tracing the history of the separation contract in North Carolina see Note, 2 N.C.L. REV. 192 (1924).

[86] *See* Note, 2 N.C.L. REV. 192 (1924) and cases cited therein.

[87] 158 N.C. 409, 74 S.E. 327 (1912).

[88] N.C. GEN. STAT. § 52-6 (1966).

[89] Tripp v. Tripp, 266 N.C. 378, 146 S.E.2d 507 (1966); N.C. GEN. STAT. § 52-6(b) (1966).

[90] Van Every v. Van Every, 265 N.C. 506, 144 S.E.2d 603 (1965).

[91] Bolin v. Bolin, 246 N.C. 666, 99 S.E.2d 920 (1957).

[92] *See* Boone v. Boone. 217 N.C. 722, 9 S.E.2d 383 (1940) (oral agreement not to maintain action tending to injure wife's reputation, *held* admissible).

[93] Bost v. Bost, 234 N.C. 554, 67 S.E.2d 745 (1951).

[94] *See* Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968); Lawson v. Bennett, 240 N.C. 52, 81 S.E.2d 162 (1954).

[95] *See* Goodyear v. Goodyear, 257 N.C. 374, 126 S.E.2d 113 (1962).

[96] *See* Wade v. Wade, 252 N.C. 330, 113 S.E.2d 424 (1960).

Unilateral mistake is insufficient to set the agreement aside.[97] Except on matters of custody and support for minor children, separation agreements are binding and conclusive; they are completely determinative of the rights and liabilities of the parties.[98] Such agreements will not be modified or set aside in regard to the division of property without the parties' consent, absent mutual mistake or fraud.[99] But if the agreement is properly executed in another jurisdiction without complying with the North Carolina statute, the agreement may be attacked as unreasonable or injurious to the wife, with the burden of proof placed upon the party asserting the invalidity of the agreement.[100] If the parties have complied with the statute, adequacy of consideration is ordinarily not a basis for a subsequent challenge to the validity of the agreement; otherwise, the adequacy of the consideration is a proper subject of inquiry.[101] Consideration has been found in forebearance to do certain acts,[102] the promise to care for a child,[103] and the mutual release of certain rights.[104]

Separation agreements must be construed according to the rules usually governing the interpretation of contracts.[105] The construction must effectuate the intent of the parties,[106] which should be ascertained from the "expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time."[107] Extrinsic factors are not permitted to modify contractual obligations under a marital settlement.[108] A separation agreement, however, does not rescind automatically an antenuptial agreement[109] and, in accordance with ordinary rules of construction, the two agreements will be construed consistently if possible. As stated in an earlier comparison with antenuptial agreements, separation agreements are ordinarily annulled by the parties' subsequent resumption with each other of conjugal cohabitation.[110] A subsequent separation does

[97] Cobb v. Cobb, 211 N.C. 146, 189 S.E. 479 (1937).
[98] Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966).
[99] Bunn v. Bunn, 262 N.C. 67, 136 S.E.2d 240 (1964).
[100] Davis v. Davis, 269 N.C. 120, 152 S.E.2d 306 (1967).
[101] *See* Tripp. v. Tripp, 266 N.C. 378, 146 S.E.2d 507 (1966); Van Every v. Every, 265 N.C. 506, 144 S.E.2d 603 (1965).
[102] Church v. Hancock, 261 N.C. 764, 136 S.E.2d 81 (1964).
[103] Campbell v. Campbell, 234 N.C. 188, 66 S.E.2d 672 (1951).
[104] Blankenship v. Blankenship, 234 N.C. 162, 66 S.E.2d 680 (1951).
[105] Church v. Hancock, 261 N.C. 764, 136 S.E.2d 81 (1964).
[106] Stanley v. Cox, 253 N.C. 620, 117 S.E.2d 826 (1961).
[107] Bowles v. Bowles, 237 N.C. 462, 465, 75 S.E.2d 413, 415 (1953).
[108] Church v. Hancock, 261 N.C. 764, 136 S.E.2d 81 (1964).
[109] Turner v. Turner, 242 N.C. 533, 89 S.E.2d 245 (1955).
[110] Hutchins v. Hutchins, 260 N.C. 628, 133 S.E.2d 459 (1963).

not revive the agreement, but neither does the resumption of the marital relationship upset executed provisions of the separation contract.[111] Reconciliation such as to invalidate a separation agreement is a question of fact,[112] but the parties may agree orally to rescind a written agreement and to execute a new one arising out of a reconciliation.[113] Neither subsequent divorce[114] nor remarriage where the promise is to support the wife for life[115] relieves the husband of his obligation to support his wife unless expressly provided otherwise in the separation agreement.

Problems of enforcement arise when separation agreements are made part of a judgment. A subsequent consent judgment may supercede certain terms of the separation contract.[116] The courts have divided over whether, once the agreement is incorporated into a consent judgment, it is then enforceable by a contempt decree.[117] North Carolina has held such awards enforceable by contempt in the above context, and the amounts awarded are not subject to modification without the consent of the parties.[118] The separation agreement may not be used, however, as a shield by the husband who breaches his promise to pay and then asserts the separation agreement as a defense to an action for alimony. A choice of remedies is given the wife in such a situation; she may sue for damages for breach of contract or, if the breach is of an indispensable part of the contract, she may seek alimony, effectually treating the contract as rescinded.[119]

The interpretation of separation contracts involves fewer variations from contracts law than the court's treatment of any other marital contracts. One reason is that the parties are no longer bound to each other by the traditional marital relation of trust and confidence. Although the statutory requirement of a private examination of the wife is necessary to validate most separation agreements,[120] legal theory suggests that the "negotiation of a property settlement involves the same considerations

[111] Joyner v. Joyner, 264 N.C. 27, 140 S.E.2d 714 (1965).
[112] Coulbourn v. Armstrong, 243 N.C. 663, 91 S.E.2d 912 (1956).
[113] Tilley v. Tilley, 268 N.C. 630, 151 S.E.2d 592 (1966).
[114] Hamilton v. Hamilton, 242 N.C. 715, 89 S.E.2d 417 (1955).
[115] Howland v. Stitzer, 240 N.C. 689, 84 S.E.2d 167 (1954).
[116] Stanley v. Cox, 253 N.C. 620, 117 S.E.2d 826 (1961).
[117] For a discussion of the enforceability of consent judgments by contempt proceedings see Note, 35 N.C.L. REV. 405 (1957).
[118] Holden v. Holden, 245 N.C. 1, 95 S.E.2d 118 (1956).
[119] Wilson v. Wilson, 261 N.C. 40, 134 S.E.2d 240 (1964).
[120] *See* Bolin v. Bolin, 246 N.C. 666, 99 S.E.2d 920 (1957); N.C. GEN. STAT. § 52-6 (1966).

as the negotiation of any other contract. Both husband and wife are of age, supposedly in full possession of their faculties, and dealing at arm's length."[121] Thus, bargain factors seem to predominate, explaining the court's tendency to treat separation contracts as commercial contracts are treated. Whether the courts are properly interpreting separation contracts has been questioned, however. The validity of the rationale that bargain factors are predominant is indeed doubtful in view of the fact that "[t]he bargaining power of the parties is affected by their relative desire for divorce. . . . On a lower plane, such items as detective reports or compromising photographs may be used as the quid pro quo for property."[122]

A degree of consistency in result is achieved by an analysis of the three categories of contracts to which attention has been directed using a combination of the three concepts delineated at the outset—the influence of the statutes, the elements of bargain and the pervasiveness of public policy. Marital contracts cases are commonly expressed in terms of contractual concepts. Courts have rarely diverted from the usual course of contractual language by stating results frankly in terms of the public policy of the marital relation. Yet there are cases subject to analysis only in terms of policies other than those usually surrounding the marital relation. For example, in *Willard v. Hobby*[123] plaintiff contracted to care for her sick husband. Though a service to which the husband already was entitled, and though the contract was with the wife's former employer (not her husband) to enable her to obtain social security benefits, performance of the services was held sufficient consideration for a valid contract not against public policy. This result has been explained in terms of the circumstances involving the social security laws with the rule of construction giving a claimant the benefit of the doubt.[124] In *Kovler v. Vagenheim*[125] plaintiff sued to recover on an antenuptial agreement that defendants would indemnify him for expenses for the care and support of defendants' pregnant sister if he would promise to marry her. Following a divorce, which was contemplated in the agreement, plaintiff's action resulted in a recovery based upon the validity of the agreement, consideration having

[121] C. CLAD, FAMILY LAW 102 (1964).
[122] *Id.* at 103.
[123] 134 F. Supp. 66 (E.D. Pa. 1955), *noted in* 7 MERCER L. REV. 383 (1956).
[124] *See* Note, 7 MERCER L. REV. 383 (1956). The result is consistent with the position that consideration exists, adopted by RESTATEMENT OF CONTRACTS § 84(d) (1932).
[125] 333 Mass. 252, 130 N.E.2d 557 (1955), *noted in* 11 MIAMI L.Q. 143 (1956).

been found in his promise to marry. Though an agreement looking to a future separation and absolving the hubsand of his duty of support, the contract was upheld as not against public policy, probably because alleviating the "financial burden of support does not facilitate divorce,"[126] nor is the desire to legitimize a child lightly regarded.[127]

D. Contracts to Raise Children in a Particular Religion

Marital contracts to raise children in a particular religion are unique in that courts and commentators generally disregard the contractual aspects of the agreement and base enforcement *vel non* purely on public policy.[128] The contract typically results from the desire of a Roman Catholic to receive a special dispensation to marry a non-Catholic[129] and thus continue to receive the Sacraments of the Roman Catholic Church.[130] The non-Catholic usually agrees to raise any children of the marriage in the Roman Catholic religion.[131]

The question of the enforceability of such agreements may arise in several different settings. Divorce or separation may lead to litigation concerning the custody of the children; the Catholic parent may die, and the surviving spouse then break the agreement; or both parents may die, and the agreement becomes relevant in determining custody.[132] No North Carolina case has been found dealing with this type of contract, but other courts' decisions have been placed in six classifications.[133] (1) The traditional English view was that father had the right to choose the religion of his children.[134] (2) Courts have enforced the contract on grounds of consideration found in the irrevocable change in status on the part of the Catholic. (3) Courts have denied enforcement of the contract but

[126] Note, 11 MIAMI L.Q. 143, 145 (1956).

[127] *Id.*

[128] *See* Friedman, *The Parental Right to Control The Religious Education of a Child*, 29 HARV. L. REV. 485 (1916); Gans, *Enforceability of Antenuptial Agreements Providing for the Religious Education of Children*, 1 J. FAM. L. 227 (1961) and cases cited therein; Martin, *Enforceability of Ante-Nuptial Promises to Raise Children in a Particular Religion*, 7 CATHOLIC LAW. 50 (1961); Note, *Enforceability of Antenuptial Contracts in Mixed Marriages*, 50 YALE L.J. 1286 (1941).

[129] *See* Gans, *supra* note 128, at 227; Martin, *supra* note 128, at 51.

[130] Note, *Enforceability of Antenuptial Contracts in Mixed Marriages*, 50 YALE L.J. 1286 (1941).

[131] *Id.*

[132] *Id.* at 1290-91.

[133] The classification which follows is that of Martin. Martin, *supra* note 128, at 51-56 and cases cited therein.

[134] Friedman, *supra* note 128, at 488.

allowed the child to choose for himself which religion he shall follow.[135] (4) Other courts have made the primary consideration the child's welfare and awarded custody on that basis. Then the parent given custody of the child may determine his religious training. (5) Some states have viewed the question as a constitutional one. (6) The position adopted by a few states is that the primary consideration is the welfare of the children "but that a parent, having freely entered a serious agreement, ought not to be allowed to breach it without good and substantial reason."[136] Other rationales that have been suggested are the availability of legal and equitable remedies, estoppel, indefiniteness and impractical enforceability of the agreement, and public policy concepts against intervention in religious matters and enforcement of moral duties.[137]

Regardless of the position taken by individual writers as to the enforceability of marital contracts to raise children in a particular religion, recognition of the very minor role of contracts law seems implicit. Even an advocate of "enforceability," who relied heavily upon the agreement between the parents in support of his position, cautioned that "wholly doctrinaire approaches and artificial standards can but prove inadequate."[138] The implication seems clear that contractual concepts contribute less toward an analysis of the enforceability of this type of marital contract than of other antenuptial contracts or of postnuptial or separation contracts. The ease with which results are explained with little emphasis on contracts law highlights the genuine nature of the problem involved—the public policy of the family. Marital contracts to raise children in a particular religion present the clearest example of the courts' recognition that the analysis of certain marital contracts falls outside the pale of contracts law.

III. Conclusion

It has been said that in the interpretation of certain marital contracts the "same rules and doctrines used in the commercial field [are] made to yield acceptable results in a field that is concerned with vastly different problems."[139] The general acceptability of the results has been

[135] Yet this case, Martin v. Martin, 308 N.Y. 136, 123 N.E.2d 812 (1954), involved a twelve year old and presumably did not deal with the more significant question of control over the earlier years of a child, before he is able to make a meaningful choice.

[136] Martin, *supra* note 128, at 56.

[137] Gans, *supra* note 128, at 227-28.

[138] Martin, *supra* note 128, at 84.

[139] Havighurst 405-06.

attributed to the flexibility of the contractual concepts used and the ability of judges to recognize and deal with the nature of the problem involved.[140] This rationale is only partly sufficient, however. The flexibility of contractual concepts has enabled the court to employ the *language* of contracts law, but judges have not looked to contracts rules and doctrines for acceptable results unless bargain factors exist. Rather, they have applied standards far higher than those of the market place in order to reach acceptable results. Then the results are expressed in contractual terms.

The question posed at the outset, whether the law of contracts provides the most meaningful method available for the *analysis* and *expression* of public policy of marital contracts reduces to a question of *preference as to expression but not as to analysis.* One concerned with remaining within the existing juridical concepts will prefer that results be expressed in contractual terms, but one concerned with actual expression of the policy rationale of the decision will prefer that results be expressed in explicit policy terms, without the cloak of contractual language. The latter view seems more appropriate, not only to keep judges intellectually honest and acutely aware of the important familial policies involved, but also to guard against the blurring of doctrinal lines, creating risks that faulty analysis will lead to the application of marital contractual principles to commercial contracts where application is inappropriate and vice versa. The *analysis* of a marital contract, however, should not be left to preference at all. Regardless of the language in which results are expressed, analytical concepts that emphasize the status or relationship between the parties should prevail over traditional contractual tests. Thus if the relationship of husband and wife in regard to a particular transaction is the rare one in which bargain factors predominate, commercial standards are sufficient. But if the relationship is the usual one of trust and confidence—which must, after all, be presumed—then standards no less stringent than those applied to fiduciary relationships should govern. The North Carolina court's decisions are consistent with this analysis now, and the standard seems implicit. It is hoped that such a standard will become explicit.

THOMAS W. TAYLOR

[140] *Id.* at 406.