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Hagler v. Hagler: The North Carolina Supreme Court Construes A Separation Agreement

In every work regard the writer's end
Since none can compass more than they intend
—Alexander Pope
An Essay on Criticism

Until 1981 North Carolina common law granted property to the spouse who held nominal title on divorce.¹ The law worked to the detriment of homemaker spouses, generally women, by ignoring the contribution their childcare and other domestic services made to marital income.² The law also worked unfairly when one spouse held title to a home, car, or other property, but the other helped make payments on that property.³

In 1981 the general assembly attempted to cure this unfairness by enacting the Equitable Distribution Act.⁴ The Act classifies property into marital⁵ and separate property,⁶ and gives courts administrative authority to distribute mari-

1. Note, *Hinton v. Hinton: Equitable Distribution Without Consideration of Marital Fault*, 63 N.C.L. REV. 1204, 1207 (1985) [hereinafter Note, *Hinton v. Hinton*]; Note, *North Carolina's Equitable Distribution Statute: Recent Developments*, 64 N.C.L. REV. 1395, 1395 (1986) [hereinafter Note, *Recent Developments*].

2. *Hagler v. Hagler*, 319 N.C. 287, 289, 354 S.E.2d 228, 231 (1987); see generally Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C.L. REV. 247 (1983) (review of the Equitable Distribution Act and attendant interpretive problems).

3. This Note deals with judicial construction of a separation agreement rather than with the merits of the equitable distribution statute. For discussions of equitable distribution, see Sharp, *supra* note 2; Note, *Hinton v. Hinton*, *supra* note 1; Note, *Recent Developments*, *supra* note 1. See also EQUITABLE DISTRIBUTION (North Carolina Bar Foundation 1985) (compilation of papers by practicing attorneys on aspects of the equitable distribution process).

4. Act of July 3, 1981, ch. 815, § 1, 1981 N.C. Sess. Laws 1184 (codified as amended at N.C. GEN. STAT. § 50-20 (1987)).

5. For purposes of the statute, marital property includes:

all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property in accordance with subdivision (2) of this section. Marital property includes all vested pension, retirement, and other deferred compensation rights, including military pensions eligible under the federal Uniformed Services Former Spouses' Protection Act.

N.C. GEN. STAT. § 50-20(b)(1) (1987); see Sharp, *supra* note 2, at 248-53.

6. The Act defines separate property as:

all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage. However, property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance. Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance. The increase in value of separate property and the income derived from separate property shall be considered separate property. All professional licenses and business licenses which would terminate on transfer shall be considered separate property. The expectation of nonvested pension, retirement, or other deferred compensation rights shall be considered separate property.

N.C. GEN. STAT. § 50-20(b)(2) (1987); see Sharp, *supra* note 2, at 253-71.

tal property as they deem equitable.⁷ An even division of marital property is presumed equitable.⁸ To achieve equity, however, a court may divide property unevenly in light of factors such as the income of each party, obligations of support arising out of a prior marriage, duration of the marriage, contributions by one spouse to the education of the other, the nonliquid character of the marital property, and tax consequences to each party.⁹ The Act thus reflects the modern view that most types of property acquired by either spouse during the marriage are acquired by joint effort and should be divided equally upon divorce.¹⁰

Even though the Equitable Distribution Act gives the courts power to distribute marital property, section 50-20(d) of the Act allows spouses to contract around the statute and distribute their property according to their own wishes, as long as the separation agreement is written, signed, and not the product of fraud or duress.¹¹ Section 50-20(d) reflects two important policies: first, that parties should have the freedom to contract,¹² and second, that separation agreements should be encouraged in order to avoid the excessive costs, in terms of both money and time, that judicial equitable distribution entails.

North Carolina courts have accepted the soundness of these policies by deferring to the language of separation agreements when the intent of such agreements is clear and the agreements conform to traditional rules of fair contracting.¹³ The North Carolina Supreme Court in *Hagler v. Hagler*¹⁴ illustrated this approach to separation agreements and established that a spouse's general release of all rights and claims to the other spouse's property may waive the right to court-ordered distribution even if the language of the release does not specifically mention the statutory right of equitable distribution.¹⁵ This Note reviews judicial treatment of separation agreements affected by the Equitable Distribution Act. It assesses the supreme court's application of traditional rules of contract construction to the *Hagler* separation agreement in light of prior judicial treatment of such agreements. The Note concludes that although

7. See generally Sharp, *supra* note 2 (review of the Act and attendant interpretive problems); Note, *Recent Developments*, *supra* note 1 (case law development since the Act was passed).

8. N.C. GEN. STAT. § 50-20(c) (1987).

9. *Id.* at §§ 50-20(c)(1)-(c)(12).

10. Sharp, *supra* note 2, at 247; Note, *Recent Developments*, *supra* note 1, at 1396-97.

11. Before, during or after marriage the parties may by written agreement, duly executed and acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1, or by a written agreement valid in the jurisdiction where executed, provide for distribution of the marital property in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties.

N.C. GEN. STAT. § 50-20(d) (1987).

12. The success of an attorney's attack on a separation agreement will be limited by "the law's propensity to enforce agreements as they are written." Hough, *Marital Agreements*, in *EQUITABLE DISTRIBUTION VI-5* (North Carolina Bar Foundation 1985).

13. See, e.g., *Rice v. Rice*, 81 N.C. App. 247, 344 S.E.2d 41, *cert. denied*, 317 N.C. 706, 347 S.E.2d 439 (1986); *Hartman v. Hartman*, 80 N.C. App. 452, 343 S.E.2d 11 (1986); *McIntosh v. McIntosh*, 74 N.C. App. 554, 378 S.E.2d 600 (1985); *Carlton v. Carlton*, 74 N.C. App. 690, 329 S.E.2d 682 (1985); *Buffington v. Buffington*, 69 N.C. App. 483, 317 S.E.2d 97 (1984).

14. 319 N.C. 287, 354 S.E.2d 228 (1987).

15. *Id.* at 295, 354 S.E.2d at 235.

the court's decision provides a clear rule for future litigants, the court was too willing to infer a waiver of an important statutory right from broad contractual language which was subject to other interpretations.

Phillip Hagler and Dorothy Dale Hagler were married in September 1962.¹⁶ In July of 1983 they entered into a separation agreement which provided for alimony, child support, child custody, remarriage, responsibility for outstanding bills, and acquisition of future property.¹⁷ The agreement also disposed of the marital residence.¹⁸ Each spouse signed an identical release. Mrs. Hagler's read:

4. RELEASE BY "WIFE." The "WIFE" does hereby release and relinquish unto the "HUSBAND," his executors, administrators, distributees, heirs and assigns, all right of future support except as may be herein specifically provided, and all right of dower, inheritance, descent and distribution, and all other rights *arising out of the marriage relationship in and to any and all property now owned by the "HUSBAND,"* or which may be hereafter acquired by him, and further does hereby release the right to administer upon his estate.¹⁹

The agreement did not expressly waive equitable distribution,²⁰ as many such agreements do. Mrs. Hagler's answer to her husband's claim for divorce requested an equitable distribution of marital property.²¹

The Haglers divorced in March 1985 and Mr. Hagler moved for summary judgment on Mrs. Hagler's prayer for equitable distribution, on the ground that the separation agreement precluded equitable distribution.²² The District Court of Rockingham County under Judge Blackwell granted summary judgment.²³ The court of appeals reversed on the ground that because the separation agreement did not dispose of any marital property other than the marital residence, the existence of additional marital property was an issue of material fact and the trial court should not have granted summary judgment.²⁴

The North Carolina Supreme Court, highly selective in granting discretionary review in equitable distribution cases,²⁵ deemed *Hagler* ripe for review. The court construed the Haglers' separation agreement as intending to dispose of all

16. *Id.* at 288, 354 S.E.2d at 231.

17. *Id.*

18. *Hagler v. Hagler*, No. 8517DC933, slip op. at 3 (N.C. App. Apr. 1, 1986).

19. *Hagler*, 319 N.C. at 288, 354 S.E.2d at 231 (emphasis added).

20. *Id.* at 291, 354 S.E.2d at 232.

21. *Id.* at 288, 354 S.E.2d at 231.

22. *Id.* Brief for plaintiff husband noted that the agreement expressly provided for the division of the marital residence and that the agreement contained mutual releases of the parties "with the [sic] respect to other properties." Brief for Appellee at 3-4, *Hagler v. Hagler*, 319 N.C. 287, 354 S.E.2d 228 (1987) (No. 8517DC933). Plaintiff then asserted that "[n]othing appears in the agreement or on the record to suggest that there was other marital property subject to distribution between the parties or that the settlement was not intended to be complete." *Id.*

23. *Hagler*, 319 N.C. at 288, 354 S.E.2d at 231.

24. *Id.* at 289, 354 S.E.2d at 231. Mrs. Hagler's answer did not allege or specify what marital property remained to be distributed. *Id.* at 288, 354 S.E.2d at 231.

25. Howell, *Equitable Distribution Caselaw Update*, in *EQUITABLE DISTRIBUTION UPDATE IV-26* (North Carolina Bar Foundation 1987).

property rights, in marital as well as separate property.²⁶ In addition, the court found that the agreement waived the property right of equitable distribution itself.²⁷ The court therefore held that the agreement barred equitable distribution, and remanded the case to the district court of Rockingham County for reinstatement of summary judgment in favor of Mr. Hagler.²⁸

Although *Hagler* represents the first time the supreme court has dealt with the issue of when a separation agreement waives equitable distribution, the court of appeals has considered the question on several occasions.²⁹ The court of appeals construction of individual separation agreements necessarily led to fact-specific holdings; however, a clear policy of enforcing separation agreements emerged from the opinions.³⁰ The court of appeals has consistently deferred to section 50-20(d), which states:

Before, during or after marriage the parties may by written agreement, duly executed and acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1 . . . provide for distribution of the marital property in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties.³¹

In *Dean v. Dean*,³² a case involving a separation agreement signed before the Equitable Distribution Act took effect, the court held the agreement barred equitable distribution.³³ The *Dean* agreement contained a merger clause stipulating that at the time the agreement was signed both parties intended it to be a complete property settlement agreement.³⁴ The court bound Mrs. Dean to the agreement, thereby effectuating a policy against opening pre-Act separation agreements to attack.³⁵

In *McArthur v. McArthur*³⁶ the court once again ruled on a separation agreement signed before the Act became effective. Under the heading "Mutual Release of all Property Claims," each spouse agreed to release "all rights he or she now has or may hereafter acquire in the personal estate of the other."³⁷ Under the heading "Waivers of Claim Against Estate," each waived "[a]ll other rights, claims, demands and obligations of every kind and character for past and future support and maintenance and for property settlement."³⁸ The court

26. *Hagler*, 319 N.C. at 293, 354 S.E.2d at 234.

27. *Id.* at 293-94, 354 S.E.2d at 234.

28. *Id.* at 295, 354 S.E.2d at 235. Justices Martin and Mitchell dissented on the ground that the language of the agreement did not clearly refer to or waive equitable distribution, as required by the law of contract. *Id.* at 295-98, 354 S.E.2d at 235-36 (Martin, J., dissenting).

29. See cases cited *supra* note 13.

30. Howell, *supra* note 25, at IV-2.

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

32. 68 N.C. App. 290, 314 S.E.2d 305 (1984).

33. *Id.* at 292, 314 S.E.2d at 307.

34. *Id.*

35. This policy is reflected in other decisions. See, e.g., *Case v. Case*, 73 N.C. App. 76, 325 S.E.2d 661 (passage of Act after separation agreement signed does not void unexecuted portions of agreement), *cert. denied*, 313 N.C. 597, 330 S.E.2d 606 (1985).

36. 68 N.C. App. 484, 315 S.E.2d 344 (1984).

37. *Id.* at 486, 315 S.E.2d at 345.

38. *Id.*

made it clear that absence of a recital that "this is the entire agreement" did not make the agreement vulnerable to new claims.³⁹ The court's holding was based on construction of contract language, but the court also voiced a more general policy, stating, "[t]o rule otherwise would impermissibly open up to attack many separation agreements entered into before the effective date of the Act."⁴⁰ Mrs. McArthur sought distribution of personal property, not marital property; the court held she was barred by the clear language of the agreement disposing of all personal property.⁴¹

The case that points out most clearly the court of appeals' commitment to protecting pre-Act separation agreements is *Blount v. Blount*.⁴² Mrs. Blount claimed her separation agreement was only a support agreement, not a property distribution, and that she was therefore entitled to equitable distribution of the marital property.⁴³ Even though the husband owned assets in excess of one million dollars and the agreement referred only to the marital residence, the home furnishings, and Mrs. Blount's car, the court construed the language of the agreement as settling all property rights which grew out of the marriage and held that no marital property remained for distribution.⁴⁴

The *Blount* court based its decision on the language of the separation agreement, in which the wife released "any and all property interest in property real, personal, and mixed, now owned or hereafter acquired by the husband . . . just the same as if she had never been married to him."⁴⁵ The court interpreted the agreement as intending a final settlement.⁴⁶ The decision further reflected the court's commitment to contractual freedom and a policy of honoring pre-Act separation agreements. Subsequent cases cite *Blount* in support of the proposition that a separation agreement need not enumerate all property in order to dispose of all property.⁴⁷

The North Carolina courts construed pre-Act separation agreements as they did in order to prevent endless attacks on these agreements once the right of equitable distribution became effective. Subsequently, however, the court of appeals extended this approach by construing separation agreements as barring

39. *Id.*

40. *Id.*

41. *Id.* at 487, 315 S.E.2d at 346. If Mrs. McArthur had sought distribution of marital property, she would likely have been barred by the general release of "all other rights . . . for property settlement." The Haglers' release arguably was not so general, since it specified that Mrs. Hagler released "all other rights arising out of the marriage relationship in and to any and all property *now owned by the [husband]*," *Hagler*, 319 N.C. at 288, 354 S.E.2d at 231, which can be read to refer to his separate property rather than to the marital property she subsequently sought to have distributed. This was the court of appeals' view, which the supreme court acknowledged in passing. *Id.* at 293, 354 S.E.2d at 234.

42. 72 N.C. App. 193, 323 S.E.2d 738 (1984).

43. *Id.* at 194, 323 S.E.2d at 739.

44. *Id.* at 195, 323 S.E.2d at 740.

45. *Id.* While the wording is similar to that of the Hagler agreement, the court's emphasis was on the latter language, "just the same as if she had never been married to him." *Id.*

46. *Id.* at 196, 323 S.E.2d at 740.

47. *See, e.g., Morris v. Morris*, 79 N.C. App. 386, 388-89, 339 S.E.2d 424, 426 (military pension disposed of though not enumerated because at time agreement signed, pensions were not considered marital property), *cert. denied*, 316 N.C. 733, 345 S.E.2d 390 (1986).

equitable distribution even when the agreements were signed after the Act took effect.⁴⁸ In *Rice v. Rice*⁴⁹ the court applied *Blount* to a separation agreement entered into after the Equitable Distribution Act became effective. In *Rice* husband and wife specifically disposed of both real and personal property and signed a general release of "[a]ll other rights, claims, demands and obligations of every kind and character . . . for property settlement."⁵⁰ The court held that by the language of the release the parties clearly intended to dispose of everything, even though they omitted from the agreement their most valuable assets, including stocks, bonds, and a drug store.⁵¹

Finally, in *Hartman v. Hartman*,⁵² which involved an agreement signed after the Act became effective, the court of appeals denied equitable distribution to a husband when it found that an agreement expressly disposing of the couple's personal property also disposed of their real property.⁵³ The court found that even though real property was not disposed of in the section of enumerated property, it was covered by the agreement's general release.⁵⁴ The release expressed the parties' wish to settle permanently their rights and obligations, each spouse agreeing that either might "purchase, acquire, own, hold, possess, encumber, dispose of and convey any and all kinds and classes of property, both real and personal, as though unmarried."⁵⁵ *Blount, Rice, Hartman*, and subsequent cases illustrate the profound effect contract language can have, even when that contract is between spouses. Divorce lawyers are forewarned: courts are likely to construe general releases as disposing of all property, whether enumerated or not.⁵⁶

Review of the case law shows that the court of appeals shares the supreme court's concern that parties be allowed to dispose of their property according to private agreement, in the absence of fraud or over reaching.⁵⁷ Such a policy preserves traditional freedom of contract and avoids the expense of court-ordered equitable distribution. When the court has upheld equitable distribution in the face of separation agreements it has generally based its decisions not on construction of language, but on the fact that the agreement was oral rather than written,⁵⁸ the agreement was invalidated by cohabitation after it was signed and

48. See cases cited *supra* note 13.

49. 81 N.C. App. 247, 344 S.E.2d 41, *cert. denied*, 317 N.C. 706, 347 S.E.2d 439 (1986).

50. *Id.* at 253-54, 344 S.E.2d at 45-46.

51. *Id.*

52. 80 N.C. App. 452, 343 S.E.2d 11 (1986).

53. *Id.* at 455, 343 S.E.2d at 13.

54. *Id.*

55. *Id.* (emphasis added).

56. The North Carolina Bar has taken the warning to heart, as evidenced in a list of Lawyers' "DOs and DON'Ts" in Boxley, *Legislative Update, Recent Cases and Attorney Fees in Equitable Distribution*, in *EQUITABLE DISTRIBUTION III-2, III-12* (North Carolina Bar Foundation 1985) (lawyers should not expect to succeed with an argument that unenumerated property is not waived by a general release).

57. "[W]e must assume that this arrangement was satisfactory to both spouses at the time it was entered into. There has been no showing of, or attempt to show, fraud or duress on the part of either party. Both parties were represented by counsel." *Hagler*, 319 N.C. at 293, 354 S.E.2d at 234.

58. See, e.g., *Weaver v. Weaver*, 72 N.C. App. 409, 324 S.E.2d 915 (1985) (court may not rely

executed,⁵⁹ the agreement was not a separation agreement but a consent judgment or oral stipulation,⁶⁰ or there was evidence of fraud.⁶¹

Other states with equitable distribution doctrines share North Carolina's commitment to contractual freedom and treat separation agreements no differently from other contracts.⁶² Some statutes expressly allow spouses to contract around the law, as the North Carolina act does.⁶³ For example, Virginia's equitable distribution statute allows a court to "affirm, ratify and incorporate . . . any valid agreement of the parties."⁶⁴ The Virginia Supreme Court expressed the policy behind this provision when it noted that "[w]hen a marriage fails, public policy favors prompt resolution of disputes concerning the maintenance and care of minor children and the property rights of the parties. Voluntary, court-approved agreements promote that policy and should be encouraged."⁶⁵ In Virginia, "to the extent that the parties have already stipulated to a particular disposition of their property, the court may not decree an equitable distribution award that is inconsistent with that contract."⁶⁶

Similarly, the Washington equitable distribution statute allows spouses to enter into a separation agreement disposing of property, unless the court finds "that the separation contract was unfair at the time of its execution."⁶⁷ In a Washington case, *In re Marriage of Shaffer*,⁶⁸ the spouses contracted voluntarily, with full knowledge of marital assets and the assistance of counsel. The court held that whereas prior law would have allowed the court to examine the economic equities of the undisputed agreement, the current provision required deference to the separation agreement unless it was executed unfairly.⁶⁹ The court stated that the provision was intended to give "wider latitude to marital

on oral agreement disposing of property to circumvent equitable distribution). Section 50-20(d) requires written agreements.

59. Cohabitation after a separation agreement is signed may bar equitable distribution with respect to those parts of the agreement that have already been executed. *See, e.g., Case v. Case*, 73 N.C. App. 76, 79, 325 S.E.2d 661, 664 (1985); *Carlton v. Carlton*, 74 N.C. App. 690, 693, 329 S.E.2d 682, 684 (1985).

60. *McIntosh v. McIntosh*, 74 N.C. App. 554, 555, 328 S.E.2d 600, 601 (1985) (stipulations dictated to a court reporter at an informal hearing and not signed by the parties required the same safeguards as a separation agreement and so did not bar equitable distribution); *Capps v. Capps*, 69 N.C. App. 755, 757, 318 S.E.2d 346, 348 (1984) (consent judgment not a written agreement under N.C. GEN. STAT. § 50-20(d)).

61. While North Carolina courts do not appear to have based any decisions on evidence of fraud, they have indicated that fraud or duress would invalidate a separation agreement. *See Hagler*, 319 N.C. at 293, 354 S.E.2d at 234; *see also* N.C. GEN. STAT. § 52-10.1 (1987) (any married couple may execute a separation agreement not inconsistent with public policy).

62. *See Freed & Walker, Family Law in the Fifty States: An Overview*, 19 FAM. L. Q. 331, 356 (1986) (list and comparison of other equitable distribution statutes and recent developments in each state).

63. *See, e.g., MD. FAM. LAW CODE ANN. § 8-101* (1973 & Supp. 1987); *OHIO REV. CODE ANN. § 3103.06* (Page 1980); *TENN. CODE ANN. § 36-4-121(g)* (Supp. 1987); *VA. CODE ANN. § 20-109* (Supp. 1988); *WASH. REV. CODE § 26.09.070(3)* (Supp. 1986).

64. *VA. CODE ANN. § 20-109* (Supp. 1988).

65. *Morris v. Morris*, 216 Va. 457, 459, 219 S.E.2d 864, 867 (1975).

66. *Parra v. Parra*, 1 Va. App. 118, 336 S.E.2d 157, 162-63 (1985).

67. *WASH. REV. CODE § 26.09.070(3)* (Supp. 1986).

68. 47 Wash. App. 189, 733 P.2d 1013 (1987).

69. *Id.* at 191, 733 P.2d at 1016.

partners to independently dispose of their property by contract, free from court supervision."⁷⁰ Washington, Virginia, and North Carolina are typical in their commitment to contractual freedom and their desire to resolve divorces economically and efficiently.

When parties are free to contract, the court's role is to interpret the meaning of contractual language when there is a dispute. Arguably, separation agreements are not arms-length transactions,⁷¹ but in North Carolina, as in most states, separation agreements are subject to the same rules of contract construction as any other agreement. In *Hagler* the court assumed the role of educator and outlined the steps involved in construing a contract. The court first stated the rule that when the language of a contract is "clear and unambiguous" its construction is a matter of law for the court.⁷² It then cited case law establishing the rule that when an agreement is in writing and free from ambiguity, thus requiring no extrinsic evidence, "[t]he heart of a contract is the intention of the parties, which is to 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."⁷³ If a term is not expressed in the agreement, the court can imply it if "it can be plainly seen from all the provisions of the instrument taken together that the obligation in question was within the contemplation of the parties when making their contract or is necessary to carry their intention into effect."⁷⁴ The court then purported to apply these rules of contract construction to the Hagler separation agreement.

The supreme court analyzed the Hagler agreement in two ways, both resulting in a denial of equitable distribution.⁷⁵ As in the cases previously discussed, the court held that equitable distribution was barred because the separation agreement included language that disposed of everything and left nothing to distribute.⁷⁶ In support of this interpretation, the court found that the words "all other rights arising out of the marital relationship" released *all* property rights, in marital as well as personal property.⁷⁷ Acknowledging the dissent's reminder that the entire clause read "all other rights arising out of the marital relationship *to any and all property now owned by the [husband]*,"⁷⁸ the majority responded that "[w]hile it might conceivably be argued that the words 'now owned by the [husband]' . . . somehow implies an attempt to limit the general nature of the release, we conclude from our reading of the entire agreement that

70. *Id.*

71. See Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399 (1984) (arguing the personal nature of separation agreements calls for considerations beyond those of commercial contracting).

72. *Hagler*, 319 N.C. at 294, 354 S.E.2d at 234.

73. *Id.* (quoting *Gould Morris Elec. Co. v. Atlantic Fire Ins. Co.*, 229 N.C. 518, 520, 50 S.E.2d 295, 297 (1948) and *Bicycle Transit Auth. v. Bell*, 314 N.C. 219, 227, 333 S.E.2d 299, 304 (1985)).

74. *Id.* (quoting 17 AM. JUR. 2D *Contracts* § 255 (1964)).

75. The court did not expressly separate its two analyses.

76. *Hagler*, 319 N.C. at 293, 354 S.E.2d at 234.

77. *Id.*

78. *Id.* at 296, 354 S.E.2d at 235-36 (Martin, J., dissenting) (emphasis added).

the parties intended to completely dispose of the marital estate."⁷⁹

In its second analysis the court went further, perhaps attempting to establish a principle that would encompass a variety of future fact situations. It again turned to the portion of the release which waived "all rights of dower, inheritance, descent, distribution, and all other rights arising out of the marital relationship to any and all property owned by the husband."⁸⁰ Given that the agreement enumerated all traditional property rights, the court asked what additional property rights the phrase "all other rights" could have been intended to cover and concluded that the words could only refer to equitable distribution.⁸¹ Thus, the court not only decided there was no marital property remaining to distribute, but also implied that even if there were, the agreement would waive the "property right" of equitable distribution itself.⁸²

There are problems with the court's application of its rules of contract construction to the Hagler separation agreement. The cases the court cited to outline its rules involved a contract to insure goods shipped,⁸³ a covenant not to compete,⁸⁴ and a contract to indemnify a bank teller.⁸⁵ None of these cases involved *waiver* of a right, particularly not waiver of a statutory right. Thus, in its analysis, the court ignored an important tenet of contract law: waivers are not favored in the law.⁸⁶ Arguably, in order to waive a statutory right, the manifestation of intent to waive should be clearer than was shown in the Hagler agreement's general release. As Justice Martin suggested in his dissent, a waiver might read "I hereby waive all my rights . . . to equitable distribution pursuant to N.C.G.S. § 50-20."⁸⁷

Case law from other jurisdictions supports the contention that waiver of a right as important as equitable distribution must be very clear before a court should give it effect. Few states have dealt with the specific problem of separation agreements waiving the right to equitable distribution, but one can draw inferences from their treatment of separation agreements waiving other statutory rights. Courts in other jurisdictions have decided whether language in a separation agreement waived the statutory right to modify alimony or child support.⁸⁸ Most of these courts appear to accept that a contract can waive the right of modification, but are reluctant to infer a waiver in the absence of express lan-

79. *Id.* at 293, 354 S.E.2d at 234. The court of appeals assumed that this language referred to the husband's separate property. *Hagler v. Hagler*, No. 8517DC933, slip op. at 3 (N.C. App. Apr. 1, 1986).

80. *Hagler*, 319 N.C. at 293, 354 S.E.2d at 234.

81. *Id.* at 293-94, 354 S.E.2d at 234.

82. "Equitable distribution is a property right. N.C.G.S. § 50-20(k)." *Id.* at 290, 354 S.E.2d at 232.

83. *Gould Morris Elec. Co. v. Atlantic Fire Ins. Co.*, 229 N.C. 518, 50 S.E.2d 295 (1948).

84. *Bicycle Transit Auth. v. Bell*, 314 N.C. 219, 333 S.E.2d 299 (1985).

85. *Indemnity Co. v. Hood*, 226 N.C. 706, 40 S.E.2d 198 (1946).

86. *See Adder v. Holman & Moody, Inc.*, 288 N.C. 484, 492, 219 S.E.2d 190, 195-96 (1975). It is the majority's failure to apply the laws pertaining to waiver that Justice Martin objected to most strongly in his dissent. *Hagler*, 319 N.C. at 296, 354 S.E.2d at 235 (Martin, J., dissenting).

87. *Hagler*, 319 N.C. at 298, 354 S.E.2d at 236 (Martin, J., dissenting).

88. *See, e.g., In re Marriage of Brown*, 626 P.2d 755 (Colo. App. 1981); *Stansel v. Stansel*, 385 Mass. 510, 432 N.E.2d 691 (1982).

guage or very clear intent. In Massachusetts, a wife who released all claims in her husband's property, including the right to modify the amount of support, could not request a modification of support unless she could show that her circumstances had so changed that without the modification, she would become a ward of the state.⁸⁹ In Colorado, the court of appeals set aside an order approving a separation agreement in which a wife waived her right to support and her husband waived visitation rights and agreed to let his children be adopted by his wife's second husband if she remarried.⁹⁰ The court accepted that the agreement could bind the spouses, but because it concerned the welfare of minors, the court held the contract did not bind either the children or the court.⁹¹

In a Florida case, the parties signed a release "to settle all rights and duties of the parties and to effect a permanent division between them in contemplation of divorce."⁹² The court of appeals refused to infer a waiver of the right of modification from boilerplate language, in the absence of "a clear waiver by express language or necessary implication from the document itself."⁹³ The court stated:

The difficult question before us concerns the generally familiar problem of the tension between a governmentally mandated right, on the one hand, and the attempt of individuals to regulate their own affairs, on the other. In resolving that issue . . . we are strongly influenced by the fact that the right involved . . . has been established by the legislature in the broadest and most compelling of terms.⁹⁴

Most states appear to recognize the freedom of parties to waive rights by contract, but when the right is important and codified, the waiver must be clearly expressed.⁹⁵

In addition to the *Hagler* court's ignoring the usual scrutiny of waivers, it is not evident that the *Hagler* separation agreement was as "clear and unambiguous" as the supreme court insisted, or that waiver of equitable distribution was "within the contemplation of the parties." In his dissent, Justice Martin pointed out that the agreement was of a form often used before the Equitable Distribution Act existed, and so the wording did not contemplate equitable distribution as either an enumerated property right or a property right covered by the general waiver of "all rights arising out of the marital relationship."⁹⁶ The ma-

89. *Stansel*, 385 Mass. at 515, 432 N.E.2d at 695.

90. *In re Marriage of Brown*, 626 P.2d at 757.

91. *Id.*

92. *Bassett v. Bassett*, 464 So. 2d 1203 (Fla. App. 1984).

93. *Id.* at 1204.

94. *Id.*

95. Even if the right to be waived is not considered "major," courts appear reluctant to infer waiver from a general release. See, for example, the treatment of separation agreements that impliedly waive attorney fees. Annotation, *Contract, Provision Thereof, or Stipulation Waiving Wife's Right to Counsel Fees in Event of Divorce or Separation Action*, 3 A.L.R.3d 716 (1970). A similar issue arises with respect to probate of wills in community property states, when a couple signs a separation agreement containing a general release of all property rights in each other's property. Without a statutory provision in the state probate code providing otherwise, courts are reluctant to infer waiver of a widow's or widower's statutory allowance. Annotation, *Waiver of Right To Widow's Allowance by Antenuptial Agreement*, 30 A.L.R.3d 858 (1970).

96. *Hagler*, 319 N.C. at 296, 354 S.E.2d at 235 (Martin, J., dissenting). Justice Martin also

majority's finding of an implied waiver of equitable distribution was therefore unjustified.⁹⁷

The court of appeals' decision in *Hagler* was unpublished, and the supreme court did not give an account of it in its own opinion. Nonetheless, the contents of the court of appeals decision are enlightening.⁹⁸ In a unanimous opinion drafted by Judge Martin, the court of appeals pointed out that the *Hagler* release dealt with property owned by the other spouse, which by definition constitutes separate, not marital, property.⁹⁹ The opinion noted that the only marital property covered in the agreement was the marital residence, and that while the agreement would thus bar equitable distribution of the residence, there was a question of material fact as to whether other marital property remained to be distributed.¹⁰⁰ Summary judgment was therefore inappropriate.¹⁰¹

Nowhere in the court of appeals' opinion does the court entertain the possibility that the words "rights arising out of the marital relationship in and to any and all property now owned by the [husband]" might be interpreted to refer to marital property rather than to Mr. *Hagler's* separate property. Assuming the court's familiarity with standard wording of separation agreements, it is evident that the court did not simply overlook a common interpretation, but rather was applying an accepted interpretation to boilerplate language.

The question then becomes, why did the supreme court reject the court of appeals' construction, given the appeals court's history of construing separation agreements as barring equitable distribution whenever such a construction was possible?¹⁰² It appears the supreme court saw *Hagler* as an opportunity to establish a precedent in an important area of equitable distribution law, and was willing to misapply its own professed rules of contract construction in order to do so. The fact that Mr. *Hagler* did not argue that a general release waived marital property until filing his amended brief for the supreme court supports this conclusion.¹⁰³ His original brief did not claim that the words "any and all property now owned by the [husband]" referred to marital property, but rather argued that Mrs. *Hagler* had the burden to show the existence of any marital property not covered in the agreement that remained to be distributed.¹⁰⁴ Fur-

made the point that the right to equitable distribution arises out of the divorce rather than out of the marriage relationship. Because her right to equitable distribution would not become relevant until a divorce decree was entered, counsel for Mrs. *Hagler* would not have seen a need to refer to equitable distribution in the agreement. *Id.* at 297, 354 S.E.2d at 236 (Martin, J., dissenting). The parties themselves did not argue this point.

97. *Id.* at 297, 354 S.E.2d at 236.

98. See *Hagler v. Hagler*, No. 8517DC933, slip op. at 3 (N.C. App. Apr. 1, 1986).

99. *Id.* Justice Martin raised this assumption in his dissent to the supreme court opinion, *Hagler*, 319 N.C. at 295-98, 354 S.E.2d at 235-36.

100. *Hagler*, No. 8517DC933, slip op. at 3. The burden was therefore on the husband to prove no marital property remained for distribution. *Id.*

101. *Id.* at 5.

102. See *supra* notes 29-56 and accompanying text.

103. New Brief for Appellee, *Hagler v. Hagler*, 319 N.C. 287, 354 S.E.2d 228 (1987) (No. 276PA86).

104. Brief for Appellee at 3-4, *Hagler v. Hagler*, 319 N.C. 287, 354 S.E.2d 228 (1987) (No. 8517DC933).

ther, in neither brief did the plaintiff argue that equitable distribution was a "property right" to be waived along with traditional rights such as dower and descent.

The *Hagler* decision establishes clearer guidelines for the treatment of separation agreements under the Equitable Distribution Act, and reflects the court's desire to encourage freedom of contract and economical use of the court-administered distribution system. Moreover, the decision provides lower courts with a valuable summary of general rules of contract construction. Knowing that courts will construe general releases as waiving equitable distribution, drafters of future separation agreements may be more careful, and the courts may see a decrease in litigation as a result. Although the supreme court has provided a clear framework for contract interpretation, its application of this framework to the Hagler agreement was flawed. If the court had confronted the issue of waiver, and adequately discussed alternate interpretations of the contract language before dismissing them, the *Hagler* opinion would be much stronger.

HEATHER NEWTON