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Specific Performance of Separation Agreements: Is the Remedy Enforceable?

Long after divorced couples have ended their emotional and physical relationships, financial ties may linger. As a result of either court-ordered alimony or voluntary payments made in compliance with separation agreements, ex-husbands frequently are obligated to send monthly checks to their former wives¹ in fulfillment of their continuing "duty of support."² If the ex-husband refuses to honor his obligation, courts face the task of enforcement. When court-imposed alimony is at issue, North Carolina courts have been consistent in their willingness to hold the defaulting husband in contempt of court,³ a holding that can result in a jail sentence.⁴ When the payments represent only a contractual obligation occasioned by a separation agreement, however, the North Carolina courts have refused to invoke their contempt power,⁵

1. In recent years, courts and legislatures have indicated that if the wife were the supporting spouse, she would be required to continue that support after divorce or separation. *See, e.g., In re Marriage of Epstein*, 24 Cal. 3d 76, 83, 592 P.2d 1165, 1169, 154 Cal. Rptr. 413, 417 (1979) ("Husband and wife assume a mutual obligation of support upon marriage.") (relying on CAL. CIV. CODE § 5100 (West 1970); "Husband and wife contract toward each other obligations of mutual respect, fidelity and support.")

Thus, recognizing that in some cases an ex-wife might be required to support her former husband but acknowledging that the overwhelming majority of cases in this area concern wives seeking support from husbands, this Note generally will speak of the duty of support as flowing from husband to wife. For a completely accurate understanding, however, the reader should read "wife" and "husband" interchangeably.

2. Although the duty of support technically ends when the marriage ends, it is often extended into the nonmarital state by an agreement between the parties or by the judicial imposition of alimony. The duty of a husband to support his wife derives from the common law and remains substantially intact today, equal rights between the sexes notwithstanding. *Compare* *Manby v. Scott*, 86 Eng. Rep. 781, 784 (1659):

[T]he husband is bound of common right to provide for and maintain his wife; and the law having disabled the wife to bind herself by her contract, therefore the burden shall rest upon the husband, who by law is bound to maintain her and he shall do it *nolens volens* [whether willing or unwilling]: generally the antecedent is most true; for she is "bone of his bone, flesh of his flesh," and no man did ever hate his own flesh so far as not to preserve it.

with *Newport v. Newport*, — Va. —, —, 245 S.E.2d 134, 139 (1978):

[T]he duty of a husband to support his wife is a moral as well as a legal obligation; it is a marital duty, in the performance of which the public as well as the parties are interested; it is a duty which is an incident to the marriage state and arises from the relation of the marriage; and it is an inherent right which may be asserted in a divorce suit or in an independent suit therefor.

3. *See, e.g., Whitesides v. Whitesides*, 271 N.C. 560, 157 S.E.2d 82 (1967); *Pain v. Pain*, 80 N.C. 322 (1879).

4. *See* N.C. GEN. STAT. § 5A-12(a) (Cum. Supp. 1979), *quoted at* note 14 *infra*.

5. *See, e.g., Holden v. Holden*, 245 N.C. 1, 95 S.E.2d 118 (1956); *Stanley v. Stanley*, 226 N.C. 129, 37 S.E.2d 118 (1946); *Davis v. Davis*, 213 N.C. 537, 196 S.E. 819 (1938).

holding that the use of this power could lead to a violation of the constitutional prohibition against imprisonment for debt.⁶ This refusal has left many ex-wives without effective means of collecting support payable pursuant to a separation agreement. A partial solution to this problem was recently delineated in *Moore v. Moore*,⁷ when the North Carolina Supreme Court granted plaintiff-wife a decree of specific performance to compel her former husband to honor the terms of their separation agreement. The ultimate viability of this remedy is left in substantial doubt, however, because the court failed to determine whether the decree of specific performance is, in turn, enforceable by the use of the contempt power.

Mr. and Mrs. Moore executed a separation agreement in 1972 in which Mr. Moore agreed to pay his wife \$250.000 per month "as alimony."⁸ When the parties later divorced, however, this agreement apparently was not made part of the divorce decree.⁹ Mr. Moore ceased making payments in July 1975. Six months later, Mrs. Moore obtained a judgment for accrued arrearages, but execution on the judgment was returned unsatisfied.¹⁰ During the following year, plaintiff initiated additional actions to satisfy the judgment, but these were also ineffective.¹¹ Mrs. Moore finally brought suit in superior court in 1977,

6. See N.C. CONST. art. I, § 28, *quoted at note 15 infra*.

7. 297 N.C. 14, 252 S.E.2d 735 (1979).

8. *Id.* at 14, 252 S.E.2d at 736. More precisely, the support provision in the separation agreement required defendant-husband to pay plaintiff-wife \$250.00 per month. The agreement stipulated that defendant's obligation to make support payments would end upon plaintiff's remarriage or would be reduced to \$175.00 a month if plaintiff remained unmarried at age 65. Record at 11-12, *Moore v. Moore*, 38 N.C. App. 700, 248 S.E.2d 761 (1978), *rev'd*, 297 N.C. 14, 252 S.E.2d 735 (1979). Although designated "as alimony" in the separation agreement, these payments were not technically alimony because they did not have the force of a court order. See text accompanying note 29 *infra*.

9. 297 N.C. at 14, 252 S.E.2d at 736. It is not apparent why the agreement was not made part of the decree. Generally, a supporting spouse would favor an arrangement in which the agreement is not made part of the divorce decree because such an agreement is not modifiable by the court and the dependent spouse may not later appeal for an increase in the support payments. Dependent spouses, on the other hand, usually favor making the agreement part of the decree because it gives them the option of requesting the court to increase payments due to changed circumstances or to force payment that is not forthcoming from the supporting spouse. See, e.g., *Howland v. Stitzer*, 236 N.C. 230, 72 S.E.2d 583 (1952). See also note 30 *infra*.

10. 297 N.C. at 14, 252 S.E.2d at 736. In January 1976, the Wake County District Court decreed that defendant owed plaintiff \$1,500.00 plus interest. In February, execution on the judgment was issued and given to the Sheriff of Wake County; it was returned unsatisfied. Record at 3-4.

11. A supplemental proceeding was held in August 1976, at which defendant was questioned about assets available to satisfy the judgment. Defendant testified that he had remarried and was earning approximately \$20,000 per year. He stated that, upon receiving his bimonthly salary check, he immediately endorsed it to his second wife, who deposited it in her individual checking account. Defendant further stated that he and his second wife owned a house as tenants by the

requesting judgment for arrearages accrued since the first judgment and a court order directing defendant to specifically perform the support provisions of the separation agreement. The court entered judgment against Mr. Moore for arrearages of \$4,875.00, but denied plaintiff's request for specific performance.¹² The court of appeals affirmed on both issues,¹³ but the supreme court reversed the trial court denial of specific performance.

The court of appeals refused to grant the decree because it viewed the request for specific performance as an effort by plaintiff to compel defendant to comply with the support provisions of the agreement under threat of being jailed for contempt¹⁴ in violation of the North Carolina constitutional proscription against imprisonment for debt.¹⁵ In its reasoning the court of appeals relied on a long line of cases defining separation agreements not incorporated into judicial decrees as contracts that are, therefore, unenforceable by imprisonment because default on the agreement is a contract debt.¹⁶ The court recognized,

entirety and that his wife held title to all personal property owned by them. In essence, defendant had no personal assets from which the judgment could be satisfied. At a hearing in September 1976, a Wake County district court judge denied plaintiff's motion to garnish defendant's wages but agreed to appoint a receiver. Mrs. Moore did not pursue that alternative. *Id.* at 15, 252 S.E.2d at 737; Record at 11-12.

12. 297 N.C. at 15, 252 S.E.2d at 737.

13. 38 N.C. App. 700, 248 S.E.2d 761 (1978), *rev'd*, 297 N.C. 14, 252 S.E.2d 735 (1979).

14. 38 N.C. App. at 701, 248 S.E.2d at 761. A North Carolina court may cite in contempt anyone who willfully refuses to obey its orders. The court's contempt power includes the authority to imprison offenders. N.C. GEN. STAT. § 5A-11 (Cum. Supp. 1979) lists as criminal contempt: "(3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution." N.C. GEN. STAT. § 5A-12(a) (Cum. Supp. 1979) states that "[a] person who commits criminal contempt, whether direct or indirect, is subject to censure, imprisonment up to 30 days, fine not to exceed five hundred dollars (\$500.00), or any combination of the three." N.C. GEN. STAT. § 5A-21 (Cum. Supp. 1979) defines civil contempt as failure to comply with a court order while it is in force when both the purpose of the order will be served by compliance and the offending party is able to comply. A judge is authorized to imprison a civil contemnor for as long as the contempt continues. For examples of the court's use of its contempt powers, see *Mauney v. Mauney*, 268 N.C. 254, 150 S.E.2d 391 (1966); *Gaylon v. Stutts*, 241 N.C. 120, 84 S.E.2d 822 (1954); *Osmar v. Crosland-Osmar, Inc.*, 43 N.C. App. 721, 259 S.E.2d 771 (1979).

15. The North Carolina Constitution, like many state constitutions, *see note 45 infra*, protects its citizens from imprisonment for debt. The constitution states: "There shall be no imprisonment for debt in this State, except in cases of fraud." N.C. CONST. art. I, § 28. Alimony is excepted from this provision, however. *See text accompanying notes 48-53 infra*.

16. The cases relied on by the court of appeals were *Mitchell v. Mitchell*, 270 N.C. 253, 154 S.E.2d 71 (1967) and *Stanley v. Stanley*, 226 N.C. 129, 37 S.E.2d 118 (1946). The *Stanley* case addressed the issue most directly. The court described the separation agreement and its effect thusly: "This agreement was an extrajudicial transaction, and although between husband and wife, and relating to the support of the wife, had no more sanction for its enforcement than any other civil contract; certainly not that of imprisonment through civil contempt for noncompliance." 226 N.C. at 133, 37 S.E.2d at 120.

based on the facts established concerning Mr. Moore's financial status¹⁷ and his past failures to pay the amounts owed, that the indebtedness was the result of willful refusal rather than an inability to pay. The court therefore assumed that another judicial order would not precipitate payment, and anticipated another suit by plaintiff to enforce the decree of specific performance through a contempt proceeding.¹⁸ Because the court was unwilling to grant a contempt citation, it saw no purpose in granting the decree for specific performance.

In reversing the court of appeals' holding on specific performance, the North Carolina Supreme Court did not address the contempt issue. In a terse opinion, the court reiterated the well-established principles that a marital agreement not incorporated into a divorce decree is subject to the same enforcement procedures as any other contract and that a decree of specific performance is available to enforce a contract when plaintiff has no adequate remedy at law.¹⁹ The court assessed the legal remedies available to plaintiff, determined that they were inadequate because of the multiplicity of suits required and their probable lack of success, and remanded the case for entry of a decree ordering defendant to specifically perform his support obligation under the separation agreement as to both the arrearages and future payments.²⁰

The issue of enforcement of support provisions included in a separation agreement is fraught with difficulties ranging from semantic confusion to constitutional problems. The starting point for analysis is the agreement itself—a civil contract between husband and wife entered into at the time of or subsequent to separation.²¹ A separation agreement customarily includes provisions for the support of the dependent spouse and minor children as well as a property settlement.²² Although

17. At the supplemental proceeding, defendant admitted he earned \$20,000 a year. *See note 11 supra*.

18. 38 N.C. App. at 701, 248 S.E.2d at 761.

19. 297 N.C. at 16, 252 S.E.2d at 737.

20. *Id.* at 17-19, 252 S.E.2d at 738-39.

21. *See generally* H. CLARK, *LAW OF DOMESTIC RELATIONS* ch. 16 (1968).

22. 2 R. LEE, *NORTH CAROLINA FAMILY LAW* § 187, at 379 (3d ed. 1963). *See generally* N.C. GEN. STAT. § 52-10.1 (Cum. Supp. 1979). Although many separation agreements do not make a distinction between support provisions and property settlements, courts do. *See, e.g.,* Colvert v. Colvert, 568 P.2d 623 (Okla. 1977); Hecht v. Hecht, 259 Cal. App. 2d 1, 67 Cal. Rptr. 293 (1968). Property settlements and support payments are enforced and taxed differently. These differences are beyond the scope of this note. It will be assumed for present purposes, however, that the provisions are distinguishable and that those at issue are solely payments for the support of the dependent spouse. For a general discussion of property settlements and support payments, see Comment, *The Economics of Divorce: Alimony and Property Awards*, 43 U. CIN. L. REV. 133 (1974). The tax implications of property settlements and support payments are discussed in Du-

once considered violative of public policy,²³ the separation agreement has been recognized for most of this century as an appropriate method for estranged couples to settle their financial affairs.²⁴ Once entered, the agreement remains in force as a contract as long as the spouses remain separated,²⁵ and the remedies for its breach are the same as for any other contract.²⁶

Complications may arise, however, if the couple subsequently obtains a divorce. The divorce decree may treat the separation agreement in any number of ways, and this treatment determines how the agreement can be enforced. At one extreme is the situation in which the separation agreement is not presented to the court. The agreement survives the divorce decree and the dependent spouse can sue in contract in case of breach of the agreement.²⁷ At the other extreme is merger, a situation in which the divorce decree supersedes the separation agreement, so that the agreement ceases to exist. The aggrieved party thus has enforcement rights under the decree, but no longer has contractual rights.²⁸ As a result, any support payments required by the decree are considered alimony, even if they are identical to the payments that were required by the separation agreement.²⁹ Having the force of a court decree, the payments may be enforced by the contempt power.³⁰

Canto, *Determination of Issue of Property Settlement as Opposed to "Periodic Payments"* (A/K/A "Alimony"), 55 CHI. B. REC. 130 (1973).

23. See *Collins v. Collins*, 62 N.C. (Phil. Eq.) 153 (1867) (North Carolina Supreme Court refused to acknowledge or enforce a separation agreement on the ground that to do so would undermine the sanctity and integrity of marriage).

24. *Archbell v. Archbell*, 158 N.C. 409, 74 S.E. 327 (1912), is the seminal case establishing the validity of separation agreements in North Carolina. The change in judicial attitude was precipitated by the legislature's adoption of a statute recognizing separation agreements. The modern version of this statute, N.C. GEN. STAT. § 52-10.1 (Cum. Supp. 1979), provides that "[a]ny married couple, both of whom are 18 years of age or over, is hereby authorized to execute a separation agreement not inconsistent with public policy which shall be legal, valid, and binding in all respects."

25. See, e.g., *Williams v. Williams*, 261 N.C. 48, 51, 134 S.E.2d 227, 230 (1964); *Turner v. Turner*, 242 N.C. 533, 538, 89 S.E.2d 245, 248 (1955).

26. 2 R. LEE, *supra* note 22, § 201, at 423-24; see text accompanying notes 40-43 *infra*; J. MURRAY, *MURRAY ON CONTRACTS* § 220, at 439-41 (2d rev. ed. 1974). See generally Annot., 154 A.L.R. 323 (1945).

27. 2 A. LINDEY, *SEPARATION AGREEMENT AND ANTE-NUPTIAL CONTRACTS* § 31, at 31-80 (1979).

28. *Id.* at 31-87, 88.

29. H. CLARK, *supra* note 21, § 16.12, at 554.

30. Enforcement procedures relating to alimony are generally controlled by statute. *Id.* § 14.10, at 465. In addition to the contempt power, courts may have the authority to appoint a receiver or enforce judgments by execution. *Id.* In North Carolina, for example, the applicable statute reads: "An order for the payment of alimony or alimony pendente lite is enforceable by proceedings for civil contempt and its disobedience may be punished by proceedings for criminal contempt, as provided in Chapter 5A, Contempt, of the General Statutes." N.C. GEN. STAT. § 50-

Between these two extremes lies a variety of alternatives. Under all of the variations, however, support payments ultimately are considered either as a contractual obligation or as alimony and are enforceable accordingly. The language used by the court when dealing with the agreement, as well as the intentions of the parties, are the primary factors used in determining whether the agreement has been merged or survived.³¹ Commonly, courts incorporate the separation agreement into the divorce decree. Some states consider this a merger,³² while others hold that the agreement survives.³³

North Carolina courts align themselves with the former group, and hold that incorporation extinguishes the agreement.³⁴ Determining when an agreement has been incorporated by a North Carolina court, however, is not without its own difficulties. In *Bunn v. Bunn*,³⁵ the supreme court summarized general guidelines for distinguishing incorporated from unincorporated agreements in the context of consent judgments, which are often entered when a couple seeks a divorce based upon separation for the statutory period and presents an agreement to the court. The court explained:

Consent judgments for the payment of subsistence to the wife are of two kinds. In one, the court merely approves or sanctions the payments which the husband has agreed to make for the wife's support and sets them out in a judgment against him. Such a judgment constitutes nothing more than a contract between the parties made with the approval of the court. Since the court itself does not in such case order the payments, the amount specified therein is not technically alimony. In the other, the court adopts the agreement of the parties as its own determination of their respective rights and obligations

16.7(j) (Cum. Supp. 1979). In addition, the court can usually modify an alimony provision upon application of a party showing changed circumstances, while the court generally does not have this power if the separation agreement survives the divorce decree. 2 A. LINDEY, *supra* note 27, at 31-64. See N.C. GEN. STAT. § 50-16.9 (1976) (authorizes modification of an alimony award). Some courts, however, allow modification of support decrees despite their contractual nature. See Annot., 61 A.L.R.3d 520, 530.

31. For a fuller treatment of this issue, see Comment, *Divorce Agreements: Independent Contract or Incorporation in Decree*, 20 U. CHI. L. REV. 138, 146 (1952).

32. See, e.g., *Hicks v. Hicks*, 417 P.2d 830, 832 (Okla. 1966) ("The agreement was incorporated in toto in the decree of divorce and by such incorporation the agreement as such was extinguished.")

33. See, e.g., *In re Estate of Kennington*, 204 So. 2d 444, 449 (Miss. 1967) ("Neither the approval of the contract by the trial court nor the incorporation in the decree of its provisions relating to the monthly payments, had the effect of stripping the obligation of its contract character, or converting the payments to alimony.")

34. See, e.g., *Mitchell v. Mitchell*, 270 N.C. 253, 256, 154 S.E.2d 71, 73 (1967) ("When the parties' agreement with reference to the wife's support is incorporated in the judgment, their contract is superseded by the court's decree.")

35. 262 N.C. 67, 136 S.E.2d 240 (1964).

and orders the husband to pay the specified amounts as alimony.³⁶

The same distinctions apply when the judgment was not obtained by consent.³⁷ In at least one case, in deference to the wishes of the parties, the court incorporated the agreement by reference but refused to consider it merged for purposes of enforcement.³⁸ In light of the semantic vagaries³⁹ in this area, such a result is not surprising, though in the usual case an agreement is either incorporated for all purposes into the divorce decree or preserved in its status as a contract.

A decision that the separation agreement retains its contractual nature forces courts to grapple with competing contract and constitutional principles. The usual remedy for breach of contract is a suit at law for money damages to compensate for losses already incurred.⁴⁰ Ordinarily, this remedy is considered adequate to enforce a contract for the payment of money in installments.⁴¹ Nevertheless, specific performance is widely recognized as an appropriate method for enforcing separation agreements.⁴² The explanation given in *Moore* on the inadequacy of the remedy at law is typical:

[T]he plaintiff must wait until payments have become due and the obligor has failed to comply. Plaintiff must then file suit for the amount of accrued arrearage, reduce her claim to judgment, and, if the defendant fails to satisfy it, secure satisfaction by execution. As is so often the case, when the defendant persists in his refusal to comply, the plaintiff must resort to this remedy repeatedly to secure her rights under the agreement as the payments become due and the de-

36. *Id.* at 69, 136 S.E.2d at 242.

37. *See* *Levitch v. Levitch*, 294 N.C. 437, 241 S.E.2d 506 (1978).

38. *Williford v. Williford*, 10 N.C. App. 529, 179 S.E.2d 113, *cert. denied*, 278 N.C. 301, 180 S.E.2d 178 (1971); *accord*, *Williford v. Williford*, 10 N.C. App. 451, 179 S.E.2d 114, *cert. denied*, 278 N.C. 301, 180 S.E.2d 177 (1971) (connected case).

39. Language used by courts considering the relationship between the divorce decree and the separation agreement is inconsistent. In *Holden v. Holden*, 245 N.C. 1, 95 S.E.2d 118 (1956), for example, the decree recited the terms of the agreement but did not order that the payments be made. Thus, the defaulting spouse was not subject to contempt. In *Dyer v. Dyer*, 212 N.C. 620, 194 S.E. 278 (1937), on the other hand, the consent judgment required the husband to make support payments "pending further orders"; contempt was thereafter used to enforce the judgment. *See* Note, 35 N.C.L. REV. 405 (1957).

40. 5 A. CORBIN, CORBIN ON CONTRACTS § 990, at 3; § 993, at 8 (1964).

41. *Id.* § 1147, at 157.

42. *Id.* That a separation agreement is specifically enforceable appears to be axiomatic. *See* 1 A. LINDEY, *supra* note 27, at 25-20 (1962) ("It is well settled that unless a separation agreement is 'iniquitous or oppressive,' the courts will decree specific performance."); 81 C.J.S. *Specific Performance* § 99 (1977) ("Generally, separation agreements may be specifically enforced, on the ground of lack of remedy at law, provided they are executed voluntarily and understandingly for the purpose of settling the issue of support, as to either arrearages or future payments."). *See, e.g.*, *Doerfler v. Doerfler*, 196 A.2d 90 (D.C. 1963); *Stern v. Williams*, 365 So. 2d 1128 (La. App. 1978); *Zouck v. Zouck*, 204 Md. 285, 104 A.2d 573 (1954); *Hoff v. Hoff*, 157 N.J. Super. 503, 385 A.2d 253 (1978) (per curiam).

fendant fails to comply. The expense and delay involved in this remedy at law is evident. The nature of the contract, *i.e.*, providing for the plaintiff's basic subsistence, is such that the remedy available at law involves unusual and extreme hardship.⁴³

A lump-sum payment designed to cover the entire contract would not be possible in this case because of the impossibility of ascertaining when the payments might terminate as a result of plaintiff's remarriage or death.

Despite the seeming appropriateness of a decree of specific performance from a contract point of view, impediments to the utility of such a decree exist. The decree will be of little help to a dependent spouse if the court cannot enforce it. The most effective method available to the court for enforcement of its orders is its contempt power, which includes the authority to jail those not in compliance.⁴⁴ The use of the contempt power to enforce an order to pay money, however, is restricted by the common constitutional provision forbidding imprisonment for debt.⁴⁵ It has been held in North Carolina that a debtor-creditor relationship is created by an extrajudicial contract such as an unincorporated separation agreement,⁴⁶ making this a situation covered by the constitutional prohibition in all cases except those involving fraud.⁴⁷ In contrast, both North Carolina case law⁴⁸ and statutory provisions⁴⁹ have excluded the payment of alimony from the constitutional provision forbidding imprisonment, despite the characterization of alimony as a debt in other respects.⁵⁰ The genesis of this distinction is

43. 297 N.C. at 17, 252 S.E.2d at 738.

44. See N.C. GEN. STAT. §§ 5A-11, -12(a), -21 (Cum. Supp. 1979), *quoted at* note 14 *supra*.

45. Approximately four-fifths of the states have provisions forbidding imprisonment for debt. LEGISLATIVE DRAFTING RESEARCH FUND OF COLUMBIA UNIVERSITY, CONSTITUTIONS OF THE UNITED STATES: NATIONAL AND STATE, FUNDAMENTAL LIBERTIES AND RIGHTS: A 50-STATE INDEX 25 (1980). For North Carolina's provision, see note 15 *supra*.

46. The court of appeals in *Sainz v. Sainz*, 36 N.C. App. 744, 745, 245 S.E.2d 372, 373 (1978), approved the following holding of the trial court: "It is the law of North Carolina that an extrajudicial contract or agreement of separation between a husband and a wife wherein the husband obligates himself to make periodic payments for the wife's support creates a debtor-creditor relationship and any judgment rendered for nonperformance is a debt."

47. Plaintiff in *Moore* argued in her brief that defendant's transfer of assets to his second wife was fraudulent and, thus, that the constitutional prohibition should not apply. Plaintiff Appellant's New Brief at 8-14. As defendant's brief correctly pointed out, however, the essential elements of fraud must be proved. Defendant Appellee's New Brief at 3-4 (relying on 6 N.C. INDEX, *Fraud* § 1 (1976)). Though these elements were not pleaded and proved in *Moore*, they could be presented in a future contempt proceeding involving the same parties or by other plaintiffs in similar situations.

48. See, *e.g.*, *Whitesides v. Whitesides*, 271 N.C. 560, 564, 157 S.E.2d 82, 85 (1967); *Wilson v. Wilson*, 261 N.C. 40, 43-44, 134 S.E.2d 240, 243 (1964).

49. See note 30 *supra*.

50. See, *e.g.*, *Morse v. Zatkiewiez*, 5 N.C. App. 242, 245, 168 S.E.2d 219, 222 (1969).

found in the court's desire to maintain the efficacy of its orders. In the 1879 case of *Pain v. Pain*,⁵¹ defendant-husband was ordered to show cause why he should not be held in contempt for failure to make alimony payments. In upholding the order, the supreme court said,

The allowance is not a debt within the meaning of the constitution . . . for which imprisonment is not permitted. It is an order of a competent court, only to be enforced as are other judicial commands when necessary by process of attachment against the person. The power to award the process is inherent in the court, essential to the exercise of its jurisdiction and the maintenance of its authority.⁵²

Underlying this exemption from the constitutional prohibition, therefore, is the perception that alimony is not only a duty owed to the wife, but a duty owed to the public as well.⁵³ The courts are well aware that effectively enforcing this duty of husbands lessens the support burden on society.

Although the North Carolina Supreme Court has never specifically enforced a separation agreement, neither has it refused to do so because it apparently has never confronted this precise issue.⁵⁴ The two most analogous cases brought in North Carolina courts were decided by the court of appeals. In *Sainz v. Sainz*,⁵⁵ plaintiff had obtained a decree of specific performance on an unincorporated separation agreement in New York. The court of appeals refused to recognize or adopt the decree, reasoning that enforcement of the decree through the contempt power would violate the constitution.⁵⁶ The court of appeals used the same reasoning in *Riddle v. Riddle*⁵⁷ to justify the denial of an injunction requested by plaintiff-wife to enjoin her

51. 80 N.C. 322 (1879).

52. *Id.* at 325.

53. In *State v. Morgan*, 141 N.C. 726, 53 S.E. 142 (1906), defendant pleaded that he should not be imprisoned for failure to support his child. The court rejected this argument and noted that "[t]his public duty can be enforced by appropriate remedy, like failure to work the public roads, to serve on the jury, to serve in the army, to pay alimony ordered." *Id.* at 730, 53 S.E. at 143; see *Wilson v. Wilson*, 261 N.C. 40, 43-44, 134 S.E.2d 240, 243 (1964).

54. In prior cases in which enforcement of a separation agreement was sought, plaintiffs routinely asked the court to hold the defaulting defendant in contempt. In every case, the court refused to grant plaintiff's request unless the separation agreement had been incorporated into a divorce decree. Compare *Holden v. Holden*, 245 N.C. 1, 95 S.E.2d 118 (1956); *Stanley v. Stanley*, 226 N.C. 129, 37 S.E.2d 118 (1946); *Davis v. Davis*, 213 N.C. 537, 196 S.E. 819 (1938) (all holding the separation agreement not incorporated and thus not enforceable by contempt) with *Stancil v. Stancil*, 255 N.C. 507, 121 S.E.2d 882 (1961); *Edmundson v. Edmundson*, 222 N.C. 181, 22 S.E.2d 576 (1942) (both holding separation agreement incorporated into the divorce decree and thus enforceable by contempt).

55. 36 N.C. App. 744, 245 S.E.2d 372 (1978).

56. *Id.* at 747, 245 S.E.2d at 374.

57. 32 N.C. App. 83, 230 S.E.2d 809 (1977).

husband from breaching a separation agreement. These results are now questionable given the supreme court's willingness in *Moore* to grant the decree of specific performance.

The court's opinion in *Moore* is perplexing in that, ostensibly, it took no cognizance of the constitutional problem inherent in enforcing the decree, even though this dilemma gave the court of appeals cause to deny the decree of specific performance as it had denied similar decrees in *Sainz* and *Riddle*. The supreme court distinguished the cases relied upon by the court below, noting that in *Moore* plaintiff had not attempted to invoke the court's contempt power, but merely had sought an order compelling compliance with the separation agreement.⁵⁸ Apparently, the supreme court believed the contempt problem was better left to another occasion when the particular facts required a determination of that issue. It seems, however, that if the decree of specific performance is not enforceable by a contempt action, as was held by the court of appeals, the supreme court provided the plaintiff with very little remedy. By not offering even dicta to indicate its position, the court has not resolved satisfactorily "the troublesome issue of enforcement of a marital separation agreement that has not been incorporated into a judgment."⁵⁹

It is possible, at least in this case, that the court will not be faced with the problem of enforcing its decree of specific performance. Mr. Moore may begin to meet his obligation on the strength of the court order alone. As plaintiff argued in her brief, "it may well be that the former spouse, the supporting spouse, would prefer the court to order him to make payments so that he would no longer have to explain to his new wife why he was 'giving' his money to a former spouse."⁶⁰ Further, the court has the option to issue writs of execution, attachment or possession or to force a sale of property.⁶¹ But because Mrs. Moore had so little success when she attempted to execute on her original superior court judgment, the probabilities are that she soon will come before the court requesting that defendant be jailed until he obeys the order. Even if she does not, another plaintiff in a similar situation inevitably will, and the supreme court will be forced to determine whether the decree is enforceable.

North Carolina courts clearly have the authority to hold a party in

58. 297 N.C. at 16, 252 S.E.2d at 737.

59. *Id.*

60. Plaintiff Appellant's New Brief at 20. Granted, this chance is exceedingly small.

61. 81A C.J.S. *Specific Performance* § 219 (1977).

civil and criminal contempt for willful disobedience of a court order.⁶² Therefore, it seems doctrinally sound to hold a defaulting husband in contempt not for his indebtedness, but for his failure to comply with the decree of specific performance. It is not clear, however, that the North Carolina courts would make this distinction, which arguably circumvents the prohibition against imprisonment for debt. Though no cases are specifically on point, *State v. Caudle*⁶³ is sufficiently analogous to shed some light on the probable proclivity of the court. Defendant in *Caudle* was convicted of fraudulent use of a credit card and sentenced to jail for a year. His sentence was suspended on the condition that he reimburse the defrauded bank. When he refused, the supreme court had to decide whether defendant could be jailed for his failure to pay, assuming the failure was willful and without lawful excuse.⁶⁴ In holding that defendant could not be jailed, the court said:

We have found no decision of this Court sustaining an order putting into effect a prison sentence for the failure of the defendant to pay obligations incurred by him otherwise than as the result of the act for which he was originally convicted, with the exception of the obligation imposed by law for the support of the defendant's wife or child. In our opinion, it is not sufficient to say . . . that when such defendant is imprisoned he will be imprisoned for his criminal act and not for his nonpayment of his debt. The purpose of the above quoted provision [barring imprisonment for debt] was to prevent the use of the criminal process to enforce the payment of civil obligations, directly or indirectly.⁶⁵

Applying this reasoning to the facts in *Moore*, the imposition of a prison sentence for failure to obey the decree of specific performance would, in essence, be an indirect imprisonment for debt and, therefore, violative of the constitution.

Other courts have been faced with the same issue, though considering the number of states that decree specific performance of separation agreements, surprisingly few opinions have dealt with it. A District of Columbia case, *O'Mara v. O'Mara*,⁶⁶ is most directly on point. In *O'Mara*, plaintiff-wife obtained a decree of specific performance to enforce a \$200.00 per month support payment set out in a separation agreement that had survived the divorce decree. When the

62. N.C. GEN. STAT. §§ 5A-11, -12, -21 (Cum. Supp. 1979), quoted at note 14 *supra*.

63. 276 N.C. 550, 173 S.E.2d 778 (1970).

64. *Id.* at 553, 173 S.E.2d at 781.

65. *Id.* at 554-55, 173 S.E.2d at 782. The exception mentioned refers, of course, to judicially decreed alimony rather than payments such as those at issue in *Moore*.

66. 238 A.2d 586 (D.C. 1968).

trial court determined that the husband was able to pay, but refused to do so, it found him in contempt. The court of appeals held the citation invalid because it violated a statute forbidding imprisonment for debt except in cases of alimony.⁶⁷ Determining that payments pursuant to a separation agreement were not alimony, the court vacated the order of contempt and imprisonment.⁶⁸ Thus, the husband's defiance of a decree for specific performance, in addition to his default on the agreement, did not persuade the court to hold defendant in contempt. Similarly, in the Indiana case of *Risk v. Thompson*,⁶⁹ involving a split between business partners rather than marital partners, the court refused even to order a decree of specific performance on the ground that "to attempt an enforcement of the payments of the installments would result in imprisonment for debt in violation of a constitutional provision."⁷⁰

Only Maryland appears to be in substantial disagreement on this subject, by enforcing payments pursuant to an unincorporated separation agreement through contempt. Its practice, however, derives specifically from its constitution, which expressly permits imprisonment for such a debt.⁷¹

Although it is not clear exactly how the North Carolina Supreme Court will resolve the issue when faced with it, it seems apparent that use of the court's contempt power to enforce an unincorporated separation agreement will not be automatic.⁷² In addressing the problem the

67. The court relied on D.C. CODE § 15-320(c) (1967), which provides that, "where a decree only directs the payment of money, the defendant may not be imprisoned except in those cases especially provided for." The cases especially provided for involved a failure to pay alimony pendente lite, failure to pay permanent alimony and failure to pay maintenance ordered by the court for support of a wife or child, or for a former wife where the former husband has obtained a foreign ex parte divorce. 238 A.2d at 587-88.

68. 238 A.2d at 588.

69. 237 Ind. 642, 147 N.E.2d 540 (1958) (per curiam).

70. *Id.* at 651, 147 N.E.2d at 545. Indiana's constitution provides that

[t]he privilege of the debtor to enjoy the necessary comforts of life, shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted; and there shall be no imprisonment for debt, except in case of fraud.

IND. CONST. art. I, § 22.

71. The Maryland constitution states:

No person shall be imprisoned for debt, but a valid decree of a court of competent jurisdiction or agreement approved by a decree of said court for the support of a wife or dependent children, or for the support of an illegitimate child or children, or for alimony, shall not constitute a debt within the meaning of this section.

MD. CONST. art. III, § 38 (emphasis added). See *LaChance v. LaChance*, 28 Md. App. 571, 346 A.2d 676 (1975); *Speckler v. Speckler*, 256 Md. 635, 261 A.2d 466 (1970).

72. If the court does hold that the decree of specific performance has made the separation agreement enforceable by contempt, the next logical question will concern modifiability. Gener-

court will at least be forced to reconcile its position in *Caudle* with its answer to the question of whether a decree to specifically perform an unincorporated separation agreement is enforceable by contempt, even if it chooses not to follow the reasoning of the courts in other jurisdictions holding that such a decree is not enforceable through the court's contempt power. Yet the supreme court's grant of a decree for specific performance in *Moore* is practically meaningless if the decree is not enforceable by contempt. A holding that the decree is not enforceable by contempt would be unfortunate because it would leave dependent spouses without an effective remedy solely because their separation agreements were merely approved rather than adopted by the courts.⁷³ Alimony payments have long been exempted from the constitutional provision because of the important public policy involved in enforcing the duty of support.⁷⁴ Yet payments made pursuant to a separation agreement—fulfilling the same duty of support—lack this special status. That a technical and confusing distinction should be determinative is without wisdom or logic.

A possible solution would be for the court to practice judicial license and declare that the decree of specific performance converts the extrajudicial support payments into technical alimony. Though somewhat fictitious, the result is a defensible one. First, the designation is no more arbitrary than the existing distinction that renders agreements adopted by a court enforceable through contempt but denies that treatment to agreements that have only been approved. Actually, it follows from that distinction because the only element missing from the "approved" judgment is a judicial order, which is supplied here by the decree of specific performance. Second, it would not require the violation of any constitutional principles. Because the court readily enforces alimony payments through contempt, it could enforce these payments without fear that it is frustrating the purposes of the constitution. In essence, the payments made pursuant to a separation agreement would retain their contractual nature in most circumstances. If, however, upon application of an aggrieved spouse, a court determined that a decree for specific performance was merited, it would then order that the payments be made. At this point, the payments would have the force

ally, if an order is subject to enforcement by contempt, it is also subject to court modification. See, e.g., *White v. White*, 296 N.C. 661, 252 S.E.2d 698 (1979). Modifiability is not necessary for logical consistency here, however, because a contempt citation presumably would be to enforce the decree of specific performance and not to enforce the separation agreement per se.

73. See text accompanying notes 35 & 36 *supra*.

74. See text accompanying note 53 *supra*.

of a court order and become alimony, just as they do when the court orders a party to make the payments when it incorporates a separation agreement into a divorce decree. Once the payments were denominated as alimony, they could be enforced through the court's contempt power without violating the constitution. The most important implication of this result is that it would supply the aggrieved spouse with a remedy she otherwise lacks, and would end the defenseless distinction that allows a dependent spouse's support rights to rest upon the fortuity of the incorporation of a separation agreement into a divorce decree.

The *Moore* case presented the supreme court with a scenario that is far from uncommon yet still unresolved. The court's decision in that case, however, brings North Carolina at least one step closer to a resolution. The labeling of support payments incorporated into divorce decrees or adopted by the court at the time of the divorce as technical alimony gives them a preferred position in the enforcement scheme because they are not considered a debt included in the prohibition against imprisonment for debt and are thus subject to enforcement by contempt. The *Moore* court has belatedly opened the door to a similar treatment of unincorporated support provisions, and its decision is certain to have repercussions in subsequent North Carolina cases. Another opinion must be forthcoming, however, to establish the court's position on the ultimate enforceability of the decree of specific performance it has now authorized.

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