Volume 62 | Number 2 Article 6

1-1-1984

Professional Responsibility--Contingent Fees in Domestic Relations Actions: Equal Freedom to Contract for the Domestic Relations Bar

Kathleen Pepi Southern

Professional Responsibility—Contingent Fees in Domestic Relations Actions: Equal Freedom to Contract for the Domestic Relations Bar

In the fall of 1981 the Montgomery County Bar Association, faced with North Carolina's new equitable distribution Act,[1] found itself in an ethical quandary. The Bar Association president inquired from the North Carolina State Bar whether an attorney could ethically and legally charge a client a contingent fee[2] when rendering services in an equitable distribution proceeding. President Fisher stated that "[t]here was divided opinion as to the question in [his] bar" and that despite bar member attendance at various seminars "no one had a clear feel for the answer to [the] question."[3]

The quandary of the Montgomery County Bar is indeed a real concern. In many states an attorney may be guilty of professional misconduct for taking a contingent fee for any aspect of a domestic relations case. The Model Code of Professional Responsibility provides that "[b]ecause of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified."[4] This language, however, is somewhat precatory, and the model disciplinary rule on attorneys' fees is silent on the matter.[5] Several states have gone beyond the precatory tone of the model code, adopting modified disciplinary rules that make taking a contingent fee in a domestic relations case per se unprofessional conduct.[6] Other states reach the same result by case law.[7] The reasoning behind this case

---

1. N.C. GEN. STAT. § 50-20 (Cum. Supp. 1981).

2. "A contingent fee can be defined as a fee received for services performed on behalf of a client who is asserting a claim, payable to the lawyer if, and only if, some recovery is achieved through the lawyer's efforts. Its distinguishing characteristic is the negative; if no recovery is obtained for his client the lawyer is not entitled to the fee." F. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES: A STUDY OF PROFESSIONAL ECONOMICS AND RESPONSIBILITIES 3 (1964).

3. Letter from Harry E. Fisher, President, Montgomery County Bar, to N.C. State Bar (Oct. 20, 1981).

4. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 (1980). North Carolina has omitted this sentence in its version of the Code. Code of Professional Responsibility of the North Carolina State Bar, N.C. GEN. STAT. app. VII (Cum. Supp. 1981).

5. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1980).

6. Florida, Iowa, Massachusetts, Michigan, and Montana provide that an attorney *shall not* enter into an arrangement for, charge, or collect a contingent fee in a divorce case. *See* NATIONAL CENTER FOR PROFESSIONAL RESPONSIBILITY, CODE OF PROFESSIONAL RESPONSIBILITY BY STATE (1980). *Compare* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(c) (1980), which simply prohibits the taking of a contingent fee in a criminal case; *accord* Code of Professional Responsibility of the North Carolina State Bar DR 2-106(c), N.C. GEN. STAT. app. VII (Cum. Supp. 1981).

7. *E.g.*, Florida Bar v. Perry, 377 So. 2d 712 (Fla. 1979) (holding acceptance of one-third interest in a van as fee for representing client in divorce proceeding *inter alia* justified six months suspension); State *ex rel.* Neb. Bar Ass'n v. Dunker, 160 Neb. 779, 71 N.W.2d 502 (1955) (attorney's agreement for 15% of all property recovered by wife exclusive of child support justifies judgment for censure); State *ex rel.* Neb. Bar Ass'n v. Jensen, 171 Neb. 1, 105 N.W.2d 459 (1960) (attorney's lien upon 15% of wife's alimony, in effect a contingent fee contract and a fraud upon the court, supports suspension), *cert. denied*, 365 U.S. 870 (1961); *In re* Pedersen, 259 Or. 429, 486 P.2d 1283 (1971) (agreement with penniless husband in divorce action for percentage of recovery of any part of wife's fortune justifies a public reprimand); *accord In re* Hill, 261 Or. 573, 495 P.2d

law follows from the majority rule that contingent fee contracts in domestic relations cases are against public policy and illegal. The Washington Supreme Court's analysis of the ethically framed issue is typical of courts' reasoning on the matter:

> [T]he Canons of Professional Ethics countenances [*sic*] contingent fees only when they are sanctioned by law. A contingent fee contract which contravenes public policy and is for that reason void is not sanctioned by law. It is therefore a violation of the ethics of the profession for an attorney to enter into such a contract [in a domestic relations case].[8]

Because the question is primarily a legal one, the real answer to President Fisher's inquiry ultimately lies not with the North Carolina State Bar Ethics Committee but with the North Carolina courts.

The State Bar's response to President Fisher's inquiry,[9] vague at best, im-

---

261 (1972). *See also In re* Smith, 42 Wash. 2d 188, 197, 254 P.2d 464, 469 (1953) (contingent fee contract in a domestic relations case is a violation of the ethics of the profession); Morfield v. Andrews, 579 P.2d 426, 433 (Wyo. 1978) (dictum) (any future contracts for contingent fees in divorce cases will be considered unethical conduct sufficient to merit discipline).

It should be noted that in an ethical proceeding, courts are limited by law to imposing disciplinary sanctions. *See* Florida Bar v. Winn, 208 So. 2d 809 (Fla.), *cert. denied*, 393 U.S. 914 (1968). In *Winn* the attorney under investigation had contracted with a wife for 50% of any property recovered from her husband in a divorce proceeding. The Florida Bar State Board of Governors found the arrangement illegal and extortionate. In addition to recommending the attorney's suspension, the Board directed the attorney to make restitution to the wife. The Florida Supreme Court held that neither it nor the Board had the power to demand restitution; it was up to the client to demand restitution in a separate civil proceeding.

8. *In re* Smith, 42 Wash. 2d 188, 197, 254 P.2d 464, 469 (1953).

9. N.C. State Bar Comm. on Professional Ethics, Proposed CPR 312 (Contingent Fees in Equitable Distribution Cases) (February 5, 1982), *reprinted in* 7 THE NORTH CAROLINA STATE BAR NEWSLETTER 1 (1982) (emphasis added):

> *Inquiry*:
>
> May an attorney ethically and legally charge a client a contingent fee when rendering services to the client pursuant to the provisions of G.S. § 50-20, Chapter 815 of the Session Laws of 1981, known informally as the Equitable Distribution of Marital Property Act?
>
> *Opinion*:
>
> The North Carolina State Bar cannot render opinions on the legality of attorneys' actions. It is noted that North Carolina does not have a history of cases holding contracts between attorney and client for contingent fees in domestic relation actions void as against public policy whereas a number of states have had decisions rejecting such contingent contracts. See 1 Speiser, Attorneys' Fees, § 2:6 (1973). Nor is there a provision in the North Carolina Code of Professional Responsibility characterizing contingent fee arrangements as rarely justified in domestic relations cases. See 1 Speiser, Attorneys' Fees, § 2:2 (1973). EC 2-20 describes the historical bases for the acceptance of contingent fee arrangements as being that they often provide the only practical means by which a person can economically prosecute his claim with the services of a competent lawyer and that a successful prosecution of the claim produces a res out of which the fee can be paid. Thus, contingent fee arrangements in criminal cases are condemned largely on the ground that such cases do not produce a res with which to pay the fee. A pure divorce action does not produce a res out of which to pay the fee and may create a conflict of interest for the attorney by frustrating the public policy in favor of reconciliation. However, an equitable distribution proceeding, if successful, does produce a res out of which to pay the fee. Also, the equitable distribution proceeding can only be prosecuted after the divorce has been granted. The Equitable Distribution of Marital Property Act does not include a provision for the recovery of attorneys' fees. Consequently, in order to make available the services of competent counsel to a person who could not otherwise

plied that in the equitable distribution aspect of a domestic relations case a contingent fee arrangement might be ethical. It did clearly indicate, however, that "[t]he North Carolina State Bar cannot render opinions on the legality of attorneys' actions," noting that "North Carolina does not have a history of cases holding contracts between attorney and client for contingent fees in domestic relations actions void as against public policy."[10] The opinion also indicates that "[i]n considering whether a fee appears to be illegal an attorney should consider such factors as the extent to which the arrangement for the contingent fee may conflict with the public policy in favor of the stability and continuation of marriages . . . ."[11] So the reasoning behind the answer to President Fisher's inquiry is circular. The contingent fee arrangement may be ethical, but it is ethical only if it is legal—and whether the arrangement is legal is still an open question in North Carolina.

The issue is not an open legal question in most American jurisdictions. The majority, albeit less modern, rule is that contingent fee arrangements in the area of domestic law are void; courts generally view them as promotive of

---

afford to employ a competent attorney, contingent fee arrangements may sometimes be the best or only practical means of making competent counsel available to an individual in an equitable distribution proceeding. In entering into a contingent fee arrangement in an equitable distribution case, an attorney is always bound by the provisions of DR 2-106 prohibiting illegal or clearly excessive fees. In considering whether a fee appears to be illegal or clearly excessive (i.e., in excess of a reasonable fee), an attorney should consider such factors as the extent to which the arrangements for the contingent fee may conflict with the public policy in favor of the stability and continuation of marriages, the type of division sought in the equitable distribution and the kinds and amounts of property involved.

10. N.C. State Bar Comm. on Professional Ethics, *supra* note 9. The North Carolina courts came very close to deciding the issue in Brooker v. Everhart, 33 N.C. App. 1, 234 S.E.2d 46 (1977), *rev'd*, 294 N.C. 146, 240 S.E.2d 360 (1978). In *Brooker* the attorneys representing a wife against her ex-husband negotiated a supplemental property settlement for her in the form of a promissory note for $150,000. The wife subsequently assigned the attorneys a one-third interest in the note. After the husband made the first installment and the attorneys retained their one-third portion, the wife experienced a change of heart and purportedly cancelled the debt. The attorneys then sued the husband and his guarantors for the one-third of the remaining balance. The parties defended *inter alia* on the grounds that the assignment was based on an illegal contract void against public policy. The Court of Appeals held that the note was a negotiable instrument and thus the makers of the note (husband and guarantors) were prohibited from asserting claims of a third party against the holder (attorneys). The court refused to comment on the validity of the underlying contract, viewing the defense of illegality personal to the wife. The supreme court reversed, holding the note nonnegotiable and finding that the wife should be joined as a necessary party. The justices noted that

> although many jurisdictions have held that a contingent fee contract between an attorney and his client in a divorce, alimony or property settlement case is invalid, we do not and cannot reach that question at this time. In the absence of [the wife], the record is not clear as to the nature of the agreement or the nature of the legal services performed in exchange for the contingent fee arrangement.

Brooker, 294 N.C. at 157, 240 S.E.2d at 366 (citations omitted).

Interestingly, one source erroneously identifies North Carolina as a jurisdiction following the majority rule. Annot., 93 A.L.R.3d 523, § 3(a) at 527 (1979). The source bases its conclusion on the case of Pierce v. Cobb, 161 N.C. 300, 77 S.E. 350 (1913). In *Pierce* the attorney's fee was not in issue. The husband made two promissory notes payable to the wife's attorney. The notes were endorsed in such a way that they were collectible only if the wife procured a divorce. The attorney was merely the wife's agent for collection. The record indicates no evidence that the attorney was legally assigned a portion of the prospective proceeds as reimbursement for his services. In a practical sense, however, those monies may have been the ultimate source of his fee.

11. N.C. State Bar Comm. on Professional Ethics, *supra* note 9, at 6.

divorce and therefore contrary to public policy.[12] Courts also state that contingent fee contracts are inappropriate in domestic relations proceedings because: (1) courts can award attorney fees for dependent spouses;[13] (2) allowing a dependent spouse to bargain away a percentage of alimony in advance of its receipt would deprive the spouse of monies intended for subsistence;[14] (3) counsel perpetrates a fraud upon the court when alimony is requested without disclosing the existence of the agreement;[15] (4) any attempt to assign property or alimony is a usurpation of the court's powers to make an equitable decision;[16] and (5) the mere presence of such arrangements is especially treacherous in light of the particular personal vulnerability of a domestic relations client.[17]

Courts have applied the rule that such fees are void when the arrangement is for a flat fee contingent on the attorney's obtaining a specified result.[18] The rule also has governed when a percentage fee is related to the alimony award,[19] or when the agreement is for a specified share of a lump sum received in lieu of alimony.[20] In addition, contingent fee arrangements have been held illegal when the percentage fee is related to the distribution of property.[21]

---

12. 6A A. CORBIN, CORBIN ON CONTRACTS § 1424 (1962); RESTATEMENT OF CONTRACTS § 542 (1932); 7 AM. JUR. 2D *Attorneys-at-Law* § 217; Annot., 93 A.L.R.3D 523 (1979); Annot., 30 A.L.R. 188 (1924); *see also* 1 S. SPEISER, ATTORNEYS' FEES § 2:6 at 89 (1973). The logic of this rule is in sharp contrast to the judicial validity given contracts between spouses (which are arguably promotive of divorce) concerning property settlements, separation agreements, and contracts for support. Annot., 93 A.L.R.3D 523, § 1(b) at 525 (1979); *see also infra* notes 29-32 and accompanying text.

13. *See infra* notes 38-39 and accompanying text.

14. *See infra* notes 49-51 and accompanying text.

15. *See infra* note 51.

16. *See infra* note 50 and accompanying text.

17. *See infra* notes 54-57 and accompanying text.

18. *E.g.,* McDearmon v. Gordon & Gremillion, 247 Ark. 318, 445 S.W.2d 488 (1969) ($45,000 fee contingent on obtaining property settlement of not less than $480,000); Barngrover v. Pettigrew, 128 Iowa 533, 104 N.W. 904 (1905) (additional $1000 fee contingent on success of husband's cross-claim for divorce).

19. *E.g.,* Brindley v. Brindley, 121 Ala. 429, 25 So. 751 (1899) (agreement for 50% of alimony recovered); McConnell v. McConnell, 98 Ark. 193, 136 S.W. 931 (1911); McCarthy v. Santangelo, 137 Conn. 410, 78 A.2d 240 (1951) (agreement for one-third of alimony recovered in divorce suit); Evans v. Hartley, 57 Ga. App. 598, 196 S.E. 273 (1938) (agreement for *inter alia* one-fifth of future payments for temporary and permanent alimony); Dannenberg v. Dannenberg, 151 Kan. 600, 100 P.2d 667 (1940) (agreement for *inter alia* 50% of alimony recovered); Jordan v. Westerman, 62 Mich. 170, 28 N.W. 826 (1886) (agreement to receive 50% of alimony recovered in excess of $300); Lynde v. Lynde, 64 N.J. Eq. 736, 52 A. 694 (1902) (agreement for percentage of alimony recovered subsequent to divorce proceeding); Levine v. Levine, 206 Misc. 884, 885, 135 N.Y.S.2d 304, 305 (1954) (dictum) (noting New York courts had held contingency fee based upon percentage of alimony void as against public policy). *Compare* Dickey v. Mingledorff, 110 Ga. App. 454, 138 S.E.2d 735 (1964) (contract giving attorney a lien in the amount of his fee upon the sum recovered from a judgment in a divorce and alimony case held not void as against public policy. Rather than an assignment of alimony, the lien was determined to be merely security for payment of notes that established amount of fee, and created an obligation independent of the amount awarded).

20. *E.g.,* Dougherty v. Burger, 133 Misc. 807, 234 N.Y.S. 274 (1929).

21. McDearmon v. Gordon & Gremillion, 247 Ark. 318, 445 S.W.2d 448 (1969) ($45,000 fee contingent on obtaining a property settlement of not less than $480,000 in divorce action by husband); Newman v. Freitas, 129 Cal. 283, 61 P. 907 (1900) (agreement for one-third of all community property secured in an action for divorce against husband); Theisen v. Keough, 115 Cal. App. 353, 1 P.2d 1015 (1931) (agreement for 15% of community property recovered in consideration for

Moreover, the rule has been imposed whether the attorney and client entered into the arrangement before or after the divorce action was commenced[22] or whether the client was the plaintiff[23] or defendant[24] in the action. The rule also generally prevails in suits subsequent to divorce involving alimony and child support such as actions for collections of arrearages.[25]

The rule is anachronistic at best. It arose in the late nineteenth century,[26] when contingent fee arrangements had not yet overcome the common-law stigma of champerty.[27] Indeed, at least one early case held a contingent fee contract in a domestic relations case void on the simple rationale of champerty.[28]

---

attorney's procuring evidence of infidelity against husband and obtaining divorce); Coons v. Kary, 263 Cal. App. 2d 650, 69 Cal. Rptr. 712 (1968) (agreement for one-third value of any property attorney might recover in excess of that provided by property agreement); Wall v. Lindner, 159 Colo. 83, 410 P.2d 186 (1966) (agreement for 50% of property or money recovered in fraud action void when attorney dismissed fraud suit and substituted an action for divorce and equitable distribution) (citing dictum of Wigton v. Wigton, 73 Col. 337, 216 P. 1055 (1923)); Aucoin v. Williams, 295 So. 2d 868 (La. 1974) (agreement for one-third of wife's community property for defending husband's divorce action); *Succession of* Butler, 294 So. 2d 512 (La. 1974) (agreement for 10% of wife's community property in suit for separation from bed and board); McInerney v. Massasoit Greyhound Ass'n, 359 Mass. 339, 269 N.E.2d 211 (1971) (agreement for one-third of shares of wife's stock if it became necessary to litigate); Klampe v. Klampe, 137 Minn. 227, 163 N.W. 295 (1917) (agreement for 50% of recovery for husband's share of property acquired by joint efforts of husband and wife but to which title was in wife's name); Shanks v. Kilgore, 589 S.W.2d 318 (Mo. Ct. App. 1979) (agreement for fixed $60,000 fee payable at rate of 20% of each installment paid by husband); Keller v. Turner, 153 Mont. 59, 453 P.2d 781 (1969) (agreement for one-third of all property recovered from claims for partition, resulting trust and accounting); *cf.* Jordan v. Kittle, 88 Ind. App. 275, 150 N.E. 817 (1926) (agreement in property settlement to put $100,000 in escrow for wife's attorney contingent on wife's obtaining a divorce on narrowly specified grounds condemns whole agreement).

A court can use the size of the marital estate as a factor in awarding attorney's fees without violating the policy against contingent fee arrangements in domestic cases. *See, e.g., In re* Gray, 422 N.E.2d 696, 703 n.6 (Ind. 1981). Arguably, this judicial approach provides the same result as a contingent fee arrangement. *See supra* note 36 and accompanying text.

22. *See, e.g.,* Keller v. Turner, 153 Mont. 59, 61, 453 P.2d 781, 783 (1969).

23. *See, e.g.,* McCarthy v. Santangelo, 137 Conn. 410, 78 A.2d 240 (1951); Jordan v. Westerman, 62 Mich. 170, 28 N.W. 826 (1886).

24. *See, e.g.,* Dannenberg v. Dannenberg, 151 Kan. 600, 100 P.2d 667 (1940); Klampe v. Klampe, 137 Minn. 227, 163 N.W. 295 (1917).

25. Contingent fee contracts in suits subsequent to divorce and involving alimony or child support also are generally held unenforceable. *See, e.g.,* Thomas v. Holt, 209 Ga. 133, 134, 70 S.E.2d 595, 597 (1952) (back child support); *In re* Brown, 178 A.D. 558, 165 N.Y.S. 736, *appeal dismissed*, 230 N.Y. 661, 130 N.E. 934 (1917) (alimony arrearages). *See also In re* Fisher, 15 Ill. 2d 139, 153 N.E.2d 832 (1958) (agreements assigning an interest in alimony and support payments to an attorney for collecting them is grounds for reprimand).

At least one court also has held a contingent fee arrangement void in actions for separate maintenance apart from divorce. *In re* Bracket, 114 A.D. 257, 99 N.Y.S. 802, *aff'd*, 189 N.Y. 502, 81 N.E. 1160 (1906).

26. The earliest judicial opinion stating the majority rule is the 1886 case of Jordan v. Westerman, 62 Mich. 170, 28 N.W. 826 (1886).

27. Contingent fee contracts were illegal at common law. They are still illegal in most countries, including England. *See, e.g.,* Hoseldine v. Hoskens, [1933] 1 K.B. 832; Solicitor's Act, 1932, 22 & 23 GEO. V., ch.37 § 63(1). *See also generally* F. MACKINNON, *supra* note 2.

28. Brindley v. Brindley, 121 Ala. 429, 25 So. 751 (1899); *see also* Farrell v. Betts & Betts, 16 Ala. App. 668, 670, 81 So. 188, 190 (1918) (reaffirming *Brindley* in dictum). This reasoning may merely have reflected the earlier view that all contingent fee contracts were champertous. Today the doctrine of champerty is generally disregarded in the United States. *See Ex parte* Wilkinson, 220 Ala. 529, 126 So. 102 (1929) (recognizing general validity of contingent fee arrangements).

The most pervasive rationale[29] against contingent fee arrangements in domestic relations matters is that they directly promote divorce by giving a third party, the attorney, a vested interest in preventing a reconciliation of the marital partners.[30] This view follows from society's interest in preserving the family unit, and finds its earliest expression in the nineteenth century case of *Jordan v. Westerman*:[31]

> Public policy is interested in maintaining the family relation. The interests of society require that those relations shall not be lightly severed; that families shall not be broken up for inadequate causes, or from unworthy motives; and that where differences have arisen which threaten disruption, public welfare and the good of society demands a reconciliation, if practicable or possible. [Contingent fee] contracts like the one in question tend to prevent such reconciliation, and, if legal and valid, tend directly to bring around alienation of husband and wife by offering a strong inducement, amounting to a premium, to induce and advise the dissolution of the marriage ties as a methods [sic] of obtaining relief from real or fancied grievances, which otherwise would pass unnoticed.[32]

The foundation of the reasoning by most courts in majority jurisdictions can be traced to this 1886 case. In the era of the 1880s society viewed divorce as

---

29. Several courts recite what they view as the universal rule without giving any rationale behind the rule. *See, e.g.,* Parsons v. Segno, 187 Cal. 260, 201 P. 580 (1921) (dictum) (undisputed that the contract was void as against public policy because it was a contract for a contingent fee in a divorce action); Sobieski v. Maresco, 143 So. 2d 62 (Fla. Dist. Ct. App. 1962); Stoller v. Onuszko, 10 Ill. App. 3d 598, 295 N.E.2d 118 (1973) (contract for 40% of any recovery of alimony, child support and property settlement); Barber v. Barber, 207 Neb. 101, 108, 296 N.W.2d 463, 469 (1980) (dictum); Blaine v. Blaine, 96 N.J. Super 460, 462, 233 A.2d 212, 213 (1967) (dictum).

30. Jordan v. Westerman, 62 Mich. 170, 28 N.W. 826 (1886). *Jordan*, the earliest and most often quoted case in this area, arose from a particularly difficult factual situation. In *Jordan* the attorneys openly admitted to the husband who wished to reconcile with his wife that it would be against the attorneys' interests to have the parties settle and live together. *Id.* at 175, 28 N.W. at 828.

See also McConnell v. McConnell, 98 Ark. 193, 136 S.W. 931 (1911) (contract that discourages reconciliation is void); McDearmon v. Gordon & Gremillion, 247 Ark. 318, 445 S.W.2d 488 (1969) (a financial interest in furthering divorce is against public policy); Newman v. Freitas, 129 Cal. 283, 289, 61 P. 907, 909 (1900) (collateral bargain promoting divorce is void); McCarthy v. Santangelo, 137 Conn. 410, 78 A.2d 240 (1951) (contingent fee induces attorney to ignore reconciliation); Barrelli v. Levin, 144 Ind. App. 576, 588, 247 N.E.2d 847, 853 (1969); Jordan v. Kittle, 88 Ind. App. 275, 150 N.E. 817 (1926); Overstreet v. Barr, 255 Ky. 82, 72 S.W.2d 1014 (1934); Aucoin v. Williams, 295 So. 2d 868, 873 (La. Ct. App.), *cert. denied*, 299 So. 2d 798 (La. 1974); Osborne v. Osborne, 428 N.E.2d 810, 820 n.12 (Mass. 1981) (dictum); Baskerville v. Baskerville, 246 Minn. 496, 504, 75 N.W.2d 762, 768 (1956); Keller v. Turner, 153 Mont. 59, 62, 453 P.2d 781, 782 (1969); Coleman v. Sisson, 71 Mont. 435, 230 P. 582 (1924); State *ex rel.* Neb. State Bar Ass'n v. Dunker, 160 Neb. 779, 783, 71 N.W.2d 502, 505 (1955); Dougherty v. Burger, 133 Misc. 807, 809, 234 N.Y.S. 274, 276 (1929); Van Vleck v. Van Vleck, 21 A.D. 272, 47 N.Y.S. 470 (1897); Longmire v. Hall, 541 P.2d 276 (Okla. Ct. App. 1975); Opperund v. Bussey, 172 Okla. 625, 628, 46 P.2d 319, 322 (1935); Hay v. Erwin, 244 Or. 488, 490, 419 P.2d 32, 33 (1966); *In re* Smith, 42 Wash. 2d 188, 196, 254 P.2d 464, 469 (1953).

This view has prevailed even in the face of a court's specific findings that the attorney had made direct efforts to reconcile the spouses. McCarthy v. Santangelo, 137 Conn. 410, 78 A.2d 240 (1951).

31. 62 Mich 170, 28 N.W. 826 (1886).

32. *Id.* at 180, 28 N.W. at 830.

the most drastic of remedies, and attempts by spouses to reconcile were encouraged at whatever cost.

The nineteenth century reasoning that a contingent fee arrangement would lead to subversive action on the attorney's part is superficially persuasive. On closer examination, however, the reasoning is questionable. First, this reasoning comes dangerously close to placing on the attorney an affirmative duty to attempt to reconcile his client with his or her estranged spouse—a task for which an attorney is not professionally suited. Second, an attorney's covert manipulations are unlikely to be very effective against a salvageable marriage. The insinuation that the majority of attorneys would consider discouraging the reconciliation of spouses waffling on the threshold of divorce is also tenuous.[33] Indeed, the rationale reflects a jaundiced view of human motivation. Under this view of human nature one can just as easily argue that a contingent fee promotes reconciliation, because a client would be tempted to reconcile to avoid paying the contingent fee.[34]

Nor does it necessarily follow that a contingent fee arrangement provides greater incentive to an attorney to prevent reconciliation. Any attorney so fee hungry as to prevent a viable reconciliation could profitably do so for a fixed fee as well as for a contingent one. Because of the greater number of billable hours, every fixed fee divorce case prosecuted to termination produces a higher fee than if the case had ended in reconciliation. Nor is the risk differential between a contingent fee contract and more traditional arrangements always significant. Despite the contingency, reconciliation is not always tantamount to an attorney's receiving no fee at all. At least one court has pointed out that "while parties to a divorce who reconcile their differences and resume the marital relation are not liable in damages for breach of a contract of employment with an attorney, such counsel is entitled to recover the reasonable value of services actually rendered."[35]

The rationale behind the majority rule also ignores reality. A perceptive Pennsylvania court has pointed out that when an attorney represents a spouse

---

33. This is certainly a view in which practitioners concur:

> I would say that lawyers try to save marriages—at least, good lawyers, try to save marriages—when it appears that the marriage is savable. Very often, unfortunately, by the time they get to the lawyers, there is not very much left to be done. But I have yet to meet a conscientious lawyer that doesn't make an attempt to do whatever he can either . . . to save the marriage, or . . . to save pieces of the marriage, because sometimes all you can do is help people live peaceably side by side rather than together . . . .

H. Buttenwieser, *Professional Responsiblity in the Practice of Family Law*, November 21, 1974, in PROFESSIONAL RESPONSIBILITY OF THE LAWYER 23, 87 (N. Galston, ed. 1977).

34. As one court has noted, such an argument taxes a court's powers of credibility. In Polis v. Briggs, 70 Pa. D. & C.2d 792 (C.P. Philadephia Co. 1971), an attorney had contracted with a wife to receive 40% of the value of any property he secured for her in excess of her entireties share. A property settlement was secured entitling him to a $10,000 fee. The spouses subsequently reconciled; the fee contingency thus failed. Nevertheless, the attorney sought to enforce his fee, arguing that "the reconciliation was effected by the marital partners '[i]n the mistaken belief that the wife Defendant could avoid payment of what was due the plaintiff by a reconciliation.' " *Id.* at 795.

35. Navarro v. Brannon, 616 S.W.2d 262, 263 (Tex. Civ. App. 1981) (contract with wife for 25% of any recovery in suit for divorce and community property division).

with no estate of his or her own, the attorney's compensation is almost always contingent in fact, regardless of the form of the compensation agreement:

> For a lawyer to tell his client, "if you obtain funds from your husband by property settlement or alimony, I will send you a bill for X dollars" is scarcely distinguishable from telling the client "I will send you a bill for X dollars, but I know perfectly well that unless you obtain money from your husband by property settlement or alimony, you will not be able to pay my bill."[36]

The majority view is in essence concerned more with form than substance.[37]

A second rationale courts use in holding contingent fee arrangements in the matrimonial area void is that the arrangements are unnecessary. This reasoning follows from the historical basis for America's acceptance of contingent fees in other areas of the law—that such arrangements often "provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim."[38] In a divorce case, courts do not recognize this financial need

---

36. Kraus v. Naumburg, 36 Pa. D & C.2d 746, 754 (C.P. Bucks Co. 1962) (holding valid a contingent fee agreement with wife for percentage of property settlement).

37. The North Carolina ethical opinion implies that the policy in favor of reconciliation has no substantial applicability in an equitable distribution proceeding: "A pure divorce action . . . may create a conflict of interest for the attorney by frustrating the public policy in favor of reconciliation. [However] the equitable distribution proceeding can only be prosecuted after the divorce has been granted." N.C. State Bar Comm. on Professional Ethics, *supra* note 9, at 6. The Ethical Committee's conclusion involves a basic procedural misunderstanding of the equitable distribution Act. Procedurally, an equitable distribution decree may not precede divorce. G.S. 50-21 provides that "[t]he equitable distribution may not precede a decree of absolute divorce." N.C. GEN. STAT. § 50-21 (Cum. Supp. 1981). Nevertheless, the two actions are generally prosecuted together because a party's right to an equitable distribution is usually destroyed unless asserted prior to the final divorce decree. G.S. 50-11(c) provides that "[a]n absolute divorce obtained within this State shall destroy the right of a spouse to an equitable distribution of the marital property under G.S. 50-20 unless the right is asserted prior to judgment of absolute divorce." N.C. GEN. STAT. § 50-11(c) (Cum. Supp. 1981). The statute creates a limited six month exception for defendants who were served with process by publication and who failed to appear in the action for divorce.

The Committee's reasoning regarding the reconciliation policy is, in a practical sense, a baseless conclusion. A client generally hires one attorney to handle both his divorce and his equitable distribution claim, which proceed in tandem. In an attorney-client contract for a share of the equitable distribution, the contingency is ultimately the divorce itself. Jurisdictions holding contracts for a share in a spouse's property settlement contrary to public policy have rejected arguments following the Ethics Committee's conclusion. In *Succession of* Butler, 294 So. 2d 512 (La. 1974), an attorney contracted for ten percent of a wife's recovery of community property. In holding the contract void as against public policy, the court refused to view the contract as "one designed for protection of the wife's interest in the community estate and not one the payment of which is contingent upon decree of separation from bed and board or divorce. Such a decree must be rendered before [the wife] can 'recover' assets from the community of acquets and gains." *Id.* at 514. The *Butler* court thus recognized that a property settlement is not a separate but rather an integral part of any divorce action. *But see*, from the same jurisdiction, Oliver v. Doga, 384 So. 2d 330 (La. 1979) (court holding no public policy violated by partition after judgment of separation). Similarly, in *In re* Hill, 261 Or. 573, 495 P.2d 261 (1972), the court stated that "[t]he accused's contention that he entered into a contingent fee contract only to secure a favorable property settlement agreement for his client and not to procure a divorce makes us doubt either the accused's competency or his sincerity." *Id.* at 574, 495 P.2d at 262. Again, courts generally reject any attorney's argument predicated solely on procedural logistics. It is unlikely that the North Carolina ethical opinion could prevail against the majority view on its procedurally based reasoning alone.

38. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 (1980); *accord* Code of Professional Responsibility of the N.C. State Bar, N.C. GEN. STAT. app. VII (Cum. Supp. 1981); *see also*

rationale because there is statutory authority for awarding a dependent spouse attorneys' fees.[39]

The North Carolina ethical opinion implies that this rationale against contingent fees in domestic relations cases is not applicable to an equitable distribution proceeding. The opinion correctly points out that the equitable distribution Act does not include a provision for the recovery of attorneys' fees.[40] The North Carolina ethical opinion makes a valid distinction between equitable distribution proceedings and other aspects of a domestic relations case in which attorneys' fees are awarded statutorily.

Under the American system, each party to a suit must bear the costs of his litigation absent a special statute to the contrary;[41] hence the necessity for and prevalence of contingent fee arrangements in personal injury actions. The attorney must look to the res produced by successful litigation to obtain his fee. A domestic relations attorney should also be able to look to the resulting res in an equitable distribution proceeding. As the ethical opinion correctly points out, "an equitable distribution proceeding, if successful, does produce a res out of which to pay the fee."[42] Equitable distribution could be the most litigious issue in a divorce action in North Carolina. Its recent adoption and the absence of interpretive case law make it likely that such actions will be time consuming for an attorney. Allowing the attorney direct and practical access to the resulting res produced by the modern legislative approach to property settlement could be the only valid resolution to the fee arrangement.

On the other hand, it is not yet absolutely clear that statutorily awarded attorneys' fees are not available in North Carolina equitable distribution proceedings. In this regard, the Committee's reasoning is not altogether persuasive. Counsel fees pendente lite for a deserving dependent spouse are statutorily provided for in North Carolina.[43] Although the statute is limited

---

Gair v. Peck, 6 N.Y.2d 97, 103, 160 N.E.2d 43, 46, 188 N.Y.S.2d 491, 494 (1959) ("[C]ontingent fees are generally allowed in the United States because of their practical value in enabling a poor man with a meritorious cause of action to obtain competent counsel. . . ."), *cert. denied*, 361 U.S. 374 (1960).

39. *See* Newman v. Freitas, 129 Cal. 283, 287, 61 P. 907, 910 (1900); Husband F. v. Wife F., 432 A.2d 331, 333 (Del. 1981) (dictum); Barrelli v. Levin, 144 Ind. App. 576, 585, 247 N.E.2d 847, 853 (1969); Succession of Butler, 294 So. 2d 512, 514 (La. 1974); Coleman v. Sisson, 71 Mont. 435, 445, 230 P. 582, 585 (1924); Dougherty v. Burger, 133 Misc. 807, 808, 234 N.Y.S. 274, 276 (1929); Hay v. Erwin, 244 Or. 488, 491, 419 P.2d 32, 33 (1966).

40. N.C. State Bar Comm. on Professional Ethics, *supra* note 9, at 6.

41. *See generally* Kuenzel, *The Attorney's Fees: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75 (1963) (proposing the assessment of attorneys' fees as court cost to losing party); *see also* Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796) (holding that attorneys' fees are not recoverable as damages by a prevailing party).

42. N.C. State Bar Comm. on Professional Ethics, *supra* note 9, at 6. This production of a res is in contrast to criminal cases, in which contingent fee arrangements are condemned primarily on the ground that the case does not produce a legal res from which to pay the fee. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 (1980); *accord* Code of Professional Responsibility of the N.C. State Bar, N.C. GEN. STAT. app. VII (Cum. Supp. 1981). *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(c) (1980) (contingent fee in a criminal case is per se unprofessional conduct); *accord* Code of Professional Responsibility of the N.C. State Bar, N.C. GEN. STAT. app. VII (Cum. Supp. 1981).

43. N.C. GEN. STAT. § 50-16.4 (1976).

on its face to alimony, no substantive reason exists why the statute cannot be interpreted as applying to an equitable distribution action. After all, the judicially espoused purpose behind the statutory allowance is that it enables the dependent spouse to employ adequate counsel and thus meet the supporting spouse on substantially even terms.[44] Again, equitable distribution could undoubtedly be one of the most litigious issues between the spouses and an area in which the need for competent counsel is crucial. Moreover, the issues of alimony and equitable distribution are so intertwined that equitable distribution may ultimately have a practical effect on alimony in a later proceeding for modification or vacation.[45]

Other equitable distribution states have recognized the relation of pendente lite fees to property proceedings. For example, New York, a state whose equitable distribution statute makes no provision for counsel fees, has interpreted its pendente lite statute to compel a supporting spouse to pay for a dependent spouse's expenses in an equitable distribution proceeding.[46] No reason exists why North Carolina should not follow suit. As one court expressed in another context, "[S]ettlement of property rights is an integral part of the dissolution proceeding and the court would have the right to include compensation for services in that respect in the fee which it is authorized to include in the cost to be paid by the other party."[47]

Given positive interpretation of the state's pendente lite statute, the North Carolina ethical opinion falters in the face of the majority rule against contingent fees; a contingent fee may not be the sole way a dependent spouse could finance equitable distribution or property settlement services. The presence of statutory attorneys' fees, however, may not be an adequate solution to the attorney-client fee arrangement in a domestic relations case. The reasoning behind the majority rule that a contingent fee arrangement is unnecessary, given the existence of court awarded fees, is valid only if court determined fees are truly adequate and accurately reflect the attorney's efforts.[48] In cases in which

---

44. Hudson v. Hudson, 200 N.C. 465, 473-74, 263 S.E.2d 719, 724-25 (1980).

45. N.C. GEN. STAT. § 50-20(f) (Supp. 1981) provides that "[a]fter the determination of an equitable distribution, the court, upon request of either party, shall consider whether an order for alimony or child support should be modified or vacated pursuant to G.S. 50-16.9 or 50-13.7."

46. Gueli v. Gueli, 106 Misc. 2d 877, 435 N.Y.S.2d 537 (1981) (sustaining wife's motion for pendante lite, requiring husband to pay for accountants' and appraisers' fees to evaluate marital assets pursuant to N.Y. Equitable Distribution Law). *See also* Litman v. Litman, 115 Misc. 2d 230, 453 N.Y.S.2d 1003 (N.Y. App. Div. 1982); Fay v. Fay, 108 Misc. 2d 373, 437 N.Y.S.2d 601 (1981).

47. Shanks v. Kilgore, 589 S.W.2d 318, 321 (Mo. Ct. App. 1979).

48. Precise documentation of the inadequacy of court awarded counsel fees would entail empirical study beyond the scope of this note. Court awarded fees may indeed be inadequate. On the other hand, courts in some jurisdictions recognize a distinction between the awarding of attorney's fees in a case in which a contractual relationship exists between the party and the attorney, and in one in which no such relationship exists:

> Where payments are . . . to be made out of the property of litigants to or for the benefit of counsel who may not have been employed by those whose estates are thus diminished, *the standard is not the same* as that applied in an action by an attorney against a client with whom he has voluntary contractural relations.

Hayden v. Hayden, 326 Mass. 587, 596, 96 N.E.2d 136, 142 (1950) (emphasis added) (citations omitted). An attorney seeking an award of counsel fees from the adversary spouse is in a differ-

the court award is inadequate and the court awards a dependent spouse adequate financial resources, it seems inequitable to deny the attorney access to a portion of these resources in order that he may recover the full value of his services.

In cases in which the contingent fee contract is related not to a portion of the court awarded property settlement but to a certain percentage of alimony recovered, other judicial rationales prevail. Courts hold that alimony is not assignable, and to allow a dependent spouse to bargain it away in advance through a contingent fee arrangement is thought to be against public policy.[49] The judiciary reasons that contingent fee arrangements tend to deprive a dependent spouse of an award intended for his or her living expenses, and that contingent fees tend to frustrate and defeat a court's efforts to make an equitable provision for the spouse since the fee is deducted from the amount awarded.[50] The same argument, however, could be made regarding contingent fees in the personal injury area in which such contracts are the most prevalent and in which no real legal controversy over their validity exists. A large portion of a personal injury award is often meant for the future support of the disabled victim, or in the case of a wrongful death action, for the support and maintenance of the victim's survivors. Yet no analogous argument against the fee arrangement is raised in the personal injury area of the law. Similarly, in the domestic relations area, the contingent fee arrangement should be no obstacle to a court's duty to award adequate support providing the fee arrangement is disclosed.[51]

---

ent, if not inferior, position from an attorney who seeks counsel fees from a spouse with whom he has contracted directly. *See generally* Lee & Segal, *Awarding Counsel Fees in Divorce Litigation*, B.B.J., Sept. 1980 at 27, 28.

49. *See, e.g.,* Jordan v. Westerman, 62 Mich. 170, 180, 28 N.W. 826, 829 (1886); Lynde v. Lynde, 64 N.J. Eq. 736, 757, 52 A. 694, 702 (1902).

50. *See, e.g.,* Dougherty v. Burger, 133 Misc. 807, 808, 234 N.Y.S. 274, 276 (1929) (contingent fee agreement against public policy because of its tendency to deprive wife of the provision for maintenance which the court has been careful to award her); Baskerville v. Baskerville, 246 Minn. 496, 503-04, 75 N.W.2d 762, 768 (1956) (contingent fee contracts that depend upon the amount of alimony and support awarded to wife frustrate the court's efforts to make a suitable provision for her); *In re* Smith, 42 Wash. 2d 188, 196, 254 P.2d 464, 469 (1953) (contingent fee contract would interfere with the duties of the court as prescribed in the divorce statutes to fix the amount and time of payment of support money and alimony); *cf.* McInerney v. Massasoit Greyhound Ass'n, 359 Mass. 339, 350, 269 N.E.2d 211, 218 (1971) (rule based on fear that contingent fee arrangements hinder court in fulfilling its duty to set up an equitable property settlement).

The fear of depriving dependant spouses of money intended for their support is also behind many courts' decisions that prohibit attorneys from charging liens against such proceeds: "The purpose of alimony is support. Equity which created the fund will not suffer its purpose to be nullified. In such circumstances, equity, confining the fund to the purpose of its creation, declines to charge it with liens which would absorb and consume it." Levine v. Levine, 206 Misc. 884, 885, 135 N.Y.S.2d 304, 305 (1954) (citations omitted); *cf.* Fuqua v. Fuqua, 88 Wash. 2d 100, 107, 558 P.2d 801, 805 (1977) (as a matter of public policy statutory attorney's lien may not be asserted against monies that represent payments for child support).

51. One court viewed less-than-candid disclosure as cause for grave concern and grounds for disciplinary action. In State *ex rel.* Neb. Bar Ass'n v. Jensen, 171 Neb. 1, 105 N.W.2d 459 (1960), the attorney under investigation had inserted a clause in a draft divorce decree giving him a lien upon 15% of the alimony due his client. The court held that the provision was in effect a contingent fee contract and viewed the attorney's action as a fraud upon the court. The justices pointed out that while they assumed that the trial judge had read the decree, the attorney had failed to fully inform the judge about the provision at issue. *See also In re* Carleton, 33 Mont. 431, 84 P.

The judicial concerns regarding alimony and contingent fees arguably do not apply to equitable distribution proceedings. The North Carolina equitable distibution statute provides that "[t]he court shall provide for an equitable distribution without regard to alimony for either party . . . ."[52] The statute goes on, however, to state that "[a]fter the determination of an equitable distribution, the court, upon request of either party, shall consider whether an order for alimony . . . should be modified or vacated . . . ."[53] Disclosure to the court in this later proceeding that some portion of the distribution was lost to attorneys' fees in the original domestic proceeding is essential if the court is to adequately perform its duty to amend or vacate the award.

The final concern of courts regarding contingent fees in the domestic relations area is concern for the vulnerability of the domestic relations client: that because of the client's personal situation, he is particularly vulnerable to an attorney's overreaching. Many courts conclude that the *mere presence* of a contingent fee contract evidences overreaching.[54] This judicial concern is again persuasive on its face. A domestic crisis is probably the average divorce client's first impetus to seek out an attorney; he is also obviously upset by the turn his personal life has taken.[55] Again the same is true of a personal injury client. Yet the contention of a wrongful death client that he was unduly influenced to sign a contingent fee contract because of the traumatic deaths of his wife and children generally will fall on deaf judicial ears.[56] A contingent fee contract in the personal injury area is not per se invalid; only concrete evidence of attorney overreaching or fraud will hold the arrangement void. In contrast, courts following the majority rule conclude that it is not the *fact* that any evil result grows out of a specific contingent fee contract in the domestic relations area "which strikes at its nullity; it is the *tendency* which approval of such contracts would have to produce evil results in other cases which makes them reprobated by the law."[57] This judicial conclusion is tantamount to an irrebutable presumption that the parties to such a contingent fee contract intended an illegal act. One can only wonder if the judiciary views the members

788 (1906) (suspension of attorney for *inter alia* deceiving the court in proceeding to obtain alimony and attorneys' fees in a suit for divorce, because he failed to inform the court that he was entitled by contract to one-fourth of wife's alimony award; no discussion of legality of contract). *Cf.* Husband F. v. Wife F., 432 A.2d 331, 333 (Del. 1981) (application to a court for allowance of counsel fees requires full disclosure of any contingent or other fee arrangement).

52. N.C. GEN. STAT. § 50-20(f) (Supp. 1981).

53. *Id.*

54. *See, e.g.,* Barrelli v. Levin, 144 Ind. App. 576, 589, 247 N.E.2d 847, 852-53 (1969) (wives contemplating divorce are often distraught and without experience in negotiating contracts), *distinguishing* Krieger v. Bulpitt, 40 Cal. 2d 97, 251 P.2d 673 (1953) (contingent fee contract with *husband* held valid).

55. *See generally* Klingman, *Domestic Relations Litigation: Attorney's Fees,* TRIAL, August 1980, at 27. Klingman notes that "the high emotional level of family law clients creates peculiar problems for attorneys in setting and collecting fees. These problems are exacerbated by the fact that for many clients [the] divorce is their first contact with a lawyer, so they have no idea what an attorney does or what is a reasonable fee." *Id.*

56. *See, e.g.,* Potts v. Mitchell, 410 F. Supp. 1278 (W.D.N.C. 1976) (rejecting argument that client was unduly influenced to sign contingent fee contract because of traumatic deaths of wife and three children).

57. *Sucession of* Butler, 294 So. 2d 512, 514 (La. 1974) (emphasis added).

of the domestic relations bar as a group more disreputable and more susceptible to temptation than their fellow lawyers—a group whose mere tendencies to evil acts must be restrained.

With a judiciary's conclusion that the temptation or tendency for reprehensible attorney conduct is at the heart of the contract's illegality, the judicial tempest quickly centers on the fairness of denying the "wayward" attorney any compensation for his service in the domestic dispute. The general view appears to be that this form of illegality does not permeate the entire contract, and courts often allow recovery in quantum meruit for services rendered.[58] A few courts, however, regard the policy favoring the stability of marital relations so compelling that they deny any recovery.[59] Specific evidence of an attorney's interference with reconciliation will also prohibit recovery.[60]

The possibility also exists that the attorney may recover for his services pursuant to a severable portion of the illegal contract. In *Evans v. Hartley*[61] an attorney contracted to represent the wife in an alimony and divorce proceeding in exchange for one-fifth of any recovery from her husband. The contract also provided for a flat fee in the event the spouses reconciled or settled the alimony suit without the attorney's consent. The court held that the contingent portion of the contract was void, but that the flat-fee clause was not a contractual attempt to restrain and penalize a reconciliation.[62] The court further deemed the flat-fee clause severable: "the fact that the agreement for a contingent fee is void as being against public policy will not vitiate this valid provision of the contract which has been fully complied with by the attor-

58. McDearmon v. Gordon & Gremillion, 247 Ark. 318, 332, 445 S.W.2d 488, 496 (1969); Salter v. St. Jean, 170 So. 2d 94, 95-96 (Fla. Dis. Ct. App. 1964) (dictum) (even if contract had been held void, attorney entitled to recovery in quantum meruit); Wall v. Linder, 159 Colo. 83, 87, 410 P.2d 186, 188 (1966); Wiley v. Silsbee, 1 Cal. App. 2d 520, 36 P.2d 854 (1934); Evans v. Hartley, 57 Ga. App. 598, 603, 196 S.E. 273, 276 (1938); *In re* Sylvester's Estate, 195 Iowa 1329, 1341, 192 N.W. 442, 447 (1923); *Succession of* Butler, 294 So. 2d 512 (La. 1974); McCurdy v. Dillon, 135 Mich. 678, 98 N.W. 746 (1904); Horton v. Horton, 269 So. 2d 347, 349 (Miss. 1972); Avant v. Whitten, 253 So. 2d 394, 397 (Miss. 1971); Ownby v. Prisock, 243 Miss. 203, 138 So. 2d 279 (1962); Lynde v. Lynde, 64 N.J. Eq. 736, 52 A. 694 (1902); Van Vleck v. Van Vleck, 21 A.D. 272, 47 N.Y.S. 470 (1897); Morfeld v. Andrews, 579 P.2d 426 (Wyo. 1978). *See generally* Annot., 100 A.L.R.2D 1378, § 6(b) at 1390 (1965).

59. McCarthy v. Santangelo, 137 Conn. 410, 414, 78 A.2d 240, 242 (1951) (no recovery despite court's finding that attorney made efforts to reconcile the parties); Barngrover v. Pettigrew, 128 Iowa 533, 535, 104 N.W. 904, 904 (1905) ("law will not imply a promise to pay for services which are in derogation of public policy"); Baskerville v. Baskerville, 246 Minn. 496, 513, 75 N.W.2d 762, 773 (1956) ("Since the illegality of the contingent fee contract rests on the ground it may govern the lawyer's actions in a manner which thwarts public policy, the taint of illegality permeats the entire lawyer-client relationship in a divorce action so that every objection to permitting a recovery on the express agreement applies with equal force to an attempted recovery in quantum meruit."), *overruling on this point* Klampe v. Klampe, 137 Minn. 227, 163 N.W. 295 (1917).

60. Jordan v. Westerman, 62 Mich. 170, 28 N.W. 826 (1886) (attorneys actually frustrated every attempt of husband to reconcile); *compare* McCurdy v. Dillon, 135 Mich. 678, 98 N.W. 746 (1904) (quantum meruit recovery allowed in same jurisdiction) *and* Horton v. Horton, 269 So. 2d 347, 349 (Miss. 1972) (attorney in divorce action entitled to recover in quantum meruit if contingent fee contract was the result of a mistake and was *evidenced by good faith*).

61. 57 Ga. App. 598, 196 S.E. 273 (1938).

62. *Id.* at 602, 196 S.E.2d at 275.

ney."[63] The court also held that the trial court had erred in denying the attorney's motion to amend the pleadings for recovery in quantum meruit.[64] Allowing an attorney to recover either on a severable portion of the illegal contract or in quantum meruit is certainly a valiant judicial attempt to ameliorate the effect of an overly harsh if not anachronistic rule.

A limited number of progressive jurisdictions have gone even further in ameliorating the harsh didacticism of the majority rule.[65] The more modern cases generally state the policy against contingent fee contracts in the domestic relations area—*i.e.*, the perceived tendency to lead lawyers to act contrary to public policy—but go on to hold that in the case at bar no such tendency appeared in the facts, and the contract is enforceable.[66] This willingness of some courts to determine on the particular facts of a case whether the contingent fee arrangement does in fact promote divorce was expressed by the California judiciary as early as 1953:

> There should not be a dogmatic condemnation of every contingent fee contract in a divorce action regardless of distinguishable circumstances. Rather the validity of such contracts should be determined in light of the factual background of the particular case and considerations of public policy appropriate therefor.[67]

This approach has been echoed by the judiciaries of Florida,[68] Louisiana,[69]

---

63. *Id.* at 602, 196 S.E. at 276.

64. *Id.* at 604, 196 S.E. at 276.

65. *See generally* Note, *Contingent Fee Contracts: Contract Related to Divorce Action Upheld,* 56 MINN. L. REV. 979, 981 (1972) (identifying modern trend).

66. At least two very early cases upheld contingent fee contracts in domestic relations cases. Hoskins v. Adkins, 184 Ark. 124, 41 S.W.2d 753 (1931); Manning v. Edwards, 205 Ky. 158, 265 S.W. 492 (1924). These cases appear to be no more than early judicial fluctuations. In *Hoskins* the wife's attorney in a divorce action contracted for a percentage of property and alimony recovered. The contract also provided that the contract would not interfere with reconciliation between husband and wife. The Arkansas Supreme Court reversed the trial court's holding that the contract was champertous, against public policy, and void. In doing so the court completely ignored its previous contrary holding in McConnell v. McConnell, 98 Ark. 193, 136 S.W. 931 (1911). Perhaps the court was influenced by the contractual clause concerning reconciliaton. In reaching its conclusion, however, the court reasoned that the wife, a schoolteacher, was a capable adult, the parties dealt at arms length, and no evidence of fraud existed. The decision was ignored in the later case of McDearmon v. Gordon & Gremillion, 247 Ark. 318, 445 S.W.2d 488 (1969) ($45,000 fee contingent on obtaining property settlement of not less than $480,000 void as against public policy). In *Manning* the attorney agreed subsequent to the spouses' separation to effect a settlement of the wife's property rights for 10% of the amount recovered. No divorce was apparently contemplated, and the court enforced the contract against the contention that the contract was void. The Kentucky court later distinguished the case in Overstreet v. Barr, 255 Ky. 82, 87, 72 S.W.2d 1014, 1017 (1934) (parties contemplated divorce).

67. Krieger v. Bulpitt, 40 Cal. 2d 97, 100, 251 P.2d 673, 675 (1953) (upholding validity of attorney's contract with husband for 10% of the appraised value of all property secured from wife but in no case would the fee be less than $5,000 nor more than $7,500). *Compare* Coons v. Kary, 69 Cal. Rptr. 712 (Cal. App. 1968) (contract condemned when court found policy considerations present after refusing to assume wife's marriage unsalveagable at time attorney retained).

Arguably, the trend is discernible even as early as 1937. *See* Smith v. Armstrong & Murphy, 181 Okla. 293, 294, 73 P.2d 140, 142 (1937), *distinguishing* Opperud v. Bussey, 172 Okla. 625, 46 P.2d 319 (1935) ("*Bussey* . . . should not be extended further than necessities of a case requires [*sic*].").

68. Salter v. St. Jean, 170 So. 2d 94 (Fla. Dist. Ct. App. 1964), *distinguishing* Sobieski v. Maresco, 143 So. 2d 62 (Fla. Dist Ct. App. 1962).

69. *See* Olivier v. Doga, 384 So. 2d 330 (La. 1979).

Minnesota,[70] Pennsylvania,[71] and Texas.[72]

The presence of two particular circumstances appears to lead the more modern courts to conclude that the particular contract in question is enforceable. First, the conclusion that reconciliation is no longer at issue, for example, when the marriage is bigamous[73] or when one spouse's desertion was of some years' duration.[74] A formal legal act signifying termination of the spousal relationship but short of absolute divorce may result in a more permissive approach.[75] These holdings follow from flexible modern thinking, evidenced in the statutory grounds for divorce, that not all marriages are worthy of salvage.[76]

The second circumstance persuasive to the courts is when the contingent fee arrangement relates only to separate property—property the client/spouse

70. Burns. v. Stewart, 290 Minn. 289, 299, 188 N.W. 2d 760, 766 (1971) ("[O]n the facts presented, it cannot be said that the contingent fee arrangement there involved was one necessarily promotive of divorce."), *distinguishing* Klampe v. Klampe, 137 Minn. 227, 163 N.W. 295 (1917) *and* Baskerville v. Baskerville, 246 Minn. 496, 75 N.W.2d 762 (1956). *See generally* Note, *supra* note 65.

71. Kraus v. Naumburg, 36 Pa. D. & C.2d 746, 750 (C.P. Bucks Co. 1964) ("[I]f the agreement does not have the effect of inducing or facilitating a divorce, the fact that a divorce is somehow involved and related to the agreement does not render the agreement invalid.").

72. Archer v. Griffith, 390 S.W.2d 735, 740 (Tex. 1964) (dictum) ("contingent fee arrangement is not *necessarily* improper in a divorce action" (emphasis added)).

Commentators have cited Texas as the sole exception to the majority rule that contingent fee contracts are per se void in domestic relations cases. *E.g.*, Note, *supra* note 65, at 980 n.2; Case Note, 15 ALA. L. REV. 208, 209 (1962) (noting Sobrieski v. Maresco, 143 So. 2d 63 (Fla. Dist. Ct. App. 1962)). *See also* Note, *Contingent Fees in Domestic Relations Actions: The Minority Rule(s),* 3 J. LEGAL PROF. 209, 209-12 (1978). These conclusions appear to follow from two earlier lower court opinions in Texas concerning contingent fee contracts in the domestic relations area. Coen v. Stout, 245 S.W.2d 971 (Tex. Civ. App. 1952) (attorney permitted to recover on contract providing for 50% of amount recovered in action for alimony and child support arrearages); Kull v. Brown, 165 S.W.2d 1011 (Tex. Civ. App. 1942) (attorney allowed recovery on contract for one-third undivided interest in wife's community property; policy considerations deemed inapplicable absent a showing of an attempted reconciliation). *See also* Huffmaster v. Toland, 250 S.W. 468 (Tex. Civ. App. 1923) (cancelling deed executed by wife pursuant to agreement to convey to attorney 25% of property recovered in divorce action on grounds attorney had misrepresented difficulty of case, rather than on public policy grounds).

73. *See, e.g.,* Coviello v. State Bar, 45 Cal. 2d 57, 286 P.2d 357 (1955).

74. *See, e.g.,* Burns v. Stewart, 188 N.W.2d 760 (Minn. 1971); *compare* Coons v. Kary, 263 Cal. App. 2d 650, 69 Cal. Rptr. 712 (1968) (contract unenforceable; client's marriage cannot be assumed to be unsalvageable at time attorney retained).

75. *See, e.g.,* Olivier v. Doga, 384 So. 2d 330 (La. 1979) (no public policy violated when attorney contracted with wife for representation in community property partition after judgment of separation).

In the same vein, at least one court has taken a permissive view toward a contingent fee arrangement in a domestic relations action subsequent to divorce. Zagar v. Zagar, 56 Ill. App. 2d 175, 205 N.E.2d 754 (1965) (holding valid 50% contingent fee for support arrearages collected). *Compare*, in the same jurisdiction, Stoller v. Onuszko, 10 Ill. App. 3d 598, 295 N.E.2d 118 (1973) (holding invalid divorce contract for 40% of any recovery of alimony, child support and property settlement).

76. In North Carolina, for example, statutory grounds for divorce include adultery, initial and continuing impotency, insanity in conjunction with three years' separation, criminal imprisonment coupled with one year's separation, and continuous separation for one year. N.C. GEN. STAT. §§ 50-5 to -6 (1976 & Supp. 1981). Each of these statutory grounds indicates that reconciliation is improbable, and that modern public policy does not extend to preserving bad marriages. *See also* Note, *supra* note 65, at 987 n.21.

could recover in an action against his or her spouse independent of divorce.[77] An example would be a husband's absconding with property purchased with the wife's separate funds in a jurisdiction recognizing the resulting trust doctrine for wives.[78] The obvious conclusion is that in equitable distribution states following this modified view toward contingent fee contracts, an attorney could contract at the very least for a portion of a spouse's property he recovers in equitable distribution that the court deems "separate" property.

Yet even this more liberal approach to contingent fee contracts in the domestic relations area is not totally satisfactory; outmoded public policy considerations still play too great a role in judicial reasoning. The approach would also tend to involve attorneys and courts in such collateral issues as the salvageability of a marriage. It is nothing less than a call for a great deal of attorney foresight and judicial hindsight.

The most satisfactory approach is to put contingent fee arrangements in the domestic law area on equal footing with contingent fee contracts in general. This approach of equal treatment is evident in the most recent case on the subject, *Gross v. Lamb*.[79] In *Lamb* an attorney contracted with a wife for ten percent of any alimony she might recover. The court held that the contract was not void against public policy. The court made no reference to the general prohibition against contingent fee arrangements in the domestic relations area or to any other public policy considerations. The justices simply noted that the wife was unable to pay a retainer or hourly fee but desired an experienced lawyer. The Ohio court implicitly viewed the contingent fee in this divorce case in the same light as one in any other branch of the law. The domestic relations attorney was as free as his fellow lawyers to make a contingent fee contract when circumstances warranted such an arrangement.

Courts in other jurisdictions, including North Carolina, should follow the implications of the Ohio case. The domestic relations bar should enjoy the same degree of freedom of contract afforded attorneys working in other areas of the law. The law should modernize the attorney-client relationship in the domestic relations area to the same extent it has modernized its approach to marriage in general. In contrast with the nineteenth century approach, the twentieth century trend is to loosen rather than increase state control over marriage and divorce. Public policy is playing an increasingly weaker role in matrimonial matters. For example, the law once viewed separation agree-

77. In North Carolina, for example, a husband or wife during coverture may bring an action to quiet title to real property against his or her spouse. A decree in favor of the plaintiff spouse will bar all claims of the defendant spouse to the property in question. N.C. GEN. STAT. § 41-10 (1976).

78. Burns v. Stewart, 188 N.W.2d 760 (Minn. 1971). *See also* Salter v. St. Jean, 170 So. 2d 94 (Fla. Dist. Ct. App. 1964) (contingent fee contracts are enforceable when relating to return of a wife's separate property); Olivier v. Doga, 384 So. 2d 330 (La. 1979) (in Louisiana wife can enforce a separation of community property during coverture and without divorce; contingent fee contract with wife in action for partition of community property is valid); Smith v. Armstrong & Murphy, 181 Okla. 293, 73 P.2d 140 (1937) (contract for percentage of recovery of value wife advanced husband for joint business venture enforceable because wife could recover property irrespective of marital dissolution).

79. 1 Ohio App. 3d 1, 437 N.E.2d 309 (1980).

ments as promoting divorce and violating public policy. Today these contracts are recognized as practical legal devices. Why should the area of fee contracts be any more restrained on grounds of anachronistic public policy?

The more modern approach will hardly cause an open field day on innocent vulnerable clients. Courts in most jurisdictions have held that an inherent equitable power exists in the trial court to pass upon the propriety of counsel fees in connection with any matter before it.[80] Courts particularly subject contingent fee arrangements to close scrutiny.[81] In North Carolina, the judicial approach to contingent fee arrangements in general is as follows:

> A contract for a contingent fee must be made in good faith, without suppression or reserve of fact or of apprehended difficulties, and without undue influence of any sort or degree; and the compensation bargained for must be absolutely just and fair, so that the transaction may be characterized throughout by all good faith to the client. If the contract is shown to have been obtained by fraud, mistake, or undue influence, or if it is so excessive in proportion to the services to be rendered as to be *in fact* oppressive or extortionate,[82] it will not be upheld.[83]

Hence, in North Carolina a contingent fee contract will be upheld "if, but only if, it is shown to be reasonable and to have been fairly and freely made, with full knowledge by the client of its effect and of all the material circumstances relating to the reasonableness of the fee."[84] Perhaps most important from a client's perspective is that "[t]he burden is upon the attorney to show the reasonableness and the fairness of the contract, not upon the client to show the contrary."[85]

Applying this judicial approach to contingent fee contracts in the domestic relations area, attorneys would be penalized only for concrete acts of overreaching and fraud. Moreover, disciplinary action would not be initiated for the mere act of contracting for a contingent fee, but only for a direct violation of the disciplinary rules—when, for example, the percentage of the client's property retained is so excessive that "a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee."[86]

---

80. Note, *Judical Power Over Contingent Fee Contracts: Reasonableness and Ethics*, 30 CAS. W. RES. L. REV. 523, 523 (1980); *contra* Thatcher v. Industrial Comm'n, 115 Utah 568, 574, 207 P.2d 178, 181 (1949) (no power of judiciary to fix or regulate fees; the courts' only right is to discipline attorney when fee charged is unconscionable or when attorney took advantage of client's ignorance).

81. *See, e.g.*, Olive v. Williams, 42 N.C. App. 380, 389, 257 S.E.2d 90, 96 (1979) ("Contracts for contingent fees are closely scrutinized by courts where there is *any* question as to their reasonableness." (emphasis added)).

82. *See, e.g.*, Archer v. Griffith, 390 S.W.2d 735 (Tex. 1964) (contingent fee contracts, while not necessarily improper in divorce proceedings, are void if exorbitant or unreasonable).

83. High Point Casket Co. v. Wheeler, 182 N.C. 459, 467, 109 S.E. 378, 383 (1921) (emphasis added).

84. Randolph v. Schuyler, 284 N.C. 496, 504, 201 S.E.2d 833, 837-38 (1974).

85. *Id.* at 504, 201 S.E.2d at 838.

86. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-106 (1980); *accord* Code of Pro-

The ethical opinion of the North Carolina State Bar is narrowly confined to the area of equitable distribution. The opinion is vague and some of its reasoning would prove unsound in the face of the didacticism of the majority rule.[87] The opinion, however, is a step toward resolving the issue in North Carolina. Significantly, the opinion does not dogmatically bar the contingent fee arrangement; it should encourage the general domestic relations bar at least to experiment with a contingent fee arrangement in one narrow area of a domestic case. Litigation will no doubt ensue, as domestic relations fees are one of the most debated grievances in post decree discussions.[88]

When this litigation reaches the appellate level, it is hoped that the North Carolina court will view the issue broadly, and take an enlightened if not revolutionary approach. Second guessing judicial opinion is a tenuous if not presumptive business. The legal community, however, can probably confidently surmise that the North Carolina judiciary will take the more enlightened view. The state courts will no doubt be influenced by the lead of the North Carolina State Bar. Traditional implicit state policy toward the issue should also prove persuasive—the strongest evidence of the State's current attitude being that North Carolina has omitted from its ethical canons the Model Code provision characterizing contingent fee arrangements as rarely justified in domestic relations cases.[89] At the very least, the courts should be willing to follow the less satisfactory modern trend of examining each contested contingent fee arrangement on its facts in order to ascertain any conflict with existing public policy.[90]

KATHLEEN PEPI SOUTHERN*

fessional Responsibility of the North Carolina State Bar N.C. GEN. STAT. app. VII, DR-2-106 (Cum. Supp. 1981).

87. *See supra* notes 33-37, 42-47 and accompanying text.

88. Johnson, *A Special Code of Professional Responsiblity in Domestic Relations Statutes*, 9 FAM. L. Q. 595, 601 (1975).

89. *See supra* note 4 and accompanying text.

90. In Brooker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978), the North Carolina Supreme Court expressed reluctance to rule upon the legality of a contingent fee contract in a domestic relations case absent the client-wife's joinder and absent clarity in the record about "the nature of the legal services performed in exchange for the contingent fee arrangement." *Id.* at 157, 240 S.E.2d at 366. *See supra* note 10. This indicates a judicial willingness to examine an individual case on its facts.

* The author expresses appreciation to the North Carolina State Bar for its assistance with the research for this comment.