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Chapter 1
Spousal Agreements

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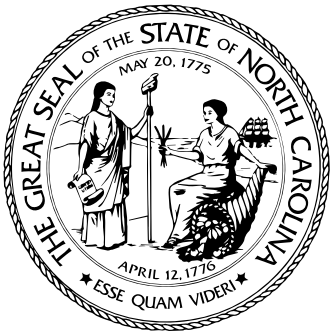

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Chapter 1: **Spousal Agreements**

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I. Premarital Agreements

A. Applicable Statutes

1. The Uniform Premarital Agreement Act. [G.S. Chapter 52B, hereinafter referred to as the Uniform Act.] For agreements executed before July 1, 1987, see discussion of G.S. 52-10 in Section II.B, below.
    a. The Uniform Act is applicable to any premarital agreement executed on or after July 1, 1987. [S.L. 1987-473, § 3.]
    b. A premarital agreement is enforceable without consideration. [G.S. 52B-3; *Harllee v. Harllee,* 151 N.C. App. 40, 565 S.E.2d 678 (2002) (noting that the Uniform Act explicitly dispenses with the need for consideration as a prerequisite for the enforcement of premarital agreements entered into on or after the Uniform Act's effective date).]
    c. A premarital agreement must be in writing and signed by both parties. [G.S. 52B-3.]
        i. A Syrian contract of marriage signed by wife's father did not meet the requirements of G.S. Chapter 52B and could not bar wife's right to alimony and equitable distribution. [*Atassi v. Atassi,* 117 N.C. App. 506, 451 S.E.2d 371, *review denied,* 340 N.C. 109, 456 S.E.2d 310 (1995).]
    d. A premarital agreement does not have to be acknowledged. [*See* G.S. 52B-3 *and* Official Comment thereto.]
    e. A premarital agreement is effective upon marriage. [G.S. 52B-5.]
        i. Marriage is a prerequisite for the effectiveness of a premarital agreement under the Uniform Act. [Official Comment, G.S. 52B-5.]
        ii. If a marriage is later determined to be void, the agreement is enforceable only to the extent necessary to avoid an inequitable result. [G.S. 52B-8.]
        iii. The Uniform Act does not cover agreements between persons who live together without marrying. [Official Comment, G.S. 52B-5.]
2. G.S. 52-10.
    a. A person of full age about to be married may, with or without consideration, release and quitclaim rights that they might acquire by marriage in the property of the other. [G.S. 52-10(a).]
    b. G.S. 52-10 applies to agreements to which the Uniform Act is not applicable. [*See Harllee v. Harllee*, 151 N.C. App. 40, 565 S.E.2d 678 (2002) (premarital agreement executed in 1984 governed by G.S. 52-10).]

c. A premarital agreement under this section is enforceable with or without consideration. [G.S. 52-10(a).] Before passage of G.S. 52-10 in 1965, common law recognized the marriage itself as sufficient consideration to support a premarital agreement. [*Harllee v. Harllee*, 151 N.C. App. 40, 565 S.E.2d 678 (2002) (citing 1 Lee's North Carolina Family Law § 1.45 (5th ed. 1993)).]

d. G.S. 52-10 does not require acknowledgment of premarital agreements. [See language in G.S. 52-10(a) requiring acknowledgment only of agreements executed by a "husband and wife made during their coverture"; *Howell v. Landry*, 96 N.C. App. 516, 386 S.E.2d 610 (1989), *review denied*, 326 N.C. 482, 392 S.E.2d 90 (1990).]

3. G.S. 50-20(d).

a. Before marriage the parties may by written agreement, duly executed and acknowledged pursuant to G.S. 52-10, or by an agreement valid in the jurisdiction where executed, provide for distribution of marital and divisible property. [G.S. 50-20(d).]

b. Premarital agreements whereby the parties dispose of their property upon divorce through the provisions of the agreement rather than by equitable distribution are expressly allowed by G.S. 50-20(d). [*Harllee v. Harllee*, 151 N.C. App. 40, 565 S.E.2d 678 (2002).]

B. Matters That May Be Included in a Premarital Agreement under the Uniform Act

1. Rights and obligations in property, whenever and wherever acquired or located. [G.S. 52B-4(a)(1).]

a. "Property" is defined as "an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings." [G.S. 52B-2(2).]

b. The term "property" is designed to embrace all forms of property and interests therein and may include rights in a professional license or practice, employee benefit plans, and pension and retirement accounts. [Official Comment, G.S. 52B-2.]

2. Right to buy, sell, transfer, use, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property. [G.S. 52B-4(a)(2).]

3. Disposition of property upon separation, divorce, death, or other event. [G.S. 52B-4(a)(3).]

a. Parties to premarital agreements may freely relinquish all rights to each others' property. [*Brown v. Ginn,* 181 N.C. App. 563, 640 S.E.2d 787 (citing *Prevatte v. Prevatte*, 104 N.C. App. 777, 411 S.E.2d 386 (1991)), *review denied,* 361 N.C. 350, 645 S.E.2d 766 (2007).]

b. Provision in a premarital agreement by which each party waived and released any right to inherit from the other or to dissent from the other's will prevented wife from dissenting from husband's will. [*In re Estate of Pate,* 119 N.C. App. 400, 459 S.E.2d 1 (rejecting wife's argument that temporary cancellation of wedding plans after execution of the premarital agreement revoked the agreement), *review denied*, 341 N.C. 649, 462 S.E.2d 515 (1995).]

c. The ability to control the disposition of property upon the dissolution of a marriage appears to be the primary purpose of most, if not all, premarital agreements. [*Harllee v. Harllee*, 151 N.C. App. 40, 565 S.E.2d 678 (2002).]

4. Modification or elimination of spousal support. [G.S. 52B-4(a)(4); 50-16.6(b), *amended by* S.L. 2013-140, § 2, effective June 19, 2013, which provides that alimony, postseparation support, and attorney fees may be barred by an express provision in a premarital agreement, separation agreement, or marital contract made pursuant to G.S. 52-10(a1) so long as the agreement is performed; see further discussion in Section I.E.2, below.] But regardless of agreement, a court may require a supporting spouse to support a dependent spouse if provisions in the agreement cause the dependent spouse to be eligible for public assistance upon separation or divorce. [G.S. 52B-7(b), discussed in Section I.E.2.b, below.]
5. The making of a will, trust, or other arrangement to carry out the agreement. [G.S. 52B-4(a)(5).]
6. Ownership rights in and disposition of the death benefit from a life insurance policy. [G.S. 52B-4(a)(6).]
   a. If the parties contract as to the ownership rights in and disposition of the death benefit from a life insurance policy and the provisions of the premarital contract conflict with the provisions of the life insurance policy, the life insurance policy prevails with respect to payment by the insurance company but not with respect to the rights of the parties to the premarital agreement. [North Carolina Comment, G.S. 52B-4.]
7. The choice of law governing the construction of the agreement. [G.S. 52B-4(a)(7).]
8. Any other matter, including personal rights and obligations, not in violation of public policy or a criminal statute. [G.S. 52B-4(a)(8).]

C. Construing a Premarital Agreement

1. Contract construction rules apply to premarital agreements.
   a. In general, the principles of construction applicable to contracts also apply to premarital agreements. [*Muchmore v. Trask*, 192 N.C. App. 635, 666 S.E.2d 667 (2008), *review improvidently allowed*, 363 N.C. 742, 686 S.E.2d 151 (2009); *Cooke v. Cooke*, 185 N.C. App. 101, 647 S.E.2d 662 (citing *Harllee v. Harllee*, 151 N.C. App. 40, 565 S.E.2d 678 (2002)), *review denied*, 362 N.C. 175, 657 S.E.2d 888 (2008); *McIntyre v. McIntyre*, 188 N.C. App. 26, 654 S.E.2d 798 (citing *Howell v. Landry*, 96 N.C. App. 516, 386 S.E.2d 610 (1989)), *aff'd per curiam*, 362 N.C. 503, 666 S.E.2d 749 (2008); *Brown v. Ginn*, 181 N.C. App. 563, 640 S.E.2d 787, *review denied*, 361 N.C. 350, 645 S.E.2d 766 (2007); *Harllee*; *Turner v. Turner*, 242 N.C. 533, 89 S.E.2d 245 (1955) (principles of construction applicable to antenuptial agreements and to contracts generally are the same).]
   b. In construing premarital agreements executed after July 1, 1987, in addition to general contract principles, the strict requirements of the Uniform Act must be considered. [*Huntley v. Huntley,* 140 N.C. App. 749, 538 S.E.2d 239 (2000).]
   c. Premarital agreements "are to be construed liberally so as to secure the protection of those interests which from the very nature of the instrument it must be presumed were thereby intended to be secured." [*Harllee v. Harllee*, 151 N.C. App. 40, 46–47,

565 S.E.2d 678, 682 (2002) (quoting *Stewart v. Stewart,* 222 N.C. 387, 392, 23 S.E.2d 306, 309 (1942)).]

d. Contracts are interpreted according to the intent of the parties, which is determined by examining the plain language of the contract. [*Brown v. Ginn,* 181 N.C. App. 563, 640 S.E.2d 787, *review denied,* 361 N.C. 350, 645 S.E.2d 766 (2007).]

e. "[A]bsent fraud or oppression . . . parties to a contract have an affirmative duty to read and understand a written contract before signing it." [*Kornegay v. Robinson,* 176 N.C. App. 19, 30, 625 S.E.2d 805, 812 (Tyson, J., dissenting) (quoting *Roberts v. Roberts,* 173 N.C. App. 354, 357, 618 S.E.2d 761, 764 (2005)), *rev'd per curiam for reasons stated in dissenting opinion*, 360 N.C. 640, 637 S.E.2d 516 (2006).]

f. The court presumes that the parties intended what the contract language clearly expresses and construes the contract "to mean what on its face it purports to mean." [*Kornegay v. Robinson,* 176 N.C. App. 19, 30, 625 S.E.2d 805, 812 (Tyson, J., dissenting) (quoting *Roberts v. Roberts,* 173 N.C. App. 354, 357, 618 S.E.2d 761, 764 (2005)), *rev'd per curiam for reasons stated in dissenting opinion*, 360 N.C. 640, 637 S.E.2d 516 (2006).]

2. Choice of law.

a. Unless the premarital agreement at issue clearly indicates a contrary intent, "the construction is to be governed by the law of the place where it is *intended* to be performed." [*Muchmore v. Trask,* 192 N.C. App. 635, 642, 666 S.E.2d 667, 671 (2008) (emphasis in original) (quoting *Hicks v. Skinner,* 71 N.C. 539, 545 (1874)), *review improvidently allowed*, 363 N.C. 742, 686 S.E.2d 151 (2009).]

b. The law of the state where a marital contract, including a premarital agreement, is formed should govern its validity. [*Muchmore v. Trask,* 192 N.C. App. 635, 666 S.E.2d 667 (2008) (citing *Morton v. Morton,* 76 N.C. App. 295, 332 S.E.2d 736 (1985)), *review improvidently allowed*, 363 N.C. 742, 686 S.E.2d 151 (2009).]

3. Use of extrinsic evidence.

a. Extrinsic evidence may be consulted when the plain language of the contract is ambiguous. [*Brown v. Ginn,* 181 N.C. App. 563, 640 S.E.2d 787 (citing *Tyndall-Taylor v. Tyndall,* 157 N.C. App. 689, 580 S.E.2d 58 (2003)), *review denied,* 361 N.C. 350, 645 S.E.2d 766 (2007).]

b. See Section IV.E.2, below.

4. Specific cases.

a. Waiver of rights.

i. Waiver of spousal support in premarital agreement executed in California was valid and enforceable in North Carolina pursuant to California law, even though at the time the agreement was executed in California, a waiver of alimony violated North Carolina public policy. [*Muchmore v. Trask,* 192 N.C. App. 635, 666 S.E.2d 667 (2008) (a waiver of alimony was valid in California when the agreement was executed and was valid in North Carolina when the parties relocated here; that agreements to waive alimony were against North Carolina public policy when this agreement was executed in California did not prevent

enforcement in North Carolina of the waiver), *review improvidently allowed*, 363 N.C. 742, 686 S.E.2d 151 (2009).]

ii. Provision in property and separation agreement, approved by South Carolina family court, whereby each party relinquished "all right, claim or interest . . . that she or he may acquire in the property or estate of the other, including without limitation . . . the right to receive proceeds, funds or property as a beneficiary under any life insurance policies" did not require plan administrator to distribute life insurance benefit to contingent beneficiary, instead of husband, upon wife's death. Even though waiver was clear, plan documents controlled disbursement of benefits, so when wife had not changed her beneficiary designation, plan administrator properly paid proceeds to husband as named beneficiary. [*Boyd v. Metro. Life Ins. Co.*, 636 F.3d 138, 139 (4th Cir. 2011) (citing *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 129 S. Ct. 865 (2009)).]

iii. When wife agreed in premarital agreement to "waive and release all statutory rights that she has, or may have, in the property or estate of" her husband, wife was not entitled to retain payments, made to her under federal law after husband's death, for husband's tobacco allotments. [*Brown v. Ginn,* 181 N.C. App. 563, 564, 640 S.E.2d 787, 788 (quoted language, and other provisions in the premarital agreement, established wife's waiver of her right to the tobacco payments), *review denied,* 361 N.C. 350, 645 S.E.2d 766 (2007).]

b. In determining the value of the marital residence pursuant to a formula set out in the premarital agreement, the phrase allowing deduction of the "outstanding indebtedness on" the marital residence referred only to debt secured by the residence and not to debt incurred by the husband to purchase the property not secured by the residence. [*Roberts v. Roberts,* 173 N.C. App. 354, 618 S.E.2d 761 (2005) (husband not allowed to deduct sum he borrowed against his separately owned brokerage account for a down payment on the marital residence; amount husband borrowed was secured by the stocks and other assets in his account).]

c. Language in premarital agreement that husband would, as part of the consideration for the agreement, pay $10,000 to the wife on the day of the marriage was construed as a promise, not a condition precedent to the effectiveness of the agreement; agreement enforceable even though payment never made. [*Harllee v. Harllee*, 151 N.C. App. 40, 565 S.E.2d 678 (2002) (agreement governed by G.S. 52-10).]

D. Modifying or Revoking a Premarital Agreement

1. Prior to the Uniform Act, the general rule was that premarital agreements could be amended or rescinded after marriage if the parties fully and freely consented to do so. [*Turner v. Turner,* 242 N.C. 533, 538, 89 S.E.2d 245, 249 (1955) (stating that "[a]ntenuptial contracts may during coverture be modified or rescinded with the full and free consent of the parties thereto, provided the rights of third parties have not intervened").]

2. The Uniform Act provides that a premarital agreement may be amended or revoked after marriage only by a written agreement signed by the parties. [G.S. 52B-6; *Huntley v. Huntley,* 140 N.C. App. 749, 538 S.E.2d 239 (2000) (considering G.S. 52B-6 for the first time, court of appeals concluded that the statute requires a signed, written agreement to amend or revoke a premarital agreement; trial court erred when it found that conduct of the parties after marriage rescinded the agreement). *See also Muchmore v. Trask,* 192 N.C. App. 635, 666 S.E.2d 667 (2008) (applying similar California law, when neither party claimed that a written revocation existed, plaintiff's allegations that defendant physically revoked the agreement by tearing it up were immaterial), *review improvidently allowed*, 363 N.C. 742, 686 S.E.2d 151 (2009).]
3. The Uniform Act is silent as to the amendment or revocation of a premarital agreement prior to marriage.
    a. Because the Uniform Act is silent on this point, a court could apply general contract principles to determine whether temporary cancellation of wedding plans after execution of a premarital agreement revoked the agreement. [*In re Estate of Pate,* 119 N.C. App. 400, 459 S.E.2d 1 (without discussing the Uniform Act, when parties subsequently reconciled and married, premarital agreement that did not specify any date upon which the parties were to be married but contemplated marriage "sometime in the near future" was valid; applying contract principles, court concluded that wedding some seven months after execution of the agreement occurred within a reasonable time period), *review denied*, 341 N.C. 649, 462 S.E.2d 515 (1995); *Huntley v. Huntley,* 140 N.C. App. 749, 538 S.E.2d 239 (2000) (noting that application of general contract principles was appropriate in *Pate* since Uniform Act was silent on revocation of a premarital agreement before marriage).]
4. No consideration is required for amendment or revocation of a premarital agreement. [G.S. 52B-6.]
5. Reconciliation.
    a. In the absence of contrary provisions in an antenuptial agreement, or of special statutory provisions, a separation and reconciliation between husband and wife will not affect or extinguish property rights under such an agreement. [*Turner v. Turner,* 242 N.C. 533, 89 S.E.2d 245 (1955).] See Section IV.H, below, for more on reconciliation. *See* G.S. 52B-4(a)(3) (allowing parties to contract with respect to "the occurrence or nonoccurrence of any other event").
6. Application of estoppel principles to purported revocation.
    a. Defendant was not equitably estopped from enforcing the parties' premarital agreement when plaintiff failed to show that she relied on defendant's alleged revocation (tearing up the agreement in her presence). [*Muchmore v. Trask*, 192 N.C. App. 635, 666 S.E.2d 667 (2008), *review improvidently allowed*, 363 N.C. 742, 686 S.E.2d 151 (2009).]

E. Effect of a Premarital Agreement on Various Rights or Interests of the Parties

1. Effect on equitable distribution.
    a. A valid premarital agreement does not automatically bar any and all claims pursuant to the equitable distribution (ED) statute. Only premarital agreements that fully

dispose of the parties' property rights bar subsequent actions for ED. [*McKissick v. McKissick*, 129 N.C. App. 252, 497 S.E.2d 711 (1998) (citing *Hagler v. Hagler,* 319 N.C. 287, 354 S.E.2d 228 (1987)). *See also Prevatte v. Prevatte,* 104 N.C. App. 777, 411 S.E.2d 386 (1991) (a general release of property rights in a premarital agreement was sufficient to bar ED).]

b. Premarital agreement that provided that each party "releases" certain rights, including "all marital rights in the real estate and personal property" of the other spouse, and that each party would be able to purchase, sell, encumber, dispose of, and convey real and personal property throughout the marriage as though unmarried and without the other's consent, did not waive either party's right to ED; rather, the agreement was a "free trader" agreement that allowed each spouse to buy and sell property without the consent or interference of the other during the marriage. [*McIntyre v. McIntyre,* 188 N.C. App. 26, 28, 654 S.E.2d 798, 799 (1986 agreement did not specifically reference property that might be acquired during marriage, did not expressly waive ED, and did not dispose of property in the event of divorce) (Uniform Act not applicable), *aff'd per curiam,* 362 N.C. 503, 666 S.E.2d 749 (2008).]

c. Until the court enters an order finding that the agreement bars ED, the court has jurisdiction to enter preliminary orders pursuant to the ED statute. [*McKissick v. McKissick*, 129 N.C. App. 252, 497 S.E.2d 711 (1998) (trial court authorized to enter an order pursuant to G.S. 50-20(i) requiring husband to return wife's separate property, even though trial court later determined that ED was barred by premarital agreement; appellate court did not address whether trial court would have had jurisdiction to enter the order under G.S. 50-20(i) after dismissal of the ED claim).]

d. It is error to order ED when a premarital agreement that specifically waives right to ED remains valid and enforceable. [*Huntley v. Huntley,* 140 N.C. App. 749, 538 S.E.2d 239 (2000) (trial court erred in finding that the parties' conduct following execution of the agreement resulted in its rescission).]

e. Property owned by the parties that is not covered by the premarital agreement is to be distributed pursuant to the Equitable Distribution Act. [*See Harllee v. Harllee*, 151 N.C. App. 40, 565 S.E.2d 678 (2002) (remanding for ED of any properties the parties might have owned that were not covered by the premarital agreement).]

2. Effect on postseparation support and alimony.

a. Alimony, postseparation support, and attorney fees may be barred by an express provision in a valid premarital agreement, separation agreement, or marital contract made pursuant to G.S. 52-10(a1) so long as the agreement is performed. [G.S. 50-16.6(b), *amended by* S.L. 2013-140, § 2, effective June 19, 2013.]

i. See Section IV.F.2, below, for more on what constitutes a valid waiver of alimony.

ii. Alimony could not be waived in an agreement executed before adoption of the Uniform Act in 1987. [*Howell v. Landry,* 96 N.C. App. 516, 386 S.E.2d 610 (1989) (provisions in a 1979 premarital agreement purporting to waive alimony unenforceable and void as against public policy), *review denied,* 326 N.C. 482, 392 S.E.2d 90 (1990).]

b. A court may require a supporting spouse to support a dependent spouse if spousal support provisions in a premarital agreement cause the dependent spouse to be eligible for public assistance upon separation or divorce. [G.S. 52B-7(b).]

i. The court must find that grounds exist for

(a) Alimony under G.S. 50-16.3A or

(b) Postseparation support under G.S. 50-16.2A. [G.S. 52B-7(b).]

ii. The court may order support only to the extent necessary to avoid eligibility for public assistance. [G.S. 52B-7(b).]

c. Provision in premarital agreement that waived "any right or claim of any kind, character, or nature whatsoever" of a spouse pursuant to G.S. Chapter 50 constituted a valid waiver of the wife's right to postseparation support and alimony. [*Stewart v. Stewart,* 141 N.C. App. 236, 240, 541 S.E.2d 209, 212 (2000) (language that specifically and unambiguously waived all rights pursuant to Chapter 50, which encompasses postseparation support and alimony, was sufficiently express to constitute a valid waiver of alimony).]

3. Effect on child support.

a. The right of a child to child support may not be adversely affected by a premarital agreement. [G.S. 52B-4(b).]

4. Effect on rights in the estate of a decedent.

a. Wife had no right to dissent from the will of her husband when she had in a premarital agreement waived and released any right to inherit from him or to dissent from his will. [*In re Estate of Pate,* 119 N.C. App. 400, 459 S.E.2d 1, *review denied*, 341 N.C. 649, 462 S.E.2d 515 (1995).]

5. Effect on interest in a retirement account.

a. Unambiguous language in premarital agreement providing that the parties' retirement accounts were to remain their separate property was a valid waiver under state law, as well as under the federal Employee Retirement Income Security Act (ERISA), of wife's interest in husband's retirement account. [*Stewart v. Stewart,* 141 N.C. App. 236, 541 S.E.2d 209 (2000) (holding that ERISA's spousal waiver restrictions apply to waivers of survivor benefits but do not apply to waivers of an interest in a spouse's retirement account). *But cf. Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 129 S. Ct. 865 (2009) (even if rights are waived, ex-spouse will receive death benefits if ex-spouse is designated as the beneficiary in plan documents at time benefits are paid).]

6. Effect on attorney fees.

a. G.S. 50-16.6(b), *amended by* S.L. 2013-140, § 2, effective June 19, 2013, provides that attorney fees may be barred by an express provision in a premarital agreement, separation agreement, or marital contract made pursuant to G.S. 52-10(a1) so long as the agreement is performed.

7. Effect on certain assets.
    a. Medical license.
        i. Medical license owned by husband before the marriage, and any appreciation thereof during the marriage, was husband's separate property pursuant to a premarital agreement that provided that each of the parties retained title to property owned by them on the date the premarital agreement was executed, as well as any increases in that property. [*Stewart v. Stewart,* 141 N.C. App. 236, 541 S.E.2d 209 (2000).]
    b. Interest in a professional practice.
        i. Husband's interest in a medical practice was husband's separate property when parties specifically acknowledged in a premarital agreement that husband "is the owner" and that the interest "shall remain the sole and separate property" of husband; same language supported conclusion that any appreciation of that interest during the marriage was husband's separate property. [*Stewart v. Stewart,* 141 N.C. App. 236, 259, 541 S.E.2d 209, 218 (2000).]

F. Enforcing a Premarital Agreement

1. Generally.
    a. G.S. 52B-7 sets forth the conditions that a party must prove to avoid enforcement of a premarital agreement. These conditions generally concern inequitable conditions surrounding the execution of the agreement, such as voluntariness and unconscionability. [*Huntley v. Huntley,* 140 N.C. App. 749, 538 S.E.2d 239 (2000).]
    b. Premarital agreements, like postmarital agreements, are generally formed within a confidential relationship. "Accordingly, transactions between such parties . . . must be free of fraud, undue influence and duress, and . . . must also be fair and reasonable." [*Kornegay v. Robinson,* 176 N.C. App. 19, 29, 625 S.E.2d 805, 811 (Tyson, J., dissenting) (quoting *Howell v. Landry,* 96 N.C. App. 516, 524, 386 S.E.2d 610, 615 (1989)), *rev'd per curiam for reasons stated in dissenting opinion*, 360 N.C. 640, 637 S.E.2d 516 (2006).] See Section IV.I.4, below, for more on defenses related to execution of an agreement.
    c. Specific performance may be used to enforce a premarital agreement. [*Muchmore v. Trask*, 192 N.C. App. 635, 666 S.E.2d 667 (2008), *review improvidently allowed*, 363 N.C. 742, 686 S.E.2d 151 (2009); *Blackburn v. Bugg*, 723 S.E.2d 585 (N.C. Ct. App. 2012) (**unpublished**) (specific performance ordered of alimony provisions in a premarital agreement).]
    d. In addition to proving breach of contract, a party seeking specific performance must allege and prove that the remedy at law is inadequate, the defendant can perform some or all of his or her obligations, and the moving party has performed his or her obligations. [*Reeder v. Carter*, 226 N.C. App. 270, 740 S.E.2d 913 (2013) (citing 3 Lee's North Carolina Family Law § 14.35 (5th ed. 2002), and *Cavenaugh v. Cavenaugh*, 317 N.C. 652, 347 S.E.2d 19 (1986)).]
    e. An order of specific performance is enforceable by contempt. [*Blackburn v. Bugg*, 723 S.E.2d 585 (N.C. Ct. App. 2012) (**unpublished**) (specific performance ordered of

alimony provisions in a premarital agreement; in later proceeding for contempt for failure to increase alimony annually based on Consumer Price Index (CPI), as provided in the agreement, trial court properly admitted into evidence computer printouts from a U.S. Department of Labor website showing CPI increases, which were used to show amount of CPI increases owed by defendant; noting that CPI information set forth in the computer printouts was public information readily available and subject to judicial notice).] For more on specific performance, see Section IV.I.2.g, below.

2. A premarital agreement is not enforceable if a party proves that
   a. The party did not execute the agreement voluntarily or
   b. The agreement was unconscionable when it was executed and, before execution of the agreement, the party
      i. Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
      ii. Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
      iii. Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party. [G.S. 52B-7(a).]
3. Voluntariness.
   a. Where wife admitted both in the premarital agreement and in a deposition that she voluntarily signed the agreement, there was no genuine issue of material fact as to voluntariness. [*Kornegay v. Robinson,* 360 N.C. 640, 637 S.E.2d 516 (rejecting wife's argument that execution not voluntary because she lacked legal counsel or an opportunity to obtain counsel before signing the agreement, because she misunderstood agreement's application upon husband's death, because she signed agreement within minutes of its presentation without reading it, and because the agreement was "unfair" based upon the current value of husband's assets), *rev'g per curiam for reasons stated in dissenting opinion in* 176 N.C. App. 19, 625 S.E.2d 805 (2006) (Tyson, J., dissenting).]
4. Failure to disclose.
   a. Before enactment of the Uniform Act, the failure to fully disclose one's financial status was grounds for invalidating an antenuptial agreement. [*Tiryakian v. Tiryakian,* 91 N.C. App. 128, 370 S.E.2d 852 (1988) (premarital agreement entered into before effective date of the Uniform Act) (opinion recognized the confidential relationship of persons about to marry and the corresponding affirmative duty on the part of each prospective spouse to fully disclose his or her financial status).]
   b. Wife unequivocally waived the right to any additional disclosure of her husband's assets pursuant to premarital agreement that provided that each party "acknowledges that the other has made a full and fair disclosure . . . [of] incomes, assets, debts, liabilities, and responsibilities[,] . . . [is] informed as to, and has adequate knowledge of, all real and personal property owned and possessed by the other party[, and] . . . [is] satisfied with the extent of their disclosure. . . ." [*Player v. Player,* 178 N.C. App. 562, 631

S.E.2d 893 (2006) (**unpublished**) (not paginated on Westlaw) (summary judgment in favor of husband affirmed on constructive fraud claim).]

c. G.S. 52B-7 appears to require that an agreement be unconscionable before it can be invalidated due to a failure to disclose. [*See Kornegay v. Robinson*, 176 N.C. App. 19, 32, 625 S.E.2d 805, 813 (Tyson, J., dissenting) (wife's alleged lack of knowledge about husband's assets at time premarital agreement was executed did not create a genuine issue of material fact when the agreement stated and wife admitted that she voluntarily signed the agreement, that the agreement was fair and equitable, and that it was not the result of duress or undue influence; "the fact that the decedent's assets grew during the marriage does not make the agreement unconscionable or unfair"), *rev'd per curiam for reasons stated in dissenting opinion*, 360 N.C. 640, 637 S.E.2d 516 (2006).]

d. For discussion on the failure to disclose in the context of a separation agreement, see Section IV.I.4.h, below.

5. Unconscionability.

a. A premarital agreement, whose terms applied equally to both parties and recognized that both parties had children from previous marriages and possessed separate property, was not substantively unconscionable when it waived all marital rights, including intestacy rights, but permitted each spouse to make specific devises, bequests, and legacies to the other. [*Kornegay v. Robinson,* 360 N.C. 640, 637 S.E.2d 516, *rev'g per curiam for reasons stated in dissenting opinion in* 176 N.C. App. 19, 625 S.E.2d 805 (2006) (Tyson, J., writing dissenting opinion but concurring with majority opinion that agreement at issue was not unconscionable).]

6. Statute of limitations; other defenses.

a. Any statute of limitations applicable to an action asserting a claim for relief under a premarital agreement is tolled during the marriage of the parties. [G.S. 52B-9.]

b. Equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party. [G.S. 52B-9.]

II. Postnuptial Agreements

A. Generally

1. A postnuptial agreement is an agreement between spouses entered into during marriage.

2. There are two broad categories of postnuptial agreements.

a. Contracts made during the marriage and before separation and *not* in contemplation of separation. Authorized by G.S. 52-10 and 50-20(d) (these contracts can address property rights but cannot address support rights, as discussed below) and

b. Contracts made during separation or in anticipation of imminent separation (these contracts include separation agreements and agreements entered into in contemplation of reconciliation and can address both property and support rights, as provided below).

3. There are two categories of contracts made during separation or in anticipation of separation.
   a. Separation agreements are contracts entered into with the intent to live separate and apart and entered for the purpose of settling rights, obligations, and issues arising from the marriage. [Authorized by G.S. 52-10.1 and 50-20(d).]
   b. Other contracts between married spouses entered during separation not based on the intent to live separate and apart; most common are agreements in anticipation of reconciliation. [Authorized by G.S. 52-10(a1) and 50-20(d).]

B. Requisites and Validity of Postnuptial Agreements

1. Statutes authorizing postnuptial agreements.
   a. G.S. 52-10(a).
      i. G.S. 52-10(a):
         (a) Validates contracts between husbands and wives that are not inconsistent with public policy;
         (b) Allows married persons, or persons of "full age" about to be married, to agree to release all property rights arising from the marriage, with or without consideration; and
         (c) Requires that contracts affecting real estate, or income thereof for more than three years, entered during the marriage be in writing and acknowledged by both parties before a certifying officer. [*See Kelley v. Kelley*, 798 S.E.2d 771 (N.C. Ct. App. 2017) (failure to comply with acknowledgment required by G.S. 52-10.1 rendered agreement void *ab initio*).]
      ii. G.S. 52-10(a) authorizes contracts that completely settle property rights arising out of marriage. [*Small v. Small,* 93 N.C. App. 614, 379 S.E.2d 273 (1989) (citing *Blount v. Blount*, 72 N.C. App. 193, 323 S.E.2d 738 (1984)), *review denied*, 313 N.C. 506, 329 S.E.2d 389 (1985).]
      iii. Except as allowed by G.S. 52-10(a1), discussed in Section II.B.1.c, below, agreements entered into under G.S. 52-10 cannot affect support rights, only rights in property. [*Eubanks v. Eubanks,* 273 N.C. 189, 195, 159 S.E.2d 562, 567 (1968) (reciting holding in *Motley v. Motley,* 255 N.C. 190, 193, 120 S.E. 2d 422, 424 (1961), that G.S. 52-10 relates to the release of an interest in property, but "has no bearing whatsoever" on the right of a party to support); *Williams v. Williams,* 120 N.C. App. 707, 463 S.E.2d 815 (1995) (citing *Eubanks*), *aff'd per curiam,* 343 N.C. 299, 469 S.E.2d 553 (1996); *Sluder v. Sluder*, 198 N.C. App. 401, 679 S.E.2d 435 (2009) (citing *Eubanks*) (agreement executed pursuant to G.S. 52-10 addresses rights in property and may be entered into at any time during marriage).]
      iv. A contract under G.S. 52-10 may be entered into at any time during marriage, not only in contemplation of separation or divorce. [*Williams v. Williams,* 120 N.C. App. 707, 463 S.E.2d 815 (1995), *aff'd per curiam,* 343 N.C. 299, 469 S.E.2d 553 (1996).]

b. G.S. 50-20(d).

i. G.S. 50-20(d) provides that before, during, or after marriage, the parties may provide by agreement, executed and acknowledged in accordance with G.S. 52-10 and 52-10.1, for the distribution of marital or divisible property, or both. [For a case interpreting G.S. 50-20(d), see *Buffington v. Buffington,* 69 N.C. App. 483, 488, 317 S.E.2d 97, 100 (1984) (parties may enter into a written property settlement agreement "[b]efore, during or after marriage" so long as the agreement is duly executed and acknowledged in accordance with G.S. 52-10 and 52-10.1 or is valid in the jurisdiction where executed; by enacting G.S. 50-20(d), "the General Assembly manifested a clear intent to change the former rule which required the actual separation of the parties to a marriage . . . for a property settlement to be effective between spouses").]

ii. A postnuptial agreement may bar equitable distribution (ED) even if executed before adoption of the Equitable Distribution Act. [*Small v. Small,* 93 N.C. App. 614, 379 S.E.2d 273 (right to ED may be released even if release was executed before the adoption of G.S. 50-20(d)), *review denied*, 325 N.C. 273, 384 S.E.2d 519 (1989).]

iii. Separation agreements that waive all property rights bar ED. [*See Blount v. Blount*, 72 N.C. App. 193, 323 S.E.2d 738 (1984) (general relinquishment of all property rights in a 1976 separation agreement was a bar to ED even though the agreement did not list property owned by husband; trial court's determination that a 1962 premarital agreement did not bar ED, while correct, did not preclude determination that 1976 separation agreement barred ED), *review denied*, 313 N.C. 506, 329 S.E.2d 389 (1985); *Hartman v. Hartman,* 80 N.C. App. 452, 343 S.E.2d 11 (1986) (general waivers in separation agreement were sufficient to bar ED even though agreement made no reference to specific real property); *Porter v. Porter,* 217 N.C. App. 629, 720 S.E.2d 778 (2011) (agreement executed in 1988, in which parties relinquished and released all rights in each other's real and personal property, barred ED even though parties reconciled following execution of the agreement and lived together until their final separation in 2005; 1988 agreement, incorporated in 2007 divorce judgment, provided that it remained in effect if the parties reconciled unless otherwise provided by the parties in writing after reconciliation).]

iv. Agreements intended by the parties to be a full and final distribution of all property bar ED. [*See* G.S. 50-20(d) (properly executed agreements providing for distribution of marital or divisible property shall be binding on the parties); *Hagler v. Hagler,* 319 N.C. 287, 354 S.E.2d 228 (1987) (comprehensive property settlement provisions in separation agreement established parties' intent to fully dispose of their respective property rights and were sufficient to bar ED even though agreement did not mention ED); *Anderson v. Anderson,* 145 N.C. App. 453, 550 S.E.2d 266 (2001) (agreement clearly intended to be a full settlement even though it did not divide husband's military pension).]

v. Agreements regarding property entered during the marriage are valid and enforceable even if not entered in contemplation of separation. [*See Dawbarn v. Dawbarn,* 175 N.C. App. 712, 625 S.E.2d 186 (2006) (transfer of property by

husband to wife during the marriage pursuant to terms of a postnuptial contract was a good faith effort on husband's part to stay in, and continue to work on, the marriage after his admission of an extramarital affair and, therefore, was valid).]

c. G.S. 52-10(a1).

i. Effective June 19, 2013, G.S. 52-10(a1) specifies that a contract between a husband and wife made during a period of separation to waive, release, or establish rights and obligations to postseparation support, alimony, or spousal support is valid and not inconsistent with public policy.

ii. Any such agreement made during separation relating to support rights will remain valid following a period of reconciliation and subsequent separation if

(a) The contract is in writing;

(b) The provision waiving the rights or obligations is clearly stated in the contract; and

(c) The contract was acknowledged by both parties before a certifying officer. [G.S. 52-10(a1). *See Kelley v. Kelley*, 798 S.E.2d 771 (N.C. Ct. App. 2017) (failure to comply with acknowledgment required by G.S. 52-10.1 rendered agreement void *ab initio*).]

d. G.S. 52-10.1.

i. G.S. 52-10.1 authorizes married couples to execute separation agreements not inconsistent with public policy. See Section II.B.2, below.

ii. A separation agreement is a contract entered with the intent to live separate and apart forever. [*Williams v. Williams,* 120 N.C. App. 707, 463 S.E.2d 815 (1995) (agreement regarding reconciliation executed during separation was not a separation agreement), *aff'd per curiam,* 343 N.C. 299, 469 S.E.2d 553 (1996).]

iii. A separation agreement must be in writing and acknowledged by both parties before a certifying officer as defined in G.S. 52-10(b). Such certifying officer may not be a party to the contract. [G.S. 52-10.1. *See Kelley v. Kelley*, 798 S.E.2d 771 (N.C. Ct. App. 2017) (failure to comply with acknowledgment required by G.S. 52-10.1 rendered agreement void *ab initio*).]

iv. While property settlement agreements can be executed at any time before, during, or after marriage, a separation agreement is valid only if executed while the parties are separated or planning to live separate and apart. [See Section IV.C.1.a, below; *Buffington v. Buffington,* 69 N.C. App. 483, 488, 317 S.E.2d 97, 100 (1984) (by enacting G.S. 50-20(d), "the General Assembly manifested a clear intent to change the former rule which required the actual separation of the parties to a marriage . . . for a property settlement to be effective between spouses").]

2. Agreements must not violate public policy.

a. A party cannot waive alimony in a postnuptial agreement unless it is a separation agreement or, for agreements entered on or after June 19, 2013, unless the waiver is made in an agreement executed during a period of separation pursuant to G.S. 52-10(a1).

i. An agreement between a husband and wife living together and not contemplating imminent separation that purports to quantify or limit the duty of support is void as against public policy. [*Gray v. Snyder,* 704 F.2d 709 (4th Cir. 1983) (under North Carolina law, spouses must separate or intend to separate immediately to execute valid support waiver under G.S. 52-10.1); *Motley v. Motley,* 255 N.C. 190, 120 S.E.2d 422 (1961) (agreement purporting to waive alimony was executed before marriage, but opinion discusses duty of support that comes into existence the "moment" parties are married); *Williams v. Williams,* 120 N.C. App. 707, 463 S.E.2d 815 (1995) (agreement executed while parties were living separate and apart but reciting that parties were considering a resumption of marital relations and providing for wife's support throughout the marriage and upon subsequent separation was a promise or a contract looking to the future separation of a husband and wife and was void against public policy), *aff'd per curiam,* 343 N.C. 299, 469 S.E.2d 553 (1996). *See also In re Estate of Tucci,* 94 N.C. App. 428, 380 S.E.2d 782 (1989) (recognizing that the supreme court in *Motley* established as public policy that married parties may not shirk their spousal duties of support and alimony and yet live together as a married couple), *aff'd per curiam,* 326 N.C. 359, 388 S.E.2d 768 (1990).]

b. While a contract executed while parties are living together or while separated which attempts to waive or quantify support rights and obligations while the parties live together is void as against public policy, [See Section II.B.2.a.i, immediately above.] G.S. 52-10(a1) allows contracts executed during a period of separation to waive or quantify support rights for any future separation. These agreements, made in contemplation of reconciliation rather than separation, can define support rights and obligations of the parties following any subsequent separation. This provision applies only to contracts entered on or after June 19, 2013.

c. The parties may by property settlement divide their real and personal property at any time, before, during or after marriage without violating public policy as long as the agreement does not encourage the parties to separate or provide an inducement to end the marriage.

i. In general, public policy "is not offended by permitting . . . spouses to execute a complete settlement of all spousal interests in each other's real and personal property and yet live together." [*Dawbarn v. Dawbarn,* 175 N.C. App. 712, 712–13, 625 S.E.2d 186, 188 (2006) (quoting *In re Estate of Tucci,* 94 N.C. App. 428, 438, 380 S.E.2d 782, 788 (1989)).]

ii. Postnuptial agreement executed during the marriage that transferred property to wife upon signing did not encourage the parties to separate and thus did not violate public policy and was enforceable. [*Dawbarn v. Dawbarn,* 175 N.C. App. 712, 625 S.E.2d 186 (2006) (transfer of property worth approximately $850,000 eight years before separation was intended as a good faith effort on the husband's part to stay in, and continue to work on, the marriage after his admission of an extramarital affair and therefore was valid).]

iii. However, when an agreement provides an economic incentive to leave the marriage, it is void as against public policy. [*Dawbarn v. Dawbarn,* 175 N.C. App. 712, 625 S.E.2d 186 (2006) (citing *Matthews v. Matthews,* 2 N.C. App. 143, 162

S.E.2d 697 (1968)). *See also Williams v. Williams,* 120 N.C. App. 707, 463 S.E.2d 815 (1995) (recognizing that contracts between spouses that conflict with public policy are void), *aff'd per curiam*, 343 N.C. 299, 469 S.E.2d 553 (1996).]

iv. Postnupital agreement wherein husband promised that if he ever left wife, everything he had would be hers was void as against public policy for providing an economic inducement to leave the marriage. [*Matthews v. Matthews,* 2 N.C. App. 143, 162 S.E.2d 697 (1968) (partition action).]

v. Postnuptial agreement, executed three years after separation and reciting that parties were considering reconciliation, contained paragraph that violated public policy by providing for wife's receipt of alimony during reconciliation and upon a subsequent separation. [*Williams v. Williams,* 120 N.C. App. 707, 716, 463 S.E.2d 815, 821 (1995) (provision was "a promise looking towards a future separation" and discouraged wife from putting forth a concerted effort to maintain the marriage because she would continue to receive alimony regardless of whether the parties separated following reconciliation), *aff'd per curiam*, 343 N.C. 299, 469 S.E.2d 553 (1996).]

d. Contracts providing that a reconciliation will not affect the terms of a property settlement are not contrary to law or public policy. [*Morrison v. Morrison*, 102 N.C. App. 514, 402 S.E.2d 855 (1991).] For more on reconciliation, see Section IV.H, below. For reconciliation agreements, see Section III, below.

C. Enforcement of a Postnuptial Agreement

1. A postnuptial agreement is enforced in the same manner as any other contract. For discussion of enforcement of a separation agreement, see Section IV.I, below.

2. "[A] postnuptial agreement, like any other contract, is not enforceable if it is 'unconscionable or procured by duress, coercion, or fraud.' " [*Dawbarn v. Dawbarn,* 175 N.C. App. 712, 716, 625 S.E.2d 186, 190 (2006) (quoting *Knight v. Knight*, 76 N.C. App. 395, 398, 333 S.E.2d 331, 333 (1985)) *See Holton v. Holton,* 813 S.E.2d 649, 656 (N.C. Ct. App. 2018) (plaintiff's complaint was sufficient to state a claim for rescission of the contract where plaintiff alleged that agreement was "unconscionable" and that she was "on post-surgery medications that affected her memory and reasoning" at the time of execution). See discussion on defenses to enforcement related to execution of a separation agreement in Section IV.I.4, below.]

3. Three-year statute of limitation on claims of fraud, duress, and undue influence began in this case to run at the time the agreement was executed, because plaintiff was aware at the time of defendant's threat to sue the person with whom plaintiff had had an affair. When this was some nine years before plaintiff filed suit to set aside the agreement, those claims were barred and summary judgment in defendant's favor affirmed. [*Dawbarn v. Dawbarn,* 175 N.C. App. 712, 625 S.E.2d 186 (2006). *See Holton v. Holton,* 813 S.E.2d 649 (N.C. Ct. App. 2018) (claim for rescission of contract has a three-year statute of limitation).]

III. Reconciliation Agreements

A. Generally

1. Reconciliation agreements are a form of postnuptial agreement executed by married persons during a period of separation with the intent to resume the marital relationship.
2. Both G.S. 52-10(a1) and 50-20(d) authorize reconciling spouses to contract regarding property rights unless that contract contains provisions which violate public policy. Regarding public policy, see *Matthews v. Matthews*, 2 N.C. App. 143, 162 S.E.2d 697 (1968) (postnuptial agreement wherein husband promised that if he ever left wife, everything he had would be hers was void as against public policy for providing an economic inducement to leave the marriage). *But cf. Dawbarn v. Dawbarn,* 175 N.C. App. 712, 625 S.E.2d 186 (2006) (actual transfer of property by husband to wife during the marriage pursuant to terms of a postnuptial contract was a good faith effort on husband's part to stay in, and to continue to work on, the marriage after his admission of an extramarital affair and, therefore, was valid).
3. In *Williams v. Williams,* 120 N.C. App. 707, 463 S.E.2d 815 (1995), *aff'd per curiam,* 343 N.C. 299, 469 S.E.2d 553 (1996), the court held that an agreement, wherein the parties indicated an intent to reconcile and agreed that if they should separate in the future husband would pay wife alimony in amount of $500 per month, was void as against public policy. However, for contracts entered into on or after June 19, 2013, parties who are separated but contemplating reconciliation may provide for support rights or for the waiver of support rights that will apply upon the occasion of any future separation. [G.S. 52-10(a1).] G.S. 52-10(a1) does not authorize agreements regarding support rights and obligations while the parties live together as husband and wife. [*See In re Estate of Tucci,* 94 N.C. App. 428, 380 S.E.2d 782 (1989) (recognizing that the supreme court in *Motley v. Motley,* 255 N.C. 190, 120 S.E.2d 422 (1961), established as public policy that married parties may not shirk their spousal duties of support and alimony and yet live together as a married couple), *aff'd per curiam,* 326 N.C. 359, 388 S.E.2d 768 (1990).]
4. Effective June 19, 2013, G.S. 52-10(a1) specifies that a contract between a husband and wife made during a period of separation to waive, release, or establish rights and obligations to postseparation support, alimony, or spousal support is valid and not inconsistent with public policy.
    a. Any such agreement made during separation relating to support rights will remain valid following a period of reconciliation and subsequent separation if:
        i. The contract is in writing;
        ii. The provision waiving the rights or obligations is clearly stated in the contract; and
        iii. The contract was acknowledged by both parties before a certifying officer. [G.S. 52-10(a1). *See Kelley v. Kelley*, 798 S.E.2d 771 (N.C. Ct. App. 2017) (failure to comply with acknowledgment required by G.S. 52-10.1 rendered agreement void *ab initio*).]

5. *See* Cheryl Howell, *Does North Carolina Law Allow Reconciliation Agreements?* UNC Sch. of Gov't: On the Civil Side Blog (Nov. 11, 2016), https://civil.sog.unc.edu/does-north-carolina-law-allow-reconciliation-agreements.

IV. Separation Agreements

A. G.S. 52-10.1

1. While G.S. 52-10(a) allows married persons to contract about property rights at any time during marriage, [See discussion in Section II.B.1, above.] G.S. 52-10.1 authorizes married persons to execute separation agreements not inconsistent with public policy, provided that the agreement is in writing and acknowledged by both parties in front of a certifying officer. [*Sluder v. Sluder,* 198 N.C. App. 401, 679 S.E.2d 435 (2009) (agreement governed by G.S. 52-10.1 that was not acknowledged by either party before a certifying officer was invalid and not enforceable as a matter of law).]
2. A separation agreement is a contract between spouses wherein the parties agree to live separate and apart and to provide for the settlement of issues arising out of the marriage. A separation agreement must be executed while the parties are separated or when they plan to separate shortly thereafter. [*See Stegall v. Stegall,* 100 N.C. App. 398, 397 S.E.2d 306 (1990) (a "pure" separation agreement is a contract wherein the husband and wife agree to live apart and which generally provides for support for the dependent spouse and minor children), *review denied,* 328 N.C. 274, 400 S.E.2d 461 (1991); *Sluder v. Sluder,* 198 N.C. App. 401, 679 S.E.2d 435 (2009) (citing *Williams v. Williams,* 120 N.C. App. 707, 463 S.E.2d 815 (1995)) (agreements between spouses under G.S. 52-10.1 concern support rights made in contemplation of separation); see Section IV.C.1.a, below, for more on separation agreements.]
3. Separation agreements serve the salutary purpose of enabling spouses to come to a mutually acceptable settlement of their financial affairs, making them favored in this state. [*Hagler v. Hagler,* 319 N.C. 287, 354 S.E.2d 228 (1987).]
4. An agreement that contained unambiguous language that declared that the parties were not contemplating living "separate and apart forever" but, rather, were "on the verge of resuming marital relations" was not a separation agreement under G.S. 52.10.1 but was a marital contract under G.S. 52-10. [*Williams v. Williams,* 120 N.C. App. 707, 711, 463 S.E.2d 815, 818 (1995), *aff'd per curiam,* 343 N.C. 299, 469 S.E.2d 553 (1996).]
5. Any waivers or agreements made during the marriage concerning the right of spousal support must be made in the context of a separation agreement and executed pursuant to G.S. 52-10.1 or made in a contract executed during a period of separation pursuant to G.S. 52-10(a1). [See discussion of "reconciliation agreements" in Section III, above; *Napier v. Napier,* 135 N.C. App. 364, 520 S.E.2d 312 (1999) (citing *Williams v. Williams,* 120 N.C. App. 707, 463 S.E.2d 815 (1995), *aff'd per curiam,* 343 N.C. 299, 469 S.E.2d 553 (1996)) (the validity of an agreement as it relates to the waiver of alimony is not to be judged in the context of G.S. 52-10, even though the "right of support" is in the nature of a property right), *review denied,* 351 N.C. 358, 543 S.E.2d 132 (2000).] See Section IV.F.2, below, for more on what constitutes a valid waiver of alimony.

6. Separation agreements cannot be orally modified. [*Jones v. Jones,* 162 N.C. App. 134, 590 S.E.2d 308 (2004) (citing *Greene v. Greene*, 77 N.C. App. 821, 336 S.E.2d 430 (1985)) (an attempt to orally modify a separation agreement fails to meet the formalities and requirements of G.S. 52-10.1).]

B. Jurisdiction

1. Subject matter jurisdiction.
   a. The district and superior courts have original concurrent jurisdiction. [G.S. 7A-240.]
   b. The district court is the proper court for actions to enforce or recover for breach of a separation agreement or property settlement agreement, regardless of the amount in controversy. [G.S. 7A-244. *See Small v. Parker,* 184 N.C. App. 358, 646 S.E.2d 658 (2007) (superior court did not err in transferring case to district court after setting aside consent order in case regarding the enforcement of a separation agreement).]
   c. The district court lacked subject matter jurisdiction over a declaratory judgment action to interpret a distributive award provision in a separation and property settlement agreement because that agreement had been incorporated into a judgment. [*Fucito v. Francis*, 175 N.C. App. 144, 622 S.E.2d 660 (2005) (while declaratory judgment statute cannot be used to interpret a court order, the trial court may construe or interpret the provision as part of an action for contempt). *See also Williams v. Williams,* 120 N.C. App. 707, 711, 463 S.E.2d 815, 818 (1995) (agreement stating that husband and wife were living separate and apart but that they "may desire" and were "considering the resumption of cohabitation", was considered to be a declaration that the parties were not contemplating living separate and apart forever; it was **not** a separation agreement), *aff'd per curiam,* 343 N.C. 299, 469 S.E.2d 553 (1996).]
   d. The trial court's consideration of G.S. 50-20 when it construed the provisions of an incorporated separation agreement did not convert the contempt proceeding into an action for equitable distribution, which the parties had waived, and did not divest the court of subject matter jurisdiction. [*Fucito v. Francis*, 184 N.C. App. 377, 646 S.E.2d 441 (2007) (**unpublished**), *review denied,* 362 N.C. 234, 659 S.E.2d 440 (2008).]
   e. A district court lacks jurisdiction to modify an unincorporated separation agreement. [*DeGree v. DeGree,* 72 N.C. App. 668, 325 S.E.2d 36, *review denied,* 313 N.C. 598, 330 S.E.2d 607 (1985); *Danai v. Danai,* 166 N.C. App. 279, 603 S.E.2d 168 (2004) (**unpublished**) (not paginated on Westlaw) (citing *DeGree*) (lack of jurisdiction not cured by statement in separation agreement that "[t]his Agreement may be amended and modified in whole or in part . . . by order of a Court of competent jurisdiction").] See Section IV.G.1.a, below, for more on modification of an unincorporated agreement.
2. Personal jurisdiction.
   a. Long-arm statute G.S. 1-75.4(12), entitled "Marital Relationship," applies to any action under G.S. Chapter 50 that arises out of the marital relationship within North Carolina, notwithstanding subsequent departure from the state, if the other party to the marital relationship continues to reside in this state.
   b. Long-arm statute G.S. 1-75.4(5)(c) grants in personam jurisdiction over a nonresident defendant in an action for arrearages due under a separation agreement entered

into in North Carolina. [*Pope v. Pope,* 38 N.C. App. 328, 248 S.E.2d 260 (1978) (the statute governs separation agreements as "local contracts" and money payments are "things of value" within the meaning of G.S. 1-75.4(5)(c)).]

c. The exercise of statutory personal jurisdiction must meet the test of constitutional due process, meaning that the defendant must have "minimum contacts" with North Carolina. [*Miller v. Kite,* 313 N.C. 474, 329 S.E.2d 663 (1985).]

d. Factors to consider when determining whether a defendant has sufficient minimum contacts with North Carolina.

i. Quantity of defendant's contacts with the state;

ii. The nature and quality of those contacts;

iii. The source and connection of the cause of action to the contacts;

iv. The interest of North Carolina in litigating the matter;

v. The convenience of the parties; and

vi. The interests of, and fairness to, the parties. [*Shaner v. Shaner,* 216 N.C. App. 409, 717 S.E.2d 66 (2011) (citing *Filmar Racing, Inc. v. Stewart,* 141 N.C. App. 668, 672, 541 S.E2d 733, 737 (2001)).]

e. Service on defendant within the state. [G.S. 1-75.4(1)a.]

i. It is not necessary to apply the minimum contacts test of due process set forth in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154 (1945), and later cases when the defendant is personally served in the forum state. [*Lockert v. Breedlove*, 321 N.C. 66, 361 S.E.2d 581 (1987); *Jenkins v. Jenkins,* 89 N.C. App. 705, 367 S.E.2d 4 (1988) (court need not determine minimum contacts where nonresident defendant was served with process while temporarily in North Carolina for a brief visit related to his employment).]

C. Form of the Agreement

1. Separation agreements and property settlement agreements contrasted.

a. Separation agreements.

i. A "pure" separation agreement is a contract in which the husband and wife agree to live apart and is executed while the parties are separated or are planning to separate "shortly thereafter." [*Stegall v. Stegall,* 100 N.C. App. 398, 404, 397 S.E.2d 306, 309 (1990), *review denied,* 328 N.C. 274, 400 S.E.2d 461 (1991).]

ii. The heart of a separation agreement is the parties' intention to live separate and apart forever. [*In re Estate of Adamee,* 291 N.C. 386, 230 S.E.2d 541 (1976).]

iii. Separation agreements are void as against public policy unless the parties are living apart at the time of execution or they plan to separate shortly thereafter. [*Stegall v. Stegall*, 100 N.C. App. 398, 403, 397 S.E.2d 306, 309 (1990) (stating North Carolina's traditional view that "separation agreements are void as against public policy unless the parties are living apart at the time the document is executed or they plan to separate shortly thereafter"), *review denied*, 328 N.C. 274, 400 S.E.2d 461 (1991); *Newland v. Newland*, 129 N.C. App. 418, 498 S.E.2d 855 (1998) (citing *Stegall*) (separation agreement valid if executed after separation or

when separation is imminent); *King v. King*, 114 N.C. App. 454, 442 S.E.2d 154 (1994) (citing *Morrison v. Morrison,* 102 N.C. App. 514, 402 S.E.2d 855 (1991)) (parties must be separated or planning to separate immediately); *In re Estate of Tucci*, 94 N.C. App. 428, 380 S.E.2d 782 (1989) (appears that public policy established under *Motley v. Motley,* 255 N.C. 190, 120 S.E.2d 422 (1961), will not permit parties to enforce the separation provisions of the agreement, i.e., support and alimony, and yet live together as a married couple), *aff'd per curiam,* 326 N.C. 359, 388 S.E.2d 768 (1990); 3 Lee's North Carolina Family Law § 14.9b (5th ed. 2002) (North Carolina law continues to require the parties to be separated or have the intent to separate immediately as a condition of enforcing the provisions on spousal support in separation agreements).]

iv. A separation agreement entered into while the parties were still living together was valid even though the parties continued to live in the same house for thirty-one days after execution of the agreement. [*Newland v. Newland,* 129 N.C. App. 418, 498 S.E.2d 855 (1998) (agreement provided that parties planned to separate "substantially contemporaneously" with execution of the agreement; after execution wife requested additional time to find a new residence, to which husband agreed; parties did not hold themselves out as husband and wife during that time; there were no attempts at reconciliation; and wife began to pack her belongings).]

v. Reconciliation of the parties voids the executory provisions of a separation agreement. [*Newland v. Newland,* 129 N.C. App. 418, 498 S.E.2d 855 (1998) (citing *In re Estate of Adamee,* 291 N.C. 386, 230 S.E.2d 541 (1976)).] This is so because living separate and apart is an essential part of the consideration supporting a separation agreement, and if that consideration fails, the agreement is void and unenforceable. [*Stegall v. Stegall,* 100 N.C. App. 398, 397 S.E.2d 306 (1990) (citing *Small v. Small,* 93 N.C. App. 614, 379 S.E.2d 273 (1989)), *review denied,* 328 N.C. 274, 400 S.E.2d 461 (1991).] See Section IV.H, below, for more on reconciliation. Contracts which provide that reconciliation will not affect the terms of a separation agreement violate public policy. [*In re Estate of Adamee,* 291 N.C. 386, 230 S.E.2d 541 (1976).] For reconciliation agreements, see Section III, above.

b. Property settlement agreements.

i. A property settlement agreement provides for a division of real and personal property held by the spouses. [*Stegall v. Stegall,* 100 N.C. App. 398, 397 S.E.2d 306 (1990), *review denied,* 328 N.C. 274, 400 S.E.2d 461 (1991). See discussion in Section II.B, above.]

ii. Parties may enter into a property settlement of their marital or divisible property at any time before, during, or after marriage, provided the written agreement is duly executed and acknowledged in accordance with G.S. 52-10 and 52-10.1. [G.S. 50-20(d).]

iii. Parties may enter into a property settlement at any time, regardless of whether the parties contemplate separation or divorce. [*Williams v. Williams,* 120 N.C.

App. 707, 463 S.E.2d 815 (1995), *aff'd per curiam,* 343 N.C. 299, 469 S.E.2d 553 (1996).]

iv. Because G.S. 50-20(d) allows parties to enter into property settlements at any time during or after marriage, a property settlement normally is not affected by a resumption of marital relations. Reconciliation rescinds a property settlement only if the settlement depended on the parties living separate and apart. [*Small v. Small,* 93 N.C. App. 614, 621, 379 S.E.2d 273, 277 (1989) (stating that resumption of marital relations does not necessarily rescind a property settlement "which might with equal propriety have been made had no separation been contemplated"). *But see Stegall v. Stegall,* 100 N.C. App. 398, 397 S.E.2d 306 (1990) (recognizing that the rationale in *Small* applies when the agreement involved is a *pure* property settlement but criticizing the *Small* decision for failing to recognize that provisions of a separation agreement labeled "support" may, and often do, constitute reciprocal consideration for property provisions in the same agreement), *review denied,* 328 N.C. 274, 400 S.E.2d 461 (1991).]

v. If property settlement was "negotiated in 'reciprocal consideration' for the separation agreement," resumption of marital relations after the execution of a property settlement agreement rescinds the executory provisions of a property settlement. [*Newland v. Newland,* 129 N.C. App. 418, 420, 498 S.E.2d 855, 857 (1998) (citing *Morrison v. Morrison,* 102 N.C. App. 514, 518, 402 S.E.2d 855, 858 (1991)).] This is so whether the property settlement and the separation agreement are contained in one document or in separate documents. [*Morrison v. Morrison,* 102 N.C. App. 514, 402 S.E.2d 855 (1991).]

vi. See Section IV.H, below, for more on the effect of reconciliation. For reconciliation agreements, see Section III, above.

2. Incorporated and unincorporated separation agreements contrasted.

a. Incorporated agreements.

i. A separation agreement approved by the court is treated as a court-ordered judgment; the contract between the parties is superseded by the court's decree. [*Walters v. Walters,* 307 N.C. 381, 298 S.E.2d 338 (1983) (applicable to judgments entered on or after Jan. 11, 1983).] These agreements are often referred to as "incorporated" separation agreements.

ii. After *Walters v. Walters,* 307 N.C. 381, 298 S.E.2d 338 (1983), a separation agreement entered as a consent judgment is treated the same as a judgment entered after litigation. There is no difference between an agreement that the court adopted or simply signed off on as in other civil cases. [*Walters* (consent judgments are modifiable and enforceable in the same manner as any other judgment in a domestic relations case); *Fucito v. Francis,* 175 N.C. App. 144, 148, 622 S.E.2d 660, 663 (2005) (for practical purposes, in *Walters*, the court fashioned a "one-size fits all" rule applicable to incorporated settlement agreements in the area of domestic law, holding that when parties present their separation agreement to the court for approval, the agreement will no longer be considered a contract between the parties, but rather a court-ordered judgment).]

iii. As a court order, an incorporated separation agreement is modifiable and enforceable by the contempt powers of the court. [*Doub v. Doub*, 313 N.C. 169, 326 S.E.2d 259 (1985) (per curiam); *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983).] See Section IV.G, below, and Section IV.I, below, on modification and enforcement of separation agreements.

iv. When interpreting an incorporated agreement, the trial court is to use normal rules of construing contracts, including, if necessary, determining the intent of the parties. [*Holden v. Holden,* 214 N.C. App. 100, 715 S.E.2d 201 (2011) (citing *Fucito v. Francis,* 175 N.C. App. 144, 622 S.E.2d 660 (2005)).]

v. Once a separation agreement is incorporated into a judgment, the agreement:

(a) Loses its contractual nature, [*Cavenaugh v. Cavenaugh*, 317 N.C. 652, 347 S.E.2d 19 (1986).]

(b) Is superseded by the court's order, [*Mitchell v. Mitchell,* 270 N.C. 253, 154 S.E.2d 71 (1967); *Jones v. Jones,* 144 N.C. App. 595, 548 S.E.2d 565 (2001) (citing *Mitchell*).] and

(c) Ceases to exist as an independent enforceable contract. [*Mitchell v. Mitchell,* 270 N.C. 253, 154 S.E.2d 71 (1967).]

vi. Upon breach, a party to an incorporated agreement must use remedies for the enforcement of a judgment and may not sue for breach of contract, seek specific performance of the contract, or file an action for a declaratory judgment to allow the trial court to determine the terms of the agreement. [*Holden v. Holden*, 214 N.C. App. 100, 715 S.E.2d 201 (2011) (citing *Walters v. Walters,* 307 N.C. 381, 298 S.E.2d 338 (1983)).] For more on enforcement of an incorporated agreement, see Section IV.I.3, below.

b. Unincorporated agreements.

i. A separation agreement not approved or ratified by a court is an "unincorporated" separation agreement and is governed by the general principles of contract. [*Jackson v. Jackson,* 360 N.C. 56, 620 S.E.2d 862, *rev'g per curiam for reasons stated in dissenting opinion in* 169 N.C. App. 46, 610 S.E.2d 731 (2005) (Hunter, J., dissenting); *Dalton v. Dalton,* 164 N.C. App. 584, 596 S.E.2d 331 (2004) (citing *Rose v. Rose,* 108 N.C. App. 90, 422 S.E.2d 446 (1992)) (separation agreement not incorporated into a court judgment is a contract); *Rose* (unincorporated separation agreement is a contract between the parties).]

ii. An unincorporated separation agreement is enforceable and modifiable only under traditional contract principles. [*Long v. Long,* 160 N.C. App. 664, 588 S.E.2d 1 (2003) (citing *Jones v. Jones,* 144 N.C. App. 595, 548 S.E.2d 565 (2001)); *Gilmore v. Garner,* 157 N.C. App. 664, 580 S.E.2d 15 (2003) (construction and effect of unincorporated separation agreement ordinarily determined by the same rules that govern the interpretation of contracts generally); *Lasecki v. Lasecki*, 809 S.E.2d 296 (N.C. Ct. App. 2017) (trial court has no authority to modify an unincorporated separation agreement).] See Section IV.G, below, and Section IV.I, below, on modification and enforcement of separation agreements.

iii. Upon breach, a party to an unincorporated agreement may sue for breach of contract or file an action for a declaratory judgment to allow the trial court to determine the terms of the agreement. [*Lasecki v. Lasecki*, 809 S.E.2d 296 (N.C. Ct. App. 2017); *Holden v. Holden,* 214 N.C. App. 100, 715 S.E.2d 201 (2011) (citing *Walters v. Walters,* 307 N.C. 381, 298 S.E.2d 338 (1983)).]

iv. Enforcement of provisions in an unincorporated separation agreement does not transform the unincorporated agreement into a court order. [*See Condellone v. Condellone,* 129 N.C. App. 675, 501 S.E.2d 690 (despite the fact that two money judgments had been entered against husband for unpaid alimony, one of which ordered specific performance of the alimony provisions in the parties' separation agreement, the trial court had no authority under G.S. Chapter 50 to modify the alimony provisions based on changed circumstances because the agreement had not been incorporated), *review denied,* 349 N.C. 354, 517 S.E.2d 889 (1998); *Danai v. Danai,* 166 N.C. App. 279, 603 S.E.2d 168 (2004) (**unpublished**) (not paginated on Westlaw) (stating that "[w]ere we to find that a court's enforcement of a separation agreement by applying contract remedies acted as a *de facto* incorporation of an otherwise unincorporated agreement, we, in effect, would force a level of jurisdiction over separation agreements not desired or intended by the parties to the agreement and which would infringe on their freedom to contract"); *cf. Young v. Young,* 224 N.C. App. 388, 736 S.E.2d 538 (2012) (contempt order requiring husband to specifically perform an unincorporated provision of a separation agreement resulted in that provision being incorporated going forward).]

c. Trial court's authority to incorporate a separation agreement.

i. There is no requirement that a separation agreement be incorporated into a judgment, making it a court order. [*See Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983) (stating that "parties can avoid the burdens of a court judgment by not submitting their agreement to the court"); *Cavenaugh v. Cavenaugh*, 317 N.C. 652, 660 n.1, 347 S.E.2d 19, 24 n.1 (1986) (observing that if a party did not desire the results that accompany incorporation, the party was free not to enter into an agreement which provided that either party could request incorporation; also noting the possibility that a trial judge, in the exercise of his equitable power, may be able to refuse to incorporate a separation agreement into the divorce decree upon finding that incorporation would be inequitable); *Pataky v. Pataky*, 160 N.C. App. 289, 303–04 n.6, 585 S.E.2d 404, 414 n.6 (2003) (stating in a footnote that parties should be free to evaluate the relative advantages and disadvantages of incorporation), *aff'd per curiam in part, review dismissed in part,* 359 N.C. 65, 602 S.E.2d 360 (2004).]

ii. Incorporated separation agreements are consent judgments. [*Walters v. Walters,* 307 N.C. 381, 298 S.E.2d 338, 342 (1983) (consent judgments are modifiable and enforceable in the same manner as any other judgment in a domestic relations case).]

(a) The trial court's authority to enter a consent judgment depends on the unqualified consent of the parties at the time the judgment is entered. [*Rockingham Cty. Dep't Soc. Servs. ex rel. Walker v. Tate,* 202 N.C. App. 747,

689 S.E.2d 913 (2010); *Lalanne v. Lalanne,* 43 N.C. App. 528, 259 S.E.2d 402 (1979) (agreement reached between the parties four months before entry of the judgment could not support entry of judgment based on consent as there was no indication of the continuing consent of the parties).]

(b) There is no requirement with consent judgments, including consent judgments relating to property, support, and custody rights of married persons, that the parties, at the time of the entry of the judgment, actually appear in court and acknowledge to the court their continuing consent to the entry of the consent judgment. The parties' failure, however, to acknowledge their continuing consent to the proposed judgment before the judge who is to sign the consent judgment subjects the judgment to being set aside on the ground that the consent of the parties was not subsisting at the time of its entry. [*Rockingham Cty. Dep't Soc. Servs. ex rel. Walker v. Tate,* 202 N.C. App. 747, 689 S.E.2d 913 (2010) (citing *Tevepaugh v. Tevepaugh*, 135 N.C. App. 489, 521 S.E.2d 117 (1999)).]

(c) *But see Cavenaugh v. Cavenaugh,* 317 N.C. 652, 347 S.E.2d 19 (1984) (indicating that an agreement to incorporate within the contract itself may be sufficient to support incorporation); *Campbell v. Campbell,* 233 N.C. App. 598, 758 S.E.2d 903 (2014) (**unpublished**) (agreement to incorporate in 2009 mediated settlement agreement supported incorporation in 2010 divorce judgment).]

(d) A trial court probably has the authority to refuse to incorporate an agreement despite the consent of the parties if the court finds that incorporation would not be equitable. [*See Cavenaugh v. Cavenaugh,* 317 N.C. 652, 660 n.1, 347 S.E.2d 19, 24 n.1 (1984); *Buckingham v. Buckingham,* 134 N.C. App. 82, 516 S.E.2d 869 (the court should review a consent judgment to ensure that it does not contradict statutory, judicial, or public policy), *review denied,* 351 N.C. 100, 540 S.E.2d 353 (1999).]

(e) *See also* Cheryl Howell, *What's The Law About Incorporating Separation Agreements?* UNC Sch. of Gov't: On the Civil Side Blog (Feb. 6, 2015), http://civil.sog.unc.edu/whats-the-law-about-incorporating-separation-agreements.

D. Requisites and Validity of Separation Agreements

1. A separation agreement must be:
   a. Consistent with public policy;
   b. Executed by persons of full age about to be married or by married persons;
   c. In written form; and
   d. Acknowledged by both parties before a certifying officer. [G.S. 52-10(a).]
      i. If a separation agreement is improperly executed, it is void *ab initio.* [*Kelley v. Kelley,* 798 S.E.2d 771 (N.C. Ct. App. 2017); *Moore v. Moore,* 108 N.C. App. 656, 424 S.E.2d 673 (citing *Lawson v. Lawson,* 321 N.C. 274, 362 S.E.2d 269 (1987)), *aff'd per curiam,* 334 N.C. 684, 435 S.E.2d 71 (1993). *See Raymond v. Raymond,* 811 S.E.2d 168 (N.C. Ct. App. 2018) (where wife signed agreement, sent

agreement to husband who added provisions before he signed, and wife did not sign acknowledging the new additions, entire agreement was invalid).]

ii. A certificate of acknowledgment may be subsequently affixed to a separation agreement if the agreement was valid under the appropriate statute, no rights of creditors or third parties being involved. [*Lawson v. Lawson,* 321 N.C. 274, 362 S.E.2d 269 (1987) (where husband signed agreement in presence of a notary, acknowledgment was sufficient even if notary seal and certification were added later).]

iii. To impeach a notary's certification, there must be more than a bare allegation that no acknowledgment occurred. [*Moore v. Moore,* 108 N.C. App. 656, 424 S.E.2d 673 (notarization of husband's signature on a separation agreement not invalid due to a technical statutory violation where husband never asserted that the signature was not his), *aff'd per curiam*, 334 N.C. 684, 435 S.E.2d 71 (1993).]

2. In determining the validity of a separation agreement, a trial court is not required to make an independent determination as to whether the agreement is fair. [*Knight v. Knight,* 76 N.C. App. 395, 398, 333 S.E.2d 331, 333 (1985) (stating that a separation agreement should be "viewed today like any other bargained-for exchange between parties who are presumably on equal footing"); *King v. King,* 114 N.C. App. 454, 458, 442 S.E.2d 154, 157 (1994) (quoting *Hill v. Hill,* 94 N.C. App. 474, 480, 380 S.E.2d 540, 545 (1989)) (noting that "there is no requirement for the trial court to make an 'independent determination regarding the "fairness" of the substantive terms of the agreement, so long as the circumstances of execution were fair' "). *See also Lancaster v. Lancaster,* 138 N.C. App. 459, 530 S.E.2d 82 (2000) (in determining the validity of a separation agreement, the court of appeals is not required to make an independent determination as to fairness).] But a court will "see to it that they are arrived at fairly and equitably." [*Stegall v. Stegall,* 100 N.C. App. 398, 401, 397 S.E.2d 306, 307 (1990)) (quoting *Johnson v. Johnson,* 67 N.C. App. 250, 255, 313 S.E.2d 162, 165 (1984)) (considering wife's allegations that she signed agreement under duress and coercion, court noted that contracts between husbands and wives are "special agreements" which courts have given a "cloak of protection"), *review denied*, 328 N.C. 274, 400 S.E.2d 461 (1991).]

3. "To be valid, 'a separation agreement must be untainted by fraud . . . and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties.' " [*Lancaster v. Lancaster,* 138 N.C. App. 459, 462, 530 S.E.2d 82, 84 (2000) (quoting *Harroff v. Harroff,* 100 N.C. App. 686, 689, 398 S.E.2d 340, 342 (1990)). *See also Sidden v. Mailman,* 137 N.C. App. 669, 529 S.E.2d 266 (2000) (separation agreement subject to rescission on grounds of lack of mental capacity, mistake, fraud, duress, or undue influence).] See Section IV.I.4, below, for more on these topics as defenses to enforcement related to execution.

4. The agreement must not violate public policy. [*See Torres v. McClain,* 140 N.C. App. 238, 535 S.E.2d 623 (2000) (fact that Illinois law awarded wife a portion of husband's nonvested military pension, when North Carolina law did not so provide, was not a violation of North Carolina public policy); *Morrison v. Morrison*, 102 N.C. App. 514, 402 S.E.2d 855 (1991) (contracts that provide that reconciliation will not affect the terms of a separation agreement violate the policy behind separation agreements and are void).]

5. An agreement that required that all court proceedings between husband and wife be closed to the public violates public policy, specifically, the qualified public right of access to civil court proceedings guaranteed by Article I, Section 18 of the North Carolina Constitution. [*France v. France,* 209 N.C. App. 406, 705 S.E.2d 399 (2011) (trial court did not err by refusing to close the proceedings; plaintiff failed to show a countervailing public interest, namely, his asserted right to privacy in matters involving the parenting of his minor children, that outweighed the qualified right of the public to open proceedings; moreover, agreement should not be excepted from the Public Records Act, and order for open proceedings did not violate any federal constitutional rights).] In an appeal after remand, an order unsealing pleadings and documents associated with the case was affirmed based on a substantial change of circumstances. [*France v. France,* 224 N.C. App. 570, 738 S.E.2d 180 (2012), *review denied,* 366 N.C. 584, 740 S.E.2d 479 (2013).]

E. Construing a Separation Agreement

1. Generally.

   a. An unincorporated separation agreement is a contract and its meaning is ordinarily determined by the same rules used to interpret any other contract. [*Case v. Case*, 73 N.C. App. 76, 325 S.E.2d 661, *review denied*, 313 N.C. 597, 330 S.E.2d 606 (1985); *Brenenstuhl v. Brenenstuhl*, 169 N.C. App. 433, 436, 610 S.E.2d 301, 303 (2005) (quoting *Blount v. Blount*, 72 N.C. App. 193, 195, 323 S.E.2d 738, 740 (1984)) ("[t]he same rules which govern the interpretation of contracts generally apply to separation agreements"); *Gilmore v. Garner*, 157 N.C. App. 664, 580 S.E.2d 15 (2003).]

   b. Similarly, in an action for contempt, a court is permitted to use "normal rules of interpreting or construing contracts" when interpreting an agreement that has been incorporated. [*Fucito v. Francis,* 175 N.C. App. 144, 150, 622 S.E.2d 660, 664 (2005).]

   c. Whenever a court is called upon to interpret a contract, its primary purpose is to ascertain the intention of the parties at the moment of its execution. [*Gilmore v. Garner,* 157 N.C. App. 664, 580 S.E.2d 15 (2003).]

   d. To determine the intent of the parties, the court must look first to the language of the agreement. [*Jackson v. Jackson,* 360 N.C. 56, 620 S.E.2d 862, *rev'g per curiam for reasons stated in dissenting opinion in* 169 N.C. App. 46, 610 S.E.2d 731 (2005) (Hunter, J., dissenting).]

   e. Where the terms of a separation agreement are plain and explicit, the court will determine the legal effect and enforce it as written by the parties. [*Tyndall-Taylor v. Tyndall,* 157 N.C. App. 689, 580 S.E.2d 58 (2003); *Anderson v. Anderson,* 145 N.C. App. 453, 550 S.E.2d 266 (2001) (citing *Blount v. Blount*, 72 N.C. App. 193, 323 S.E.2d 738 (1984), *review denied,* 313 N.C. 506, 329 S.E.2d 389 (1985)); *Blount.*]

   f. The trial court determines as a matter of law the construction of a clear and unambiguous contract. [*McIntyre v. McIntyre,* 188 N.C. App. 26, 654 S.E.2d 798 (citing *Hagler v. Hagler,* 319 N.C. 287, 354 S.E.2d 228 (1987)), *aff'd per curiam,* 362 N.C. 503, 666 S.E.2d 749 (2008); *Anderson v. Anderson,* 145 N.C. App. 453, 550 S.E.2d 266 (2001) (citing *Hagler*). *See also Case v. Case,* 73 N.C. App. 76, 325 S.E.2d 661 (when a separation agreement is in writing and free from ambiguity, its meaning and effect are questions of law for the court), *review denied,* 313 N.C. 597, 330 S.E.2d 606

(1985).] The trial court's rulings on questions of law are fully reviewable on appeal. [*Reavis v. Reavis,* 82 N.C. App. 77, 345 S.E.2d 460 (1986).]

g. Whether the language of a contract is ambiguous or unambiguous is a question for the court to determine. [*Tyndall-Taylor v. Tyndall,* 157 N.C. App. 689, 580 S.E.2d 58 (2003); *Anderson v. Anderson,* 145 N.C. App. 453, 550 S.E.2d 266 (2001).]

h. An ambiguity exists where the terms of the contract are reasonably susceptible to either of the differing interpretations proffered by the parties. [*McIntyre v. McIntyre,* 188 N.C. App. 26, 654 S.E.2d 798, *aff'd per curiam,* 362 N.C. 503, 666 S.E.2d 749 (2008).]

2. Use of extrinsic evidence.

a. Rule when agreement is not ambiguous.

i. The parol evidence rule prohibits evidence of agreements made prior to or contemporaneously with the signing of a written contract that would alter or contradict the written terms. [*Lancaster v. Lancaster,* 138 N.C. App. 459, 530 S.E.2d 82 (2000) (parol evidence rule barred evidence of alleged oral agreements between husband and wife that would have added or changed terms of the separation agreement).]

ii. When the terms of an agreement are not ambiguous, extrinsic evidence may not be used to determine the intention of the parties. [*Hartman v. Hartman,* 80 N.C. App. 452, 343 S.E.2d 11 (1986) (agreement clearly and unambiguously established that parties intended to dispose of their respective property rights in both real and personal property, even though agreement contained no specific references to real property but only to personal property; no extrinsic evidence of parties' intent allowed).]

iii. When the terms of the agreement are clear and unambiguous, construction of the agreement is a matter of law for the trial court. [*Hagler v. Hagler*, 319 N.C. 287, 354 S.E.2d 228 (1987); *Hartman v. Hartman,* 80 N.C. App. 452, 343 S.E.2d 11 (1986) (citing *Piedmont Bank & Tr. Co. v. Stevenson,* 79 N.C. App. 236, 240–41, 339 S.E. 2d 49, 52 (1986)).]

b. Rule when agreement is ambiguous.

i. If a term is ambiguous, the court may admit parol evidence to explain the term. [*Jackson v. Jackson,* 360 N.C. 56, 620 S.E.2d 862, *rev'g per curiam for reasons stated in dissenting opinion in* 169 N.C. App. 46, 610 S.E.2d 731 (2005) (Hunter, J., dissenting) (trial court erred by finding separation agreement vague and unenforceable when intent of the parties could be determined by the agreement's plain language and use of parol evidence); *Patterson v. Taylor*, 140 N.C. App. 91, 535 S.E.2d 374 (2000) (court may consider extrinsic evidence to determine the parties' intention behind an ambiguous term); *Vestal v. Vestal,* 49 N.C. App. 263, 271 S.E.2d 306 (1980) (although parol evidence may not be allowed to vary, add to, or contradict an integrated written instrument, an ambiguous term may be explained or construed with the aid of parol evidence).]

ii. A trial court seeking to determine the intent of the parties at the time an agreement was signed may consider extrinsic evidence of the conduct of the parties as

they carry out the agreement. [*Patterson v. Taylor*, 140 N.C. App. 91, 535 S.E.2d 374 (2000) (how parties implement an agreement over a number of years may be probative of their intent at time of execution).]

iii. When the terms of a contract are ambiguous, the intent of the parties is a question of fact for the trier of fact and parol evidence is admissible to ascertain that intent. [*Hartman v. Hartman,* 80 N.C. App. 452, 343 S.E.2d 11 (1986) (citing *Piedmont Bank & Tr. Co. v. Stevenson,* 79 N.C. App. 236, 240–41, 339 S.E.2d 49, 52 (1986)); *Weisberg v. Griffith,* 171 N.C. App. 517, 615 S.E.2d 738 (2005) (**unpublished**).]

iv. Review of a trial court's determination that the terms of an unincorporated separation agreement are ambiguous is de novo. [*Weisberg v. Griffith,* 171 N.C. App. 517, 615 S.E.2d 738 (2005) (**unpublished**) (citing *Crider v. Jones Island Club, Inc.,* 147 N.C. App. 262, 554 S.E.2d 863 (2001)).]

F. Effect of a Separation Agreement on Various Rights or Interests of the Parties

1. Effect on equitable distribution (ED).

a. A valid separation agreement that distributes all of the parties' property and complies with G.S. 52-10 bars an action for ED. [*Herring v. Herring,* 231 N.C. App. 26, 752 S.E.2d 190 (2013) (citing *Lee v. Lee,* 93 N.C. App. 584, 378 S.E.2d 554 (1989)) (separation agreement that provided that wife was to retain her state retirement accounts as her separate property precluded trial court from valuing and distributing those accounts); *Brenenstuhl v. Brenenstuhl*, 169 N.C. App. 433, 610 S.E.2d 301 (2005) (citing *Blount v. Blount*, 72 N.C. App. 193, 323 S.E.2d 738 (1984), *review denied*, 313 N.C. 506, 329 S.E.2d 389 (1985)); *Lee* (citing *Knight v. Knight,* 76 N.C. App. 395, 333 S.E.2d 331 (1985)).]

b. Separation agreements that waive all property rights bar ED. [*See Blount v. Blount*, 72 N.C. App. 193, 323 S.E.2d 738 (1984) (general relinquishment of all property rights in a 1976 separation agreement was a bar to ED even though the agreement did not list property owned by husband; trial court's determination that a 1962 premarital agreement did not bar ED, while correct, did not preclude determination that 1976 separation agreement barred ED), *review denied*, 313 N.C. 506, 329 S.E.2d 389 (1985); *Hartman v. Hartman,* 80 N.C. App. 452, 343 S.E.2d 11 (1986) (general waivers in separation agreement were sufficient to bar ED even though agreement made no reference to specific real property); *Porter v. Porter,* 217 N.C. App. 629, 720 S.E.2d 778 (2011) (agreement executed in 1988, in which parties relinquished and released all rights in each other's real and personal property, barred ED even though parties reconciled following execution of the agreement and lived together until their final separation in 2005; 1988 agreement, incorporated in 2007 divorce judgment, provided that it remained in effect if the parties reconciled unless otherwise provided by the parties in writing after reconciliation).]

c. Agreements intended by the parties to be full and final distributions of all property bar ED. [*See* G.S. 50-20(d) (properly executed agreements providing for distribution of marital or divisible property shall be binding on the parties); *Hagler v. Hagler,* 319 N.C. 287, 354 S.E.2d 228 (1987) (comprehensive property settlement provisions in

separation agreement established parties' intent to fully dispose of their respective property rights and were sufficient to bar ED even though agreement did not mention ED); *Anderson v. Anderson,* 145 N.C. App. 453, 550 S.E.2d 266 (2001) (agreement clearly intended to be a full settlement even though it did not divide husband's military pension).]

d. When language is unambiguous, determination of whether the parties intended the agreement to be a full and final settlement is a matter of law to be determined by the court. [*Anderson v. Anderson,* 145 N.C. App. 453, 550 S.E.2d 266 (2001) (trial court did not err in refusing to allow evidence on the issue of whether the agreement barred the equitable distribution of husband's pension rights).]

e. An agreement may bar ED even if executed before adoption of the Equitable Distribution Act. [*Morrison v. Morrison,* 102 N.C. App. 514, 402 S.E.2d 855 (1991) (citing *Small v. Small,* 93 N.C. App. 614, 379 S.E.2d 273 (1989)) (agreement executed in 1976 that released all spousal property rights found to bar ED sought in 1988).]

f. An action to enforce a separation agreement that results in a distribution of property does not constitute an action for ED prohibited by the separation agreement. [*Gilmore v. Garner,*157 N.C. App. 664, 580 S.E.2d 15 (2003) (specific performance of a separation agreement that enforced provision granting wife a portion of husband's railroad retirement benefits did not convert the action into a prohibited action for ED).]

2. Effect on postseparation support and alimony.

a. Alimony, postseparation support, and attorney fees may be barred by an express provision in a valid separation agreement, premarital agreement, or marital contract made pursuant to G.S. 52-10(a1), so long as the agreement is performed. [G.S. 50-16.6(b), *amended by* S.L. 2013-140, § 2, effective June 19, 2013.]

b. "Express" means "[d]efinitely and explicitly stated . . . [p]articular; specific." [*Napier v. Napier,* 135 N.C. App. 364, 367, 520 S.E.2d 312, 314 (1999) (dictionary definition of "express"), *review denied,* 351 N.C. 358, 543 S.E.2d 132 (2000).]

c. The waiver provision must specifically refer to alimony. A general release will not be sufficient. [*Napier v. Napier*, 135 N.C. App. 364, 365–66, 366, 520 S.E.2d 312, 313 (1999) (blanket release of "all causes of action, claims, rights or demands whatsoever, at law or in equity" did not release or settle wife's alimony claims since it did not specifically refer to the waiver, release, or settlement of "alimony" or use some other similar language; nor did language stating that agreement was "an agreement settling their property and marital rights" and that it was "in full satisfaction of all obligations which each of them now has or might hereafter or otherwise have toward the other"), *review denied*, 351 N.C. 358, 543 S.E.2d 132 (2000); *Jones v. Jones,* 162 N.C. App. 134, 590 S.E.2d 308 (2004) (marital dissolution agreement entered into after execution of a separation agreement, which contained no specific mention of alimony or of statutory provisions regarding alimony, did not waive alimony due wife under the separation agreement). *But see Stewart v. Stewart*, 141 N.C. App. 236, 240, 541 S.E.2d 209, 212 (2000) (holding that a premarital agreement that waived "any right or claim of any kind, character, or nature whatsoever" of a spouse pursuant to G.S. Chapter 50

was sufficiently express to constitute a valid waiver of postseparation support and alimony).]

d. A reference to G.S. 50-20(d) in the preamble to a separation agreement revealed the intent of the parties to restrict the agreement to marital property issues within the scope of equitable distribution (ED). Because spousal support is not within the province of ED, the agreement did not waive alimony rights. [*Napier v. Napier,* 135 N.C. App. 364, 520 S.E.2d 312 (1999), *review denied,* 351 N.C. 358, 543 S.E.2d 132 (2000).]

e. In an unpublished opinion, *Gordon v. Gordon,* 238 N.C. App. 362, 768 S.E.2d 202 (2014), the court of appeals upheld the trial court's decision that a court order for alimony superseded and replaced the alimony provisions contained in an unincorporated separation agreement. According to the court, plaintiff forfeited her right to enforce the contract provisions regarding alimony when she filed the action seeking alimony by court order.

f. For more on the effect of separation agreements on alimony, see *Postseparation Support and Alimony*, Bench Book, Vol. 1, Chapter 2.

3. Effect on child custody.

a. Custody agreements are enforceable between parties. [See *Child Custody*, Bench Book, Vol. 1, Chapter 4.]

b. Although parents may contract concerning custody, no contract will deprive the court of inherent authority to protect and provide for minor children. [*Hennessey v. Duckworth,* 231 N.C. App. 17, 22 n.4, 752 S.E.2d 194, 198 n.4 (2013) (citing *Kiger v. Kiger,* 258 N.C. 126, 129, 128 S.E.2d 235, 237 (1962)) (it is well-established that custody and support provisions in a separation agreement are always subject to later modification by the court); *Hudson v. Hudson*, 299 N.C. 465, 263 S.E.2d 719 (1980); *Harris v. Harris,* 58 N.C. App. 314, 293 S.E.2d 602 (1982) (questions of support and custody may not be finally determined by an agreement between the parties but remain matters for the court).]

c. Therefore, a separation agreement will not prevent one party from subsequently filing an action seeking court-ordered custody. [*See Winborne v. Winborne*, 41 N.C. App. 756, 255 S.E.2d 640 (despite the existence of an agreement, the trial court has a duty to award custody in accordance with the best interest of the child), *review denied*, 298 N.C. 305, 259 S.E.2d 918 (1979).]

d. Parents may enter individualized separation agreements and set up specialized conditions of "joint custody" by including or omitting "conditions pertaining to the child's education, health care, religious training, and the like . . . tak[ing] into account various factors including the particularities of the relationships, the personalities involved, the bonds between family members, the needs of the parties, and any other appropriate features that together make each marriage and each family unique." [*Patterson v. Taylor,* 140 N.C. App. 91, 96, 535 S.E.2d 374, 378 (2000).]

4. Effect on child support.

a. Agreements regarding child support are enforceable. [See *Procedure for Initial Child Support Orders*, Bench Book, Vol. 1, Chapter 3, Part 2.]

b. A parent may assume in a separation agreement contractual obligations to a child greater than the law imposes. [*Jackson v. Jackson,* 360 N.C. 56, 620 S.E.2d 862 (unincorporated agreement provided for child support beyond age of majority), *rev'g per curiam for reasons stated in dissenting opinion in* 169 N.C. App. 46, 610 S.E.2d 731 (2005) (Hunter, J., dissenting); *Altman v. Munns,* 82 N.C. App. 102, 345 S.E.2d 419 (1986) (father bound by separation agreement to pay for daughter's college expenses); *Blount v. Lemaire*, 232 N.C. App. 521, 757 S.E.2d 527 (2014) (**unpublished**) (not paginated on Westlaw) (when father agreed in incorporated separation agreement to pay college expenses for "room, board and tuition" and "reasonable spending money" for each child, court properly entered money judgment for college costs father failed to pay).]

c. Parties may contract that support will be paid in a higher amount or for longer than required by statute, but the court of appeals has held that if the duration of support ordered in an incorporated agreement is "less generous" than statutory provisions, the obligee can recover support for the duration provided by G.S. 50-13.4. [*Malone v. Hutchinson-Malone,* 246 N.C. App. 544, 548–49, 784 S.E.2d 206, 209 (2016).]

d. However, no agreement between the parents can fully deprive the courts of their authority to protect the best interests of minor children. [*Pataky v. Pataky*, 160 N.C. App. 289, 585 S.E.2d 404 (2003) (citing *Winborne v. Winborne,* 41 N.C. App. 756, 255 S.E.2d 640 (1979)), *aff'd per curiam in part, review dismissed in part,* 359 N.C. 65, 602 S.E.2d 360 (2004); *Bottomley v. Bottomley,* 82 N.C. App. 231, 346 S.E.2d 317 (1986) (court has inherent authority to pass on custody and support issues); *Boyd v. Boyd,* 81 N.C. App. 71, 343 S.E.2d 581 (1986) (citing *Fuchs v. Fuchs,* 260 N.C. 635, 133 S.E.2d 487 (1963)) (provisions of a separation agreement relating to custody and support are not binding on the court, which has inherent and statutory authority to protect the interests of children).]

e. Parties to an unincorporated separation agreement may seek court-ordered prospective child support.

   i. Either party to an unincorporated separation agreement may seek a court order to establish child support pursuant to G.S. 50-13.4 in an amount, scope, or duration different from that provided in the unincorporated agreement. [*See Bottomley v. Bottomley*, 82 N.C. App. 231, 346 S.E.2d 317 (1986) (noncustodial parent sought a decrease in his support payments); *Boyd v. Boyd*, 81 N.C. App. 71, 343 S.E.2d 581 (1986) (custodial parent sought an increase in amount of support).]

   ii. In this case, the child support order entered by the court is an **initial** child support order and does not modify the child support provisions contained in the unincorporated separation agreement. [*Pataky v. Pataky*, 160 N.C. App. 289, 585 S.E.2d 404 (2003) (citing *Boyd v. Boyd*, 81 N.C. App. 71, 343 S.E.2d 581 (1986)), *aff'd per curiam in part, review dismissed in part,* 359 N.C. 65, 602 S.E.2d 360 (2004); *Powers v. Parisher*, 104 N.C. App. 400, 409 S.E.2d 725 (1991), *appeal dismissed, review denied,* 331 N.C. 286, 417 S.E.2d 254 (1992).]

   iii. A party seeking an initial judicial determination of child support where the parties have executed an unincorporated separation agreement need not show

changed circumstances between the time of the separation agreement and the hearing, but must instead show the amount of support necessary to meet the reasonable needs of the children at the time of the hearing. [*Pataky v. Pataky,* 160 N.C. App. 289, 585 S.E.2d 404 (2003), *aff'd per curiam in part, review dismissed in part,* 359 N.C. 65, 602 S.E.2d 360 (2004).]

f. Awarding prospective support when there is an unincorporated separation agreement.

i. When a valid, unincorporated separation agreement determines a parent's child support obligations, in a subsequent action for child support, the court must base the parent's prospective child support obligation on the amount of support provided under the separation agreement rather than the amount of support payable under the child support guidelines, unless the court determines, by the greater weight of the evidence, taking into account the child's needs and the factors enumerated in the first sentence of G.S. 50-13.4(c), that the amount of support under the separation agreement is unreasonable. [N.C. Child Support Guidelines, 2019 Ann. R. N.C. 49 (effective Jan. 1, 2019; hereinafter referred to as 2019 Guidelines).]

ii. To establish prospective child support when there is an unincorporated separation agreement, the court must apply a rebuttable presumption that the support amount agreed on is just and reasonable.

iii. Where parties to an unincorporated separation agreement have agreed upon the amount for the support and maintenance of their minor children, there is a presumption that the amount mutually agreed upon is just and reasonable and that, therefore, application of the guidelines would be inappropriate. [*Pataky v. Pataky,* 160 N.C. App. 289, 585 S.E.2d 404 (2003), *aff'd per curiam in part, review dismissed in part,* 359 N.C. 65, 602 S.E.2d 360 (2004).]

iv. To rebut the presumption, a party must show by the greater weight of the evidence that the amount in the agreement is not reasonable, taking into account the needs of the children existing at the time of the hearing and considering the factors listed in the first sentence of G.S. 50-13.4(c), which are the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case. [*Pataky v. Pataky,* 160 N.C. App. 289, 585 S.E.2d 404 (2003), *aff'd per curiam in part, review dismissed in part,* 359 N.C. 65, 602 S.E.2d 360 (2004).]

v. When considering the "earnings" of the parties, the court cannot consider a parent's earning capacity rather than actual income unless the court concludes that the party is deliberately depressing his income in bad faith disregard of his child support obligation. [*Lasecki v. Lasecki,* 246 N.C. App. 518, 786 S.E.2d 286 (2016).]

vi. When applying the presumption, the trial court must make findings of fact

(a) Regarding the needs of the child at the time of the hearing and the factors set out in the first sentence of G.S. 50-13.4(c) and

(b) Indicating whether the party has rebutted the presumption of reasonableness. [*Pataky v. Pataky,* 160 N.C. App. 289, 585 S.E.2d 404 (2003), *aff'd per curiam in part, review dismissed in part,* 359 N.C. 65, 602 S.E.2d 360 (2004).]

vii. The presumption cannot be rebutted by evidence that a parent's income has been reduced. Rather, the presumption is rebutted only by evidence that the amount in the agreement does not meet the needs of the children. [*Lasecki v. Lasecki*, 809 S.E.2d 296 (N.C. Ct. App. 2017).]

viii. If the presumption is rebutted:

(a) The trial court is to look to the presumptive guidelines but may deviate if it determines that application of the guidelines would not meet or would exceed the needs of the child or would be otherwise unjust or inappropriate. [*Pataky v. Pataky,* 160 N.C. App. 289, 585 S.E.2d 404 (2003), *aff'd per curiam in part, review dismissed in part,* 359 N.C. 65, 602 S.E.2d 360 (2004).]

(b) The trial court has discretion to order child support in an amount greater than that in the unincorporated agreement. [*Carson v. Carson,* 199 N.C. App. 101, 680 S.E.2d 885 (2009) (where presumption rebutted, trial court correctly ordered prospective child support greater than the amount set out in the unincorporated separation agreement).]

(c) The trial court has discretion to order child support in an amount less than that in the unincorporated agreement. [*Brind'Amour v. Brind'Amour,* 196 N.C. App. 322, 674 S.E.2d 448 (2009) (citing *Bottomley v. Bottomley*, 82 N.C. App. 231, 346 S.E.2d 317 (1986)) (noting however, that in most cases the custodial parent obtains child support in an amount greater than that in the agreement). *Cf. Lasecki v. Lasecki*, 809 S.E.2d 296, 304 (N.C. Ct. App. 2017) (emphasis in original) ("the question for the trial court was limited . . . to whether the amount of child support should be *increased*").]

(d) If the court orders a parent to pay less child support than provided under an unincorporated separation agreement, the court of appeals has indicated that the party receiving support may still be able to seek to enforce his contractual rights to support under the unincorporated separation agreement. [*Lasecki v. Lasecki*, 809 S.E.2d 296 (N.C. Ct. App. 2017) (mother entitled to money judgment for entire amount due under contract even though trial court ordered specific performance of a lower amount); *Bottomley v. Bottomley*, 82 N.C. App. 231, 346 S.E.2d 317 (1986) (order setting child support in lesser sum than that provided for in parties' separation agreement did not deprive obligee wife of her contractual right to recover sums provided for in the agreement but did limit her contempt remedy to sums provided for by court order); *McKaughn v. McKaughn,* 29 N.C. App. 702, 225 S.E.2d 616 (1976) (noting that judgment cutting monthly support payments in half did not change the contractual obligations under the separation agreement). *But see Richardson v. Richardson,* 261 N.C. 521, 135 S.E.2d 532 (1964) (when court ordered less in support than required by separation

agreement, mother not entitled to enforce separation agreement to recover the difference).]

ix. If the presumption is not rebutted, the trial court should enter an order for support in the separation agreement amount and make a finding that application of the guidelines would be inappropriate. [*Pataky v. Pataky,* 160 N.C. App. 289, 585 S.E.2d 404 (2003), *aff'd per curiam in part, review dismissed in part,* 359 N.C. 65, 602 S.E.2d 360 (2004).]

g. Awarding retroactive support when there is an unincorporated separation agreement.

i. Where a valid, unincorporated separation agreement sets out the obligations of a parent for support and the parent fully complies with that obligation, a trial court is not permitted to award retroactive child support absent an emergency situation. [2019 Guidelines; *Carson v. Carson,* 199 N.C. App. 101, 680 S.E.2d 885 (2009) (citing *Fuchs v. Fuchs,* 260 N.C. 635, 133 S.E.2d 487 (1963)) (interpreting the 2006 Guidelines) (time period in *Carson* for which support sought was three years prior to the filing of the complaint, during which time parties had an unincorporated separation agreement that was not being breached; trial court erred by using guidelines to determine retroactive support when unincorporated separation agreement was in effect and was not being breached).]

h. See *Procedure for Initial Child Support Orders* and *Modification of Child Support Orders*, Bench Book, Vol. 1, Chapter 3, Parts 2 and 3, for more on the effect of support provisions in a separation agreement. Specific topics include, among others, enforcement of child support provisions in both incorporated and unincorporated agreements, other cases considering a request to establish child support in an amount different than that in an unincorporated agreement, and the two types of retroactive support.

5. Effect on rights in estate of a decedent.

a. Unless the right has been waived in a separation agreement or terminated by divorce, a surviving spouse may by statute assert a claim:

i. For an intestate share. [G.S. 29-13 *et seq.*]

ii. For a life estate. [G.S. 29-30 *et seq.*]

iii. For an elective share. [G.S. 30-3.1 *et seq.*]

iv. For a year's allowance in the decedent's personal property. [G.S. 30-15 *et seq.*]

v. To administer the decedent's estate. [G.S. 28A-4-1.]

b. A surviving spouse may waive or release by agreement the statutory rights listed above.

i. The surviving spouse may waive the right to claim an elective share, wholly or partially, before or after marriage, with or without consideration, by a written waiver signed by the surviving spouse. [G.S. 30-3.6(a).] The waiver may be included as part of another document, such as a prenuptial agreement or a separation agreement.

ii. Widow found to have released her rights to a life estate and a year's allowance by premarital agreement. [*In re Estate of Cline*, 103 N.C. App. 83, 404 S.E.2d 178 (1991) (judgment awarding widow a life estate reversed based on premarital agreement in which she relinquished all claim to any property of husband; widow also barred from recovering a year's allowance by same agreement).]

iii. Parties found to have contracted away their right to dissent from a will. [*In re Estate of Pate*, 119 N.C. App. 400, 459 S.E.2d 1 (prenuptial agreement barred wife's right to dissent; agreement was not terminated by cancellation of first wedding and was applicable to wedding occurring seven months later), *review denied,* 341 N.C. 649, 462 S.E.2d 515 (1995); *Brantley v. Watson*, 113 N.C. App. 234, 438 S.E.2d 211 (1994) (widower in postnuptial agreement gave up right to dissent from wife's will).]

iv. The language of the agreement should be carefully considered. Just because a party gave up one right does not mean that he or she gave up other or all rights. [*See Brantley v. Watson*, 113 N.C. App. 234, 438 S.E.2d 211(1994) (surviving spouse's agreement in a postnuptial agreement not to dissent from other spouse's will was enforced, but surviving spouse was entitled to apply for a year's allowance because he did not expressly give up that right in the agreement). *But see In re Estate of Tucci,* 94 N.C. App. 428, 380 S.E.2d 782 (1989) (considering the effect of the parties' temporary reconciliation, the court found that a separation and property settlement agreement barred the husband's statutory right to dissent from wife's will, even though that right was not specifically set out in the agreement; agreement expressly provided that it was to remain in effect if the parties reconciled), *aff'd per curiam,* 326 N.C. 359, 388 S.E.2d 768 (1990).]

c. Waiver or release by agreement of an interest under the will of the other spouse.

i. A judgment of absolute divorce revokes provisions in a testator's will in favor of the testator's former or purported former spouse unless otherwise specifically provided in the will. [G.S. 31-5.4.]

ii. When husband died before divorce, wife's waiver in a separation agreement of her interest under husband's will was valid and binding and prevented her from taking under husband's will. [*Sedberry v. Johnson*, 62 N.C. App. 425, 302 S.E.2d 924 (parties entered into a separation agreement in 1979, in which each spouse waived and renounced rights under previously executed wills of the other spouse, but had not divorced at time of husband's death in 1980; waiver by wife precluded her from taking under husband's 1976 will), *review denied*, 309 N.C. 322, 307 S.E.2d 167 (1983).]

d. A separation agreement may obligate a decedent to make certain provisions in his or her will, which the surviving spouse or intended beneficiary may enforce. [*See Tyndall-Taylor v. Tyndall,* 157 N.C. App. 689, 580 S.E.2d 58 (2003) (where separation agreement obligated both spouses to separately execute wills that devised their interests in certain real estate to their son but husband failed to execute a will and died intestate, surviving spouse and grandson, after death of parties' son, the intended beneficiary, entitled to maintain an action to enforce the agreement).]

6. Effect on right to partition.
    a. In the absence of an equitable distribution of entirety property under G.S. 50-20, an ex-spouse (or tenant in common after divorce) may bring an action for partition. [*Hagler v. Hagler*, 319 N.C. 287, 354 S.E.2d 228 (1987) (listing partition as one of several rights or actions).]
    b. A co-tenant's right to partition can be contracted away in a deed of separation executed while the property is still owned by the parties as tenants by the entirety. [*Hepler v. Burnham*, 24 N.C. App. 362, 210 S.E.2d 509 (1975).]
    c. The following language in a separation agreement has been found to waive the right to partition:
        i. Agreement allowed husband to occupy the marital residence and obligated him to make mortgage payments while he lived there and further provided for an equal division of the proceeds upon sale. [*Diggs v. Diggs,* 116 N.C. App. 95, 446 S.E.2d 873 (wife waived her right to partition), *review denied*, 338 N.C. 515, 452 S.E.2d 809 (1994).]
        ii. Agreement allowed wife to live in or rent marital residence and obligated husband to pay the monthly mortgage indebtedness, subject to certain conditions, until such time as the parties mutually agreed to sell the property. [*McDowell v. McDowell,* 61 N.C. App. 700, 301 S.E.2d 729 (1983) (husband impliedly limited his right to partition the property without the consent of the wife).]
        iii. Agreement provided that the "parties own a home as 'tenants by the entirety,' in which husband will continue to live and make payments." [*Winborne v. Winborne*, 54 N.C. App. 189, 189, 282 S.E.2d 487, 488 (1981) (petition for partition should have been dismissed).]
        iv. Agreement allowed wife to reside rent-free until emancipation of the parties' minor child and obligated husband to continue mortgage payments. [*Hepler v. Burnham*, 24 N.C. App. 362, 210 S.E.2d 509 (1975) (language impliedly limited husband's right to partition).]
7. Effect on interest in a retirement account.
    a. Parties to a divorce may provide for division of retirement benefits as part of a separation agreement. [G.S. 50-20(d) (parties by written agreement may provide for distribution of marital or divisible property); *Gilmore v. Garner,* 157 N.C. App. 664, 580 S.E.2d 15 (2003).]
    b. However, wife's waiver, in a divorce decree that was not a qualified domestic relations order, of her right to any interest in husband's savings and investment plan was inconsistent with plan document in which she was named as beneficiary. After employee spouse's death, plan administrator properly distributed benefits to wife in accordance with the plan documents pursuant to bright-line requirement to follow plan documents in distributing benefits. [*Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 129 S. Ct. 865 (2009) (husband never removed wife as beneficiary and there was no contingent beneficiary; distribution to wife did not constitute an assignment or alienation rendered void under anti-alienation provision of Employee Retirement Income Security Act, 29 U.S.C. § 1056(d)(1)).]

G. Modifying a Separation Agreement

1. Generally.

a. An unincorporated separation agreement is a contract and can be modified only with consent of the parties. [*Walters v. Walters,* 307 N.C. 381, 298 S.E.2d 338 (1983); *Ticconi v. Ticconi,* 161 N.C. App. 730, 589 S.E.2d 371 (2003); *Torres v. McClain,* 140 N.C. App. 238, 535 S.E.2d 623 (2000). *See also Lasecki v. Lasecki*, 809 S.E.2d 296 (N.C. Ct. App. 2017) (trial court has no authority to modify an unincorporated separation agreement; order of specific performance for less than amount due under the agreement did not affect party's contractual liability); *Danai v. Danai,* 166 N.C. App. 279, 603 S.E.2d 168 (2004) (**unpublished**) (district court's lack of jurisdiction to modify an unincorporated separation agreement not cured by provision in the agreement authorizing modification by a court of competent jurisdiction).]

b. Parties cannot orally modify a separation agreement. [*Jones v. Jones,* 162 N.C. App. 134, 590 S.E.2d 308 (2004) (citing *Greene v. Greene*, 77 N.C. App. 821, 336 S.E.2d 430 (1985)) (conversations between husband and wife in which they purportedly agreed to modify the alimony provisions in their separation agreement, even if true, could not modify that agreement).]

c. A modification must comply with the requirements of the statute, that is, it must be in writing and must be acknowledged in accordance with G.S. 52-10.1. [*Kelley v. Kelley*, 798 S.E.2d 771 (N.C. Ct. App. 2017) (improperly executed modification was void *ab initio*, so estoppel and ratification could not be applied to enforce the agreement); *Greene v. Greene*, 77 N.C. App. 821, 336 S.E.2d 430 (1985) (oral modification did not meet formalities and requirements of G.S. 52-10.1).]

d. Because incorporated agreements are court orders, they cannot be modified by the court except as specifically authorized by a statute. [See, e.g., sections below regarding modification of child support, child custody, and alimony.]

e. Relevant date for a change in circumstances when a separation agreement has been incorporated into a divorce judgment is the date of incorporation and not the date the agreement was executed. [*Smart v. State ex rel. Smart,* 198 N.C. App. 161, 678 S.E.2d 720 (2009).]

i. When a separation agreement has been incorporated into a divorce judgment, the court must compare present circumstances to those existing on the date of incorporation to determine whether there has been a substantial change in circumstances. [*Smart v. State ex rel. Smart,* 198 N.C. App. 161, 678 S.E.2d 720 (2009) (citing *Cavenaugh v. Cavenaugh,* 317 N.C. 652, 347 S.E.2d 19 (1984)) (child support modification).]

ii. Where's husband's military discharge, and his corresponding reduction in income, occurred prior to incorporation of the separation agreement into the divorce decree, trial court properly entered summary judgment denying husband's motion for modification of child support. [*Smart v. State ex rel. Smart,* 198 N.C. App. 161, 678 S.E.2d 720 (2009) (change of circumstances between execution of separation agreement and entry of divorce decree incorporating agreement irrelevant to husband's motion to modify child support).]

2. Modifying provisions relating to child support.
   a. Incorporated agreement.
      i. G.S. 50-13.7(a), addressing modification of an order for child support, applies to the child support provisions of a separation agreement that has been incorporated into a divorce decree or other court order. [*Beamer v. Beamer,* 169 N.C. App. 594, 610 S.E.2d 220 (2005); *Duffey v. Duffey,* 113 N.C. App. 382, 438 S.E.2d 445 (1994). *See also Cavenaugh v. Cavenaugh*, 317 N.C. 652, 347 S.E.2d 19 (1986) (incorporated separation agreement may be modified on the basis of changed circumstances).]
      ii. Child support provisions in an incorporated separation agreement are modifiable in the same manner as any other judgment involving child custody and support. [*Beamer v. Beamer,* 169 N.C. App. 594, 610 S.E.2d 220 (2005); *Tyndall v. Tyndall*, 80 N.C. App. 722, 343 S.E.2d 284 (citing *Walters v. Walters,* 307 N.C. 381, 298 S.E.2d 338 (1983)), *review denied,* 318 N.C. 420, 349 S.E.2d 606 (1986).]
      iii. The circumstances of the parties must have changed subsequent to the date of incorporation. [*Cavenaugh v. Cavenaugh,* 317 N.C. 652, 347 S.E.2d 19 (1986); *Smart v. State ex rel. Smart,* 198 N.C. App. 161, 678 S.E.2d 720 (2009) (citing *Cavenaugh*).] See Section IV.G.1.e, above.
      iv. The parties may not extrajudicially modify the provisions of a child support order through unilateral action or mutual agreement (other than a consent order approved by the court). [*Baker v. Showalter*, 151 N.C. App. 546, 566 S.E.2d 172 (2002) (parties could not modify a child support order by oral agreement; amount of support in incorporated separation agreement remained in effect).]
   b. Unincorporated agreement.
      i. G.S. 50-13.7(a) does not apply to child support obligations that are included in an unincorporated separation agreement or property settlement. [*Pataky v. Pataky,* 160 N.C. App. 289, 585 S.E.2d 404 (2003), *aff'd per curiam in part, review dismissed in part,* 359 N.C. 65, 602 S.E.2d 360 (2004); *Bottomley v. Bottomley*, 82 N.C. App. 231, 346 S.E.2d 317 (1986).]
      ii. Absent the consent of both parties, a court has no authority to modify child support provisions in a separation agreement that has not been incorporated in a divorce decree, judgment, or consent order. [*Lasecki v. Lasecki*, 809 S.E.2d 296 (N.C. Ct. App. 2017) (trial court has no authority to modify support provision in contract due to father's inability to pay); *Rose v. Rose,* 108 N.C. App. 90, 422 S.E.2d 446 (1992) (trial court erred by modifying child support provision in an unincorporated agreement without the consent of both parties). *See also Danai v. Danai,* 166 N.C. App. 279, 603 S.E.2d 168 (2004) (**unpublished**) (in alimony case, district court's lack of jurisdiction to modify an unincorporated separation agreement not cured by provision in the agreement authorizing modification by a court of competent jurisdiction).]
      iii. Either party to an unincorporated separation agreement may seek a court order to establish child support pursuant to G.S. 50-13.4 in an amount, scope, or duration different from that provided in the unincorporated agreement. [*See Bottomley v. Bottomley*, 82 N.C. App. 231, 346 S.E.2d 317 (1986) (noncustodial parent

sought a decrease in his support payments); *Boyd v. Boyd*, 81 N.C. App. 71, 343 S.E.2d 581 (1986) (custodial parent sought an increase in amount of support).]

iv. A party seeking an initial judicial determination of child support where the parties have executed an unincorporated separation agreement need not show changed circumstances between the time of the separation agreement and the hearing, but must instead show the amount of support necessary to meet the reasonable needs of the child at the time of the hearing. [*Pataky v. Pataky*, 160 N.C. App. 289, 585 S.E.2d 404 (2003) (citing *Boyd v. Boyd,* 81 N.C. App. 71, 343 S.E.2d 581 (1986)), *aff'd per curiam in part, review dismissed in part,* 359 N.C. 65, 602 S.E.2d 360 (2004). *See also Lasecki v. Lasecki*, 809 S.E.2d 296 (N.C. Ct. App. 2017) (a court may not enter a child support order in an amount different than the contract rate based on the parent's inability to pay the amount owed under the agreement; rather, the court is authorized to set a different amount if necessary to meet the reasonable needs of the children).]

v. However, there is a rebuttable presumption that a mutually agreed upon amount of child support in an unincorporated separation agreement is just and reasonable. [*Pataky v. Pataky,* 160 N.C. App. 289, 585 S.E.2d 404 (2003), *aff'd per curiam in part, review dismissed in part,* 359 N.C. 65, 602 S.E.2d 360 (2004). See discussion in Section IV.F.4.f, above, on *Pataky* decision.]

vi. "To the extent an [unincorporated] agreement makes provision for the maintenance and support of a child *past his majority,* it is beyond the inherent power of the court to modify absent the consent of the parties," and agreement is "enforceable at law as any other contract." [*Shaffner v. Shaffner,* 36 N.C. App. 586, 588, 244 S.E.2d 444, 446 (1978) (emphasis added) (citing *Church v. Hancock,* 261 N.C. 764, 136 S.E.2d 81 (1964)).]

c. For a discussion of the modifiability of child support generally, see *Modification of Child Support Orders*, Bench Book, Vol. 1, Chapter 3, Part 3.

3. Modifying provisions relating to child custody.

a. Parents may contract concerning custody, but no contract will deprive the court of inherent authority to protect and provide for minor children. [*Hudson v. Hudson*, 299 N.C. 465, 263 S.E.2d 719 (1980); *Hennessey v. Duckworth,* 231 N.C. App. 17, 22 n.4, 752 S.E.2d 194, 198 n.4 (2013) (citing *Kiger v. Kiger,* 258 N.C. 126, 129, 128 S.E.2d 235, 237 (1962)) (it is well-established that custody and support provisions in a separation agreement are always subject to later modification by the court).]

b. A separation agreement will not prevent one party from subsequently filing an action seeking court-ordered custody. [*See Winborne v. Winborne*, 41 N.C. App. 756, 255 S.E.2d 640 (despite existence of agreement, the trial court has a duty to award custody in accordance with the best interest of the child), *review denied,* 298 N.C. 305, 259 S.E.2d 918 (1979).]

c. However, if the separation agreement was incorporated into a court order, modification requires a showing of changed circumstances since the date of incorporation in accordance with G.S. 50-13.7. [*Tyndall v. Tyndall*, 80 N.C. App. 722, 343 S.E.2d 284 (modification of child support), *review denied,* 318 N.C. 420, 349 S.E.2d 606 (1986);

Barnes v. Barnes, 55 N.C. App. 670, 286 S.E.2d 586 (1982), *overruled on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998).]

d. For a discussion of the modifiability of child custody orders generally, see *Child Custody*, Bench Book, Vol. 1, Chapter 4.

4. Modifying provisions relating to alimony and postseparation support.

a. Modification of an alimony award is in the discretion of the trial judge and will not be disturbed absent an abuse of discretion. [*Lemons v. Lemons,* 112 N.C. App. 110, 434 S.E.2d 638 (1993), *review denied*, 335 N.C. 556, 441 S.E.2d 117 (1994).]

b. Unincorporated agreements.

i. Alimony provisions of a separation agreement that has not been incorporated into a court order cannot be modified by the court, absent the consent of both parties. [*Lasecki v. Lasecki*, 809 S.E.2d 296 (N.C. Ct. App. 2017) (even when trial court orders specific performance in an amount less than that provided in the contract, party remains liable for full amount owed pursuant to terms of the contract); *DeGree v. DeGree,* 72 N.C. App. 668, 325 S.E.2d 36, *review denied,* 313 N.C. 598, 330 S.E.2d 607 (1985); *Condellone v. Condellone,* 129 N.C. App. 675, 501 S.E.2d 690 (unincorporated agreement could not be modified under G.S. Chapter 50 based upon changed circumstances), *review denied,* 349 N.C. 354, 517 S.E.2d 889 (1998). *See also* G.S. 50-16.9(a) (emphasis added) (stating that only "[a]n *order* of a court of this State for alimony or post separation support . . . may be modified or vacated").]

c. Incorporated agreements.

i. A court may modify support provisions in an incorporated separation agreement only if the moving party shows two things:

(a) The support provisions in the agreement are "true" alimony and not property settlement [*See Marks v. Marks*, 316 N.C. 447, 342 S.E.2d 859 (1986); *Holcomb v. Holcomb,* 132 N.C. App. 744, 513 S.E.2d 807 (1999); *see also Underwood v. Underwood,* 365 N.C. 235, 717 S.E.2d 361 (2011) (citing *Marks*) (in the context of a consent judgment, holding that the parties unambiguously intended support provisions to be alimony, making the payments subject to modification and termination).] and

(b) A motion has been filed pursuant to G.S. 50-16.9 and there has been a substantial change of circumstances since the agreement was incorporated.

ii. "True" alimony.

(a) If periodic payments set out in an incorporated agreement are reciprocal consideration for, and inseparable from, provisions in the agreement settling property matters:

(1) The order is an integrated agreement;

(2) The periodic payments are not in fact "true" alimony payments because they are integrated with and become part of the property settlement provisions; and

(3) The provisions for periodic payments are not modifiable. [*Marks v. Marks*, 316 N.C. 447, 455, 342 S.E.2d 859, 864 (1986); *Holcomb v. Holcomb,* 132 N.C. App. 744, 513 S.E.2d 807 (1999); *Lemons v. Lemons,* 112 N.C. App. 110, 434 S.E.2d 638 (1993) (citing *Marks* and *Hayes v. Hayes,* 100 N.C. App. 138, 394 S.E.2d 675 (1990)), *review denied,* 335 N.C. 556, 441 S.E.2d 117 (1994); *Rogers v. Rogers,* 111 N.C. App. 606, 432 S.E.2d 907 (1993); *Hayes* (citing *White v. White,* 296 N.C. 661, 252 S.E.2d 698 (1979), and *Marks*).]

(b) If periodic payments set out in an incorporated agreement are not reciprocal consideration for, and are separable from, provisions in the agreement settling property matters:

(1) The order is not integrated;

(2) The periodic payments are "true" alimony payments; and

(3) The provisions for periodic payments are modifiable upon a showing of changed circumstances. [*Underwood v. Underwood,* 365 N.C. 235, 717 S.E.2d 361 (2011) (citing *Marks v. Marks*, 316 N.C. 447, 342 S.E.2d 859 (1986)) (in the context of a consent judgment); *Marks*; *Lemons v. Lemons,* 112 N.C. App. 110, 434 S.E.2d 638 (1993) (citing *Marks* and *Hayes v. Hayes,* 100 N.C. App. 138, 394 S.E.2d 675 (1990)), *review denied,* 335 N.C. 556, 441 S.E.2d 117 (1994); *Rogers v. Rogers,* 111 N.C. App. 606, 432 S.E.2d 907 (1993); *Hayes* (citing *White v. White,* 296 N.C. 661, 252 S.E.2d 698 (1979), and *Marks*).]

(c) True alimony provisions in an incorporated agreement are modifiable, notwithstanding express language to the contrary. [*Acosta v. Clark,* 70 N.C. App. 111, 318 S.E.2d 551 (1984) (support provisions that were separable and independent were modifiable even though agreement provided that the alimony provisions were not to be modified except by the consent of both parties in writing).]

(d) True alimony provisions in a consent order may be modified and terminated upon cohabitation despite a provision providing that support payments to wife were given in reciprocal consideration for the agreement of the parties as to equitable distribution and property settlement. This was so even though the consent order provided that payments terminated upon wife's death or remarriage and did not speak to cohabitation. [*Underwood v. Underwood,* 365 N.C. 235, 717 S.E.2d 361 (2011) (parties cannot, by including a reciprocal consideration provision in their agreement, immunize alimony payments from modification or termination under applicable statutes where rest of agreement clearly indicated that payments were alimony payments).]

(e) For more on whether payments to a party are "true alimony," subject to termination, or are payments exchanged for property settlement provisions, see *Postseparation Support and Alimony*, Bench Book, Vol. 1, Chapter 2.

iii. Changed circumstances.

(a) If true alimony, then court can modify pursuant to G.S. 50-16.9.

(b) The power of the court to modify an alimony order is not power to grant a new trial or to retry the issues of the original hearing, but only to adapt the decree to some distinct and definite change in the financial circumstances of the parties. [*Cunningham v. Cunningham,* 345 N.C. 430, 480 S.E.2d 403 (1997) (party's status as a dependent spouse is not properly reconsidered upon a motion to modify alimony).]

(c) Only those changed circumstances that relate to the "factors used in the original determination of the amount of alimony awarded" are relevant. [*Kowalick v. Kowalick,* 129 N.C. App. 781, 785, 501 S.E.2d 671, 674 (1998) (quoting *Cunningham v. Cunningham,* 345 N.C. 430, 435, 480 S.E.2d 403, 406 (1997)). *See Cunningham* (purpose of comparing circumstances or facts considered in entering original order and the present circumstances is to ascertain whether a material change of circumstances has occurred).]

(d) The change in circumstances must occur subsequent to the date of incorporation. Changes in circumstances occurring between the time the agreement is executed and the time the agreement becomes a court order are irrelevant to modification. [*Cavenaugh v. Cavenaugh,* 317 N.C. 652, 347 S.E.2d 19 (1986) (obligations in the agreement are purely contractual before incorporation); *Smart v. State ex rel. Smart,* 198 N.C. App. 161, 678 S.E.2d 720 (2009) (citing *Cavenaugh*).]

(e) A change in circumstances sufficient for modification would not ordinarily be a change that was contemplated by the original agreement and for which a provision was made therein for appropriate adjustment. [*Cunningham v. Cunningham,* 345 N.C. 430, 480 S.E.2d 403 (1997) (citing *Britt v. Britt*, 49 N.C. App. 463, 271 S.E.2d 921 (1980)) (when agreement contained an automatic adjustment provision, the fact that husband's income had changed since the time of the original agreement was not sufficient for modification of the alimony order absent a showing that the change in income hindered his ability to meet his alimony obligation).]

(f) Where an alimony order originates from a private agreement between the parties, there may be few, if any, findings of fact as to the circumstances or factors in the court decree awarding alimony. Determining whether there has been a material change in the parties' circumstances sufficient to justify a modification of the alimony order may require the trial court to make findings of fact as to what the original circumstances or factors were in addition to what the current circumstances or factors are. [*Cunningham v. Cunningham,* 345 N.C. 430, 480 S.E.2d 403 (1997).]

iv. For a discussion of the modifiability of alimony generally, see *Postseparation Support and Alimony*, Bench Book, Vol. 1, Chapter 2.

v. Procedure for determining whether an agreement is an integrated property settlement.

(a) To resolve the question of whether an agreement is integrated or nonintegrated, a court looks to the intention of the parties. [*Lemons v. Lemons,* 103 N.C. App. 492, 406 S.E.2d 8 (1991) (citing *Hayes v. Hayes,* 100 N.C. App.

138, 394 S.E.2d 675 (1990)).] The intent of the parties is determined from the language of the agreement, its subject matter and purpose, and the parties' situation at the time of its execution. [*White v. White,* 296 N.C. 661, 252 S.E.2d 698 (1979).]

(b) Procedure when agreement clearly and unequivocally states the parties' intent.

(1) The court of appeals has held that if the agreement contains an unequivocal clause regarding integration or unequivocal integration language, that language controls and there is no need for an evidentiary hearing on integration. [*Lemons v. Lemons,* 103 N.C. App. 492, 406 S.E.2d 8 (1991) (citing *Morrison v. Morrison,* 102 N.C. App. 514, 402 S.E.2d 855 (1991)).] However, the state supreme court held that an agreement will not be considered integrated even when it contains a clear integration clause if the rest of the agreement clearly shows that payments were considered to be alimony by the parties. [*Underwood v. Underwood,* 365 N.C. 235, 717 S.E.2d 361 (2011).]

(2) When the agreement is clear and unambiguous and leaves no room for construction, construction of the agreement is a matter of law. [*Rudisill v. Rudisill,* 102 N.C. App. 280, 401 S.E.2d 818 (citing *Allison v. Allison,* 51 N.C. App. 622, 277 S.E.2d 551 (1981)), *review denied,* 329 N.C. 790, 408 S.E.2d 525 (1991); *Underwood v. Underwood,* 365 N.C. 235, 717 S.E.2d 361 (2011) (no hearing on intent of parties required where language of agreement clearly showed that payments were alimony).]

(3) For examples of unequivocal integration clauses, see *Acosta v. Clark,* 70 N.C. App. 111, 318 S.E.2d 551 (1984) (agreement provided that provisions for payment of alimony to wife were independent of any division or agreement for division of property between the parties and should not for any purpose be deemed to be a part of or merged in or integrated with a property settlement of the parties); *Britt v. Britt*, 36 N.C. App. 705, 711, 245 S.E.2d 381, 385 (1978) (agreement provided that "provisions for the support, maintenance and alimony of wife are independent of any division or agreement for division of property . . . and shall not for any purpose be deemed to be a part of or merged in or integrated with a property settlement of the parties"); *Cunningham v. Cunningham,* 121 N.C. App. 771, 468 S.E.2d 466 (1996) (agreement provided that alimony was separate from the property settlement), *rev'd in part on other grounds,* 345 N.C. 430, 480 S.E.2d 403 (1997). For an example of unequivocal integration language, see *Morrison v. Morrison,* 102 N.C. App. 514, 402 S.E.2d 855 (1991) (provision in the agreement relating to the release of spousal property rights included specific language "AND FOR THE CONSIDERATION AFORESAID" and was preceded by a provision wherein parties agreed to live separate and apart; waiver of property rights was given in consideration of agreement to live separate and apart). *Cf. Holcomb*

v. Holcomb, 132 N.C. App. 744, 746, 513 S.E.2d 807, 809 (1999) (clause titled "ENTIRE AGREEMENT," which provided that the agreement contained the entire understanding of the parties and that there were "no representations, warranties, covenants, or undertakings other than those expressed and set out [in the agreement]," was a standard merger clause designed to merge prior discussions, negotiations, and representations into the agreement and not an integration clause).]

(c) Procedure when agreement does not clearly and unequivocally state the parties' intent.

(1) In the absence of an unequivocal integration or nonintegration clause, the court is to hold an evidentiary hearing to determine the intent of the parties. [*Lemons v. Lemons,* 103 N.C. App. 492, 406 S.E.2d 8 (1991) (citing *Hayes v. Hayes,* 100 N.C. App. 138, 394 S.E.2d 675 (1990)) (error for trial court to refuse to allow evidence to determine the intent of the parties regarding whether provisions of the agreement were separable or integrated); *Hayes*, 100 N.C. App. at 148, 394 S.E.2d at 680 (error for the trial court to refuse to hold an evidentiary hearing where there were no "explicit, unequivocal provisions on integration or non-integration").]

(2) At the hearing, the court must apply a presumption that the provisions in an incorporated separation agreement are separable and not integrated; this presumption is rebuttable by the greater weight of the evidence. [*White v. White,* 296 N.C. 661, 252 S.E.2d 698 (1979); *Holcomb v. Holcomb,* 132 N.C. App. 744, 513 S.E.2d 807 (1999) (citing *White*); *Williams v. Williams,* 120 N.C. App. 707, 463 S.E.2d 815 (1995) (presumption of separability prevails unless a party proves by a preponderance of the evidence that the parties intended an integrated agreement), *aff'd per curiam,* 343 N.C. 299, 469 S.E.2d 553 (1996). *See Marks v. Marks,* 316 N.C. 447, 342 S.E.2d 859 (1986) (the *White* presumption of separability is required in those cases in which it properly arises).]

(3) The party contending that support and property settlement provisions are integrated has the burden of proving that the parties intended an integrated agreement. [*White v. White,* 296 N.C. 661, 252 S.E.2d 698 (1979) (party opposing modification has the burden of proof on issue of separability; standard is a preponderance of the evidence); *Holcomb v. Holcomb,* 132 N.C. App. 744, 513 S.E.2d 807 (1999) (citing *White*); *Lemons v. Lemons,* 112 N.C. App. 110, 434 S.E.2d 638 (1993), *review denied,* 335 N.C. 556, 441 S.E.2d 117 (1994).]

(4) A trial court may admit parol evidence regarding the situation of the parties at the time they executed their separation agreement and property settlement. [*Love v. Mewborn,* 79 N.C. App. 465, 339 S.E.2d 487, *review denied,* 317 N.C. 704, 347 S.E.2d 43 (1986).] See Section IV.E.2, above, for more on extrinsic evidence.

(5) At the evidentiary hearing on integration, evidence of the negotiation between the parties is admissible to clarify the provisions of the order. [*Hayes v. Hayes,* 100 N.C. App. 138, 394 S.E.2d 675 (1990) (citing *Rowe v. Rowe*, 305 N.C. 177, 287 S.E.2d 840 (1982)).]

(6) If the presumption of separability is not rebutted, the agreement is not integrated. [*Williams v. Williams,* 120 N.C. App. 707, 463 S.E.2d 815 (1995), *aff'd per curiam*, 343 N.C. 299, 469 S.E.2d 553 (1996).]

(7) If the presumption of separability is rebutted, the agreement is integrated. [*See Stegall v. Stegall,* 100 N.C. App. 398, 397 S.E.2d 306 (1990), *review denied*, 328 N.C. 274, 400 S.E.2d 461 (1991).]

(8) When it is not clear whether the provisions of a separation agreement are integrated, summary judgment is not appropriate. [*White v. Bowers,* 101 N.C. App. 646, 400 S.E.2d 760 (1991) (where no clause in the agreement in question addressed integration, court must look to intention of the parties, making summary judgment inappropriate).]

(d) Cases finding an agreement integrated.

(1) Trial court found that property settlement and alimony payments were mutually dependent. [*Love v. Mewborn,* 79 N.C. App. 465, 339 S.E.2d 487, *review denied,* 317 N.C. 704, 347 S.E.2d 43 (1986).]

(e) Cases finding an agreement not integrated.

(1) When a consent order methodically enumerated stipulations and findings that established the essential elements of an alimony award, set out the parties' consent to support provisions that complied with the statutory definition of "alimony" which were listed separately from the order's property provisions, and frequently used the term "alimony", support provisions in the order were alimony, which the trial court properly terminated pursuant to G.S. 50-16.9(b) upon wife's cohabitation. [*Underwood v. Underwood,* 365 N.C. 235, 717 S.E.2d 361 (2011) (consent order "unambiguously" demonstrated the parties' intent that payments to wife were alimony).]

(2) Language of the contract, its purpose, and the respective circumstances of the parties demonstrated the intent of the parties to separate the support and property provisions. [*Rudisill v. Rudisill,* 102 N.C. App. 280, 401 S.E.2d 818 (1991) (payment of alimony to wife was based on husband's abandonment and fact that husband was able-bodied wage-earner and wife was unemployed and ill; court found that husband was a supporting spouse and able to pay alimony and that wife was a dependent spouse; contract language indicated that the property provision was additional consideration and not inseparable consideration).]

(3) Court properly found that provisions relating to the form of ownership and the possession of the family home were negotiated separately from the question of alimony. [*Lemons v. Lemons*, 112 N.C. App. 110, 434 S.E.2d 638 (1993), *review denied*, 335 N.C. 556, 441 S.E.2d 117 (1994).]

5. Modifying provisions for division of property.
    a. Incorporated agreements.
        i. Property settlement provisions of a separation agreement included in a consent decree are not modifiable without the consent of both parties, regardless of whether the provisions are part of an integrated agreement. [*White v. White,* 296 N.C. 661, 252 S.E.2d 698 (1979) (indicating provisions not modifiable); *Holsomback v. Holsomback,* 273 N.C. 728, 161 S.E.2d 99 (1968) (agreed-upon division of property, a separable provision, set out in an incorporated consent judgment, absent the consent of the parties thereto, could be modified or set aside only for fraud or mistake in an independent action); *Rudisill v. Rudisill*, 102 N.C. App. 280, 401 S.E.2d 818 (once house passed to wife under a consent judgment, court could not later modify the property division by ordering husband to pay wife for repairs on the house) *review denied*, 329 N.C. 790, 408 S.E.2d 525 (1991); *Hayes v. Hayes,* 100 N.C. App. 138, 394 S.E.2d 675 (1990) (citing *Holsomback*); *Reavis v. Reavis,* 82 N.C. App. 77, 345 S.E.2d 460 (1986) (court had no authority to order a partial refund of a fully executed lump sum payment that represented, at least in part, a property settlement); *Cobb v. Cobb*, 54 N.C. App. 230, 282 S.E.2d 591 (1981) (citing *Holsomback*) (determinations of property rights in an incorporated separation agreement are beyond the power of the court to modify without the consent of both parties), *appeal dismissed, review denied,* 304 N.C. 724, 288 S.E.2d 809 (1982); 3 Lee's North Carolina Family Law § 14.31c (5th ed. 2002) (upon incorporation, court has no statutory power to modify property provisions in an integrated agreement). *But cf. Walters v. Walters,* 307 N.C. 381, 385, 298 S.E.2d 338, 341 (1983) (dicta suggesting that provisions that "concern some aspect of a property settlement" may be modified "only so long as the court's order remains unsatisfied as to that specific provision").]
    b. Unincorporated agreements.
        i. An unincorporated separation agreement is a contract and cannot be modified absent the consent of the parties. [*Rose v. Rose*, 108 N.C. App. 90, 422 S.E.2d 446 (1992) (court erred when it modified the property settlement provisions in an unincorporated agreement to award a monthly amount of equity in the family residence as child support).]

H. Reconciliation

1. Reconciliation occurs when there is a resumption of marital relations.
2. Definition of "resumption of marital relations."
    a. "Resumption of marital relations" is defined as the voluntary renewal of the husband and wife relationship, as shown by the totality of the circumstances. [G.S. 52-10.2.]
    b. Isolated incidents of sexual intercourse between the parties do not constitute resumption of marital relations. [G.S. 52-10.2.]
    c. There may be a resumption of marital relations even though the relationship lasts only a short time. [*See Casella v. Estate of Casella*, 200 N.C. App. 24, 682 S.E.2d 455 (2009) (finding that parties reconciled for three-week period before husband's death).]

d. The relevant time frame to determine reconciliation is the period after which a party contends that the parties have reconciled, and the evidence presented should speak to the period following the date of alleged reconciliation. [*Casella v. Estate of Casella*, 200 N.C. App. 24, 682 S.E.2d 455 (2009).]

e. Whether parties have reconciled is determined by one of two methods:

i. When the evidence is undisputed and there is substantial objective indicia that the parties held themselves out as husband and wife, the trial court may find reconciliation as a matter of law. The trial court does not need to consider the subjective intent of the parties. [*Casella v. Estate of Casella*, 200 N.C. App. 24, 682 S.E.2d 455 (2009).]

ii. When the evidence of reconciliation is in dispute, the trial court must consider the subjective intent of the parties. [*Casella v. Estate of Casella*, 200 N.C. App. 24, 682 S.E.2d 455 (2009).]

f. That parties had reconciled was established by undisputed evidence that the parties slept in the same bed, that wife assumed responsibility for the intimate care of the husband, that both parties indicated to others that they had reconciled and held themselves out to the public in a manner that suggested that they were husband and wife, and others interacted with plaintiff as if she were defendant's wife, and that a substantial amount of property passed to wife outside of husband's will. Trial court properly determined that the facts were not in dispute and that objective evidence established that the parties had reconciled as a matter of law. [*Casella v. Estate of Casella*, 200 N.C. App. 24, 682 S.E.2d 455 (2009) (equitable distribution claim by estate of husband against wife dismissed).]

g. Four hours on each of six evenings spent together in the former marital home eating dinner and visiting with the parties' children in combination with three or four "isolated acts" of sexual intercourse did not constitute resumption of marital relations under G.S. 52-10.2. [*Fletcher v. Fletcher,* 123 N.C. App. 744, 474 S.E.2d 802 (1996) (wife never "moved" back into or resumed cohabitation in the marital home, but instead maintained her separate residence; time period involved was brief; no evidence that parties shared chores or household responsibilities, that they accompanied each other to public places or held themselves out as husband and wife, or indicated to others that their problems had been resolved or that they desired to terminate the separation), *review denied,* 345 N.C. 640, 483 S.E.2d 706 (1997).]

3. Effect of reconciliation.

a. Support provisions in a separation agreement.

i. The general rule is that executory provisions of a **separation agreement** for support and maintenance are terminated upon the resumption of marital relations. [*In re Estate of Adamee,* 291 N.C. 386, 230 S.E.2d 541 (1976); *Campbell v. Campbell,* 234 N.C. 188, 66 S.E.2d 672 (1951); *Williams v. Williams,* 120 N.C. App. 707, 463 S.E.2d 815 (1995), *aff'd per curiam,* 343 N.C. 299, 469 S.E.2d 553 (1996).]

ii. Executory provisions of a separation agreement are those in which "a party binds himself to do or not to do a particular thing *in the future*." [*Carlton*

v. Carlton, 74 N.C. App. 690, 693, 329 S.E.2d 682, 684 (1985) (emphasis in original) (quoting *Whitt v. Whitt,* 32 N.C. App. 125, 129–30, 230 S.E.2d 793, 796 (1977)).]

iii. Executed support provisions are not affected by reconciliation. [*Potts v. Potts,* 24 N.C. App. 673, 211 S.E.2d 815 (1975) (noting that a complete waiver of future support may be considered fully executed if given in return for a lump sum payment that was made in full before reconciliation); *Schultz v. Schultz,* 107 N.C. App. 366, 420 S.E.2d 186 (1992) (husband's duty under a consent judgment to pay alimony up to the date of reconciliation, as an executed portion of the consent judgment, remained enforceable through the court's contempt power), *review denied,* 333 N.C. 347, 426 S.E.2d 710 (1993).]

iv. "Executed" provisions are "those that have been carried out and which require no future performance." [*Carlton v. Carlton,* 74 N.C. App. 690, 693, 329 S.E.2d 682, 684 (1985) (quoting *Whitt v. Whitt,* 32 N.C. App. 125, 130, 230 S.E.2d 793, 796 (1977)).]

v. If a party has not complied with a provision for payment of support up to the date of reconciliation, the provision remains enforceable. [*See Schultz v. Schultz,* 107 N.C. App. 366, 420 S.E.2d 186 (1992) (trial court may find that provision for payment of future alimony in an incorporated agreement is no longer valid because of reconciliation while holding a party in contempt for past violations of the provision; order finding defendant in civil contempt for failure to pay past due alimony upheld), *review denied,* 333 N.C. 347, 426 S.E.2d 710 (1993).]

vi. For agreements executed during separation pursuant to G.S. 52-10(a1) on or after June 19, 2013, reconciliation will not completely void any waiver, release, or establishment of support rights and obligations. Any such waiver, release, or establishment will remain valid following a period of reconciliation and subsequent separation. [G.S. 52-10(a1).] It is unclear whether this provision will affect the law relating to separation agreements entered pursuant to G.S. 52-10.1.

b. Property settlement provisions.

i. Generally, property settlement agreements are not affected by reconciliation. [*See Porter v. Porter,* 217 N.C. App. 629, 720 S.E.2d 778 (2011) (agreement executed in 1988, in which parties relinquished and released all rights in each other's real and personal property, barred equitable distribution even though parties reconciled following execution of the agreement and lived together until their final separation in 2005; 1988 agreement, incorporated in 2007 divorce judgment, provided that it remained in effect if the parties reconciled unless otherwise provided by the parties in writing after reconciliation).]

ii. However, if the property settlement was negotiated as "reciprocal consideration" for the agreement to live separate and apart, the provisions are deemed integrated and the resumption of marital relations will terminate the executory provisions of the property settlement agreement. [*Morrison v. Morrison,* 102 N.C. App. 514, 402 S.E.2d 855 (1991) (when property settlement was conditioned upon agreement to live separate and apart, resumption of marital relations

terminated executory provisions); *Stegall v. Stegall,* 100 N.C. App. 398, 397 S.E.2d 306 (1990), *review denied*, 328 N.C. 274, 400 S.E.2d 461 (1991).]

iii. If the property settlement was not negotiated as "reciprocal consideration" for the agreement to live separate and apart, the provisions of the property settlement are deemed separate and not integrated and the resumption of marital relations will not affect either executed or executory provisions of a property settlement. [*Morrison v. Morrison,* 102 N.C. App. 514, 402 S.E.2d 855 (1991).] For procedure for determining whether the agreement is integrated, see Section IV.G.4.c.v, above.

iv. When an agreement calls for immediate performance, a party may not render a provision executory by wrongfully refusing to comply. In those circumstances, the provision is not invalidated by subsequent reconciliation. [*Whitt v. Whitt,* 32 N.C. App. 125, 230 S.E.2d 793 (1977) (where agreement called for husband and wife to contemporaneously execute deeds of conveyance, which husband did but wife did not, wife's unfulfilled duty to convey was not executory and thus terminated by subsequent reconciliation; wife's failure to convey constituted a breach of an executed contract).]

v. Executed property provisions are not terminated by reconciliation.

(a) Provision that required husband to convey his interest in the marital residence to the wife was executed before reconciliation and therefore not terminated by the parties' resumption of marital relations. [*Case v. Case,* 73 N.C. App. 76, 325 S.E.2d 661, *review denied,* 313 N.C. 597, 330 S.E.2d 606 (1985). *See also Potts v. Potts,* 24 N.C. App. 673, 211 S.E.2d 815 (1975) (provisions dividing property and mutually waiving alimony executed before reconciliation and thus not affected thereby), and *Jones v. Lewis,* 243 N.C. 259, 90 S.E.2d 547 (1955) (recognizing that reconciliation by the parties to a separation agreement would not revoke or invalidate a duly executed deed of conveyance in a property settlement between the parties).]

(b) **EXCEPTION**: Provisions in a separation agreement that were executed before reconciliation may be void if the evidence shows an intent by the parties to cancel those provisions. In that case, equitable distribution might still be allowed. [*Stegall v. Stegall,* 100 N.C. App. 398, 397 S.E.2d 306 (1990) (citing *Carlton v. Carlton,* 74 N.C. App. 690, 329 S.E.2d 682 (1985)), *review denied*, 328 N.C. 274, 400 S.E.2d 461 (1991).]

c. Provisions terminated upon a finding that parties had resumed marital relations.

i. Provisions in a separation agreement waiving certain estate rights. [*In re Estate of Adamee,* 291 N.C. 386, 230 S.E.2d 541 (1976) (reconciliation terminated provisions of a separation agreement waiving wife's right to administer, and share in, husband's estate); *In re Estate of Archibald,* 183 N.C. App. 274, 644 S.E.2d 264 (2007) (citing *Adamee*) (reconciliation rescinded husband's waiver of his right to inherit from wife's estate; award of an elective share to the husband upheld; also noting, as support for affirming award to husband of an elective share, language in separation agreement tracking common law rule that upon reconciliation, executory provisions of the agreement were cancelled and rescinded).]

ii. Provisions in separation agreement whereby wife relinquished all rights and interests in property "hereafter acquired" by her husband and in which the parties agreed to a "full, complete and final settlement of any property rights that might arise in the future." [*Carlton v. Carlton,* 74 N.C. App. 690, 692, 329 S.E.2d 682, 684 (1985) (wife's promise not to make a claim in the future against husband's future property was executory; if determination made on remand that parties had resumed marital relationship, equitable distribution of property acquired after reconciliation would be proper).]

iii. Provisions for future child support in an unincorporated separation agreement. [*Campbell v. Campbell*, 234 N.C. 188, 66 S.E.2d 672 (1951) (wife could not base her claim for child support on provision in separation agreement that was rescinded, at least as to the future, by resumption of cohabitation).] For more on child support provisions in incorporated and unincorporated separation agreements, see *Procedure for Initial Child Support Orders*, Bench Book, Vol. 1, Chapter 3, Part 2.

iv. If agreement at issue was a separation agreement, provisions for future alimony payments. [*Williams v. Williams,* 120 N.C. App. 707, 712, 463 S.E.2d 815, 819 (1995) (noting as "well established that resumption of the marital relationship voids executory portions of a separation agreement"), *aff'd per curiam,* 343 N.C. 299, 469 S.E.2d 553 (1996).] **NOTE:** G.S. 52-10(a1), *added by* S.L. 2013-140, § 1, effective June 19, 2013, allows a husband and wife to enter into a marital contract, during a period of separation, waiving, releasing, or establishing rights and obligations to postseparation support, alimony, or spousal support, which provisions remain valid following a period of reconciliation and subsequent separation. It is unclear whether this provision will affect the law relating to separation agreements entered pursuant to G.S. 52-10.1.

d. Effect of a subsequent separation on an agreement rescinded by reconciliation.

i. A subsequent separation of the parties will not revive a rescinded separation agreement. [*In re Estate of Adamee,* 291 N.C. 386, 230 S.E.2d 541 (1976) (citing *Campbell v. Campbell,* 234 N.C. 188, 66 S.E.2d 672 (1951)); *Williams v. Williams,* 120 N.C. App. 707, 463 S.E.2d 815 (1995) (citing *Hand v. Hand,* 46 N.C. App. 82, 264 S.E.2d 597 (1980)), *aff'd per curiam,* 343 N.C. 299, 469 S.E.2d 553 (1996).]

ii. But see G.S. 52-10(a1), *added by* S.L. 2013-140, § 1, effective June 19, 2013, which allows a husband and wife to enter into a marital contract, during a period of separation, waiving, releasing, or establishing rights and obligations to postseparation support, alimony, or spousal support, which provisions remain valid following a period of reconciliation and subsequent separation. It is unclear whether this provision will affect the law relating to separation agreements entered pursuant to G.S. 52-10.1.

4. Parties may not alter the effect of reconciliation on a separation agreement.

a. Contracts providing that a reconciliation will not affect the terms of a **property settlement** are not contrary to law or public policy. [*Morrison v. Morrison,* 102 N.C. App. 514, 402 S.E.2d 855 (1991); *In re Estate of Tucci,* 94 N.C. App. 428, 380 S.E.2d

782 (1989) (reconciliation did not rescind husband's release of his right to dissent from wife's will; a spouse's statutory right to dissent from the other spouse's will is a property right, and the separation and property settlement agreement here expressly provided that it was to remain in effect if the parties reconciled), *aff'd per curiam,* 326 N.C. 359, 388 S.E.2d 768 (1990).]

b. However, contracts that provide that reconciliation will not affect the terms of a **separation agreement** violate the policy behind separation agreements and are void. [*Morrison v. Morrison,* 102 N.C. App. 514, 402 S.E.2d 855 (1991). *But cf. Porter v. Porter,* 217 N.C. App. 629, 720 S.E.2d 778 (2011) (equitable distribution was barred by property settlement agreement executed during a prior separation of the parties and later incorporated into a divorce judgment, where agreement expressly provided that it remained in effect if the parties reconciled unless otherwise provided by the parties in writing after reconciliation).]

c. Provision in a separation agreement that executory provisions were to be cancelled and rescinded upon reconciliation was valid and was cited as support for the court's conclusion that a waiver of inheritance rights was rescinded and cancelled by the parties' reconciliation. [*In re Estate of Archibald,* 183 N.C. App. 274, 644 S.E.2d 264 (2007) (citing *In re Estate of Adamee,* 291 N.C. 386, 230 S.E.2d 541 (1976)) (following holding from *Adamee* that a reconciliation rescinds and nullifies a separation agreement's waiver of estate rights; also noting, as support for affirming award to husband of an elective share, language in separation agreement tracking the common law rule that upon reconciliation, executory provisions of the agreement were "cancelled and rescinded").]

d. But see G.S. 52-10(a1), *added by* S.L. 2013-140, § 1, effective June 19, 2013, which allows a husband and wife to enter into a marital contract, during a period of separation, waiving, releasing, or establishing rights and obligations to postseparation support, alimony, or spousal support, which provisions remain valid following a period of reconciliation and subsequent separation. It is unclear whether this provision will affect the law relating to separation agreements entered pursuant to G.S. 52-10.1.

I. Enforcing a Separation Agreement

1. What law governs.

a. The general rule is that the validity and construction of a separation agreement is determined by the law of the place where the agreement was executed. [*Davis v. Davis*, 269 N.C. 120, 152 S.E.2d 306 (1967) (Florida law determined the validity and construction of an agreement executed in Florida); *Behr v. Behr,* 46 N.C. App. 694, 266 S.E.2d 393 (1980) (citing *Medders v. Medders,* 40 N.C. App. 681, 254 S.E.2d 44 (1979)) (validity and construction of a separation agreement entered into in another state governed by the law of that state).]

b. Choice of law. Choice of law provisions contained in an agreement are valid and must be given effect. [*Franzen v. Franzen,* 135 N.C. App. 369, 520 S.E.2d 74 (1999) (where parties specified Ohio law as controlling, court looked to Ohio law to construe a premarital agreement).]

i. The parties' choice of law is generally binding as long as the parties had a reasonable basis for their choice and the law of the chosen state does not violate a fundamental public policy of the state or other applicable law. [*Behr v. Behr,* 46 N.C. App. 694, 266 S.E.2d 393 (1980).]

ii. Choice of law provision in a separation agreement not incorporated into the Japanese divorce judgment calling for Illinois law was enforceable. [*Torres v. McClain,* 140 N.C. App. 238, 535 S.E.2d 623 (2000) (that both parties were domicilaries of Illinois when agreement executed made Illinois law a reasonable choice).]

c. The law of another state may not be applied if the law violates North Carolina public policy. [*Torres v. McClain,* 140 N.C. App. 238, 535 S.E.2d 623 (2000) (applying Illinois law after finding that it did not violate North Carolina public policy).] To show that the law of another state violates North Carolina public policy, a party must show that the law violates "some prevalent conception of good morals or fundamental principle of natural justice or involve injustice to the people of the forum state." [*Torres v. McClain,* 140 N.C. App. 238, 243, 535 S.E.2d 623, 626 (2000) (quoting *Boudreau v. Baughman,* 322 N.C. 331, 342, 368 S.E.2d 849, 857–58 (1988)) (fact that Illinois law awarded wife a portion of husband's nonvested military pension, when North Carolina law did not so provide, did not violate North Carolina public policy).]

2. Enforcement of an unincorporated separation agreement.

a. An unincorporated separation agreement is enforced in the same manner as any other contract. [*Lasecki v. Lasecki*, 809 S.E.2d 296 (N.C. Ct. App. 2017); *Herring v. Herring*, 231 N.C. App. 26, 752 S.E.2d 190 (2013) (citing *Gilmore v. Garner,* 157 N.C. App. 664, 580 S.E.2d 15 (2003)); *Reeder v. Carter*, 226 N.C. App. 270, 740 S.E.2d 913 (2013), and *Gilmore* (both citing *Moore v. Moore,* 297 N.C. 14, 252 S.E.2d 735 (1979)). *See also Long v. Long,* 160 N.C. App. 664, 588 S.E.2d 1 (2003) (citing *Jones v. Jones,* 144 N.C. App. 595, 548 S.E.2d 565 (2001)) (unincorporated agreements are governed by general contract principles and are enforceable only under such principles).]

b. An unincorporated separation agreement is enforced as an ordinary contract, even when the agreement creates rights not provided for by North Carolina statute. [*Torres v. McClain,* 140 N.C. App. 238, 535 S.E.2d 623 (2000) (trial court properly distributed husband's nonvested military pension pursuant to a separation agreement governed by Illinois law, even though North Carolina law at the time did not provide for equitable distribution of nonvested pensions).]

c. An unincorporated agreement is enforced as an ordinary contract even when some provisions therein have been superseded, so long as the agreement was not incorporated into a court order. [*See Hennessey v. Duckworth,* 231 N.C. App. 17, 752 S.E.2d 194 (2013) (custody and child support provisions of a separation agreement were superseded by a consent order but a provision in the agreement for attorney fees remained enforceable when the agreement had never been incorporated into an order; however, attorney fee provision in the agreement, that losing party was solely responsible for all legal fees and costs upon breach or in a suit for enforcement, was not applicable when later action between the parties was not one for breach

or specific performance of the agreement but became a G.S. Chapter 50 custody action).]

d. Enforcement of provisions in an unincorporated separation agreement does not transform the unincorporated agreement into a court order. [*See Condellone v. Condellone,* 129 N.C. App. 675, 501 S.E.2d 690 (despite the fact that two money judgments had been entered against husband for unpaid alimony, one of which ordered specific performance of the alimony provisions in the parties' unincorporated separation agreement, the trial court had no authority under G.S. Chapter 50 to modify the alimony provisions based on changed circumstances because the agreement had not been incorporated), *review denied,* 349 N.C. 354, 517 S.E.2d 889 (1998); *Danai v. Danai,* 166 N.C. App. 279, 603 S.E.2d 168 (2004) (**unpublished**) (not paginated on Westlaw) (stating that "[w]ere we to find that a court's enforcement of a separation agreement by applying contract remedies acted as a *de facto* incorporation of an otherwise unincorporated agreement, we, in effect, would force a level of jurisdiction over separation agreements not desired or intended by the parties to the agreement and which would infringe on their freedom to contract"); *cf. Young v. Young,* 224 N.C. App. 388, 736 S.E.2d 538 (2012) (contempt order requiring husband to specifically perform an unincorporated provision of a separation agreement resulted in that provision being incorporated going forward).]

e. Unincorporated agreements are enforced through an action for breach of contract.

   i. A party may sue for breach of contract and seek money damages, or the party may elect to rescind the contract based on a substantial breach and, if the statutory requirements are met, seek other remedies, such as alimony [*Wilson v. Wilson,* 261 N.C. 40, 134 S.E.2d 240 (1964).] or equitable distribution. [*See Lee v. Lee,* 93 N.C. App. 584, 378 S.E.2d 554 (1989).]

   ii. A party may sue for breach of contract and seek specific performance when the legal remedy for breach of contract is inadequate. See Section IV.I.2.g, below.

   iii. A trial court can award both a money judgment for amounts past due under the contract and specific performance of future payments. [*Lasecki v. Lasecki,* 809 S.E.2d 296 (N.C. Ct. App. 2017) (trial court did not err in entering money judgment for arrears along with the order of specific performance, even though plaintiff's complaint requested only specific performance).]

f. Breach of the separation agreement.

   i. The elements of breach of contract are:

      (a) The existence of a valid contract and

      (b) Breach of the terms of the contract. [*Long v. Long,* 160 N.C. App. 664, 588 S.E.2d 1 (2003) (citing *Poor v. Hill*, 138 N.C. App. 19, 530 S.E.2d 838 (2000)).]

   ii. The statute of limitations for breach of an unincorporated agreement:

      (a) Is generally three years. [G.S. 1-52(1).]

      (b) Under seal is ten years. [G.S. 1-47(2); *Crogan v. Crogan,* 236 N.C. App. 272, 763 S.E.2d 163 (2014).]

(c) Begins to run when the claim accrues, and in a breach of contract action, the claim generally accrues upon breach. [*Scott & Jones, Inc. v. Carlton Ins. Agency, Inc.,* 196 N.C. App. 290, 677 S.E.2d 848 (2009); *Greene v. Colby,* 193 N.C. App. 454, 667 S.E.2d 340 (2008) (**unpublished**) (citing *Pearce v. Highway Patrol Volunteer Pledge Comm.,* 310 N.C. 445, 312 S.E.2d 421 (1984)) (ten-year statute of limitations for a separation agreement under seal had run when defendant, some eleven years prior to filing of complaint, committed an act indicating breach when she presented a deed for plaintiff's signature that contained "clear language" violating the terms of the parties' separation agreement).]

iii. For a breach of contract to be actionable, "it must be a material breach, one that substantially defeats the purpose of the agreement or goes to the very heart of the agreement, or can be characterized as a substantial failure to perform." [*Long v. Long,* 160 N.C. App. 664, 668, 588 S.E.2d 1, 4 (2003) (citing *Fletcher v. Fletcher*, 123 N.C. App. 744, 474 S.E.2d 802 (1996)); *Lancaster v. Lancaster,* 138 N.C. App. 459, 466, 530 S.E.2d 82, 87 (2000) (noting that "[s]mall lapses or inconsequential breaches are not substantial breaches requiring rescission").] *See* Cheryl Howell, *Separation and Property Settlement Agreements: When Does Breach by One Party Excuse Performance by the Other?* UNC Sch. of Gov't: On the Civil Side Blog (Apr. 11, 2018) (hereinafter Howell, *Separation and Property Settlement Agreements*), https://civil.sog.unc.edu/separation-and-property-settlement-agreements-when-does-breach-by-one-party-excuse-performance-by-the-other.

(a) Husband's deviation in the method of paying child support was not a substantial breach. [*Long v. Long,* 160 N.C. App. 664, 588 S.E.2d 1 (2003) (husband's payment of child support by check sometime after the first of the month was not a substantial breach of agreement that called for payment by direct deposit on the first of the month).]

(b) Husband's failure to disclose his enrollment in a retirement plan after the date of separation was not a material breach of the separation agreement. [*Lancaster v. Lancaster,* 138 N.C. App. 459, 530 S.E.2d 82 (2000) (enrollment in the plan after the date of separation would not affect the wife's share of the property).]

(c) Husband's failure to inform wife of son's dental surgery, failure to cancel certain joint credit card accounts, and failure to pay wife the full amount of her interest in his pension benefits were not material breaches of the agreement. [*Fletcher v. Fletcher*, 123 N.C. App. 744, 474 S.E.2d 802 (1996) (failures did not substantially defeat the purpose of the agreement, nor did they go to the very heart of the agreement), *review denied,* 345 N.C. 640, 483 S.E.2d 706 (1997).]

(d) Husband's failure to make alimony payments was not a material breach of the agreement when husband had missed only three payments, those breaches occurred simultaneously with summary judgment hearings, husband performed intermittently during that time, and there was no evidence

that husband was attempting to avoid his obligation. [*Cator v. Cator,* 70 N.C. App. 719, 321 S.E.2d 36 (1984).]

iv. Breach of a duty to disclose.

(a) No breach by wife of duty to disclose information when husband testified that he knew that attorney and attorney's firm only represented wife, that agreement would affect significant legal rights with a long range effect, that he should consult an attorney before signing the agreement, that he had adequate time to consider the agreement, and that he signed the agreement free from pressure and coercion. [*Dawbarn v. Dawbarn,* 175 N.C. App. 712, 625 S.E.2d 186 (2006) (parties' fiduciary relationship terminated when wife retained attorney but court assumed, for the purpose of argument, that relationship was still in existence for this portion of the discussion on wife's failure to disclose).]

(b) No breach by husband where agreement provided that each party had disclosed all information regarding property and finances requested by the other. Husband not required by agreement to disclose to wife all marital assets. [*Daughtry v. Daughtry*, 128 N.C. App. 737, 497 S.E.2d 105 (1998) (because parties had attorneys representing them in the negotiation of the agreement, a confidential relationship did not exist).]

(c) Nondisclosure of $102,000 loan made by husband to corporation in which he was majority shareholder was material breach justifying rescission of separation agreement where "essence of the separation agreement was that the parties must fully disclose all of their assets worth $100 or more." [*Lee v. Lee*, 93 N.C. App. 584, 588, 378 S.E.2d 554, 556 (1989).]

v. Breach of a "no interference" clause.

(a) Husband breached the "no interference" provision in the separation agreement by making statements about or to his wife: "Your day is on the way"; "Are you scared yet?"; "It's finally time for you to pay for what you've done"; and "You are getting ready to see difficult." [*Long v. Long,* 160 N.C. App. 664, 669, 588 S.E.2d 1, 4 (2003).]

vi. Breach of a "no molestation" clause.

(a) Wife established breach of a no molestation clause by showing that husband filed or caused to be filed numerous lawsuits against the wife, which were dismissed before hearing, tampered with wife's mail, and mistreated their children, which caused wife mental anguish. [*Reis v. Hoots,* 131 N.C. App. 721, 509 S.E.2d 198 (1998), *review denied,* 350 N.C. 595, 537 S.E.2d 481 (1999).]

vii. Waiver/ratification of a breach.

(a) A nonbreaching party to a separation agreement may waive enforcement of a provision of that agreement by ratifying the breaching party's partial performance of the contract. [*Altman v. Munns,* 82 N.C. App. 102, 345 S.E.2d 419 (1986) (mother waived enforcement of father's contractual requirement

to pay daughter's college expenses when mother agreed to pay half of those expenses).]

viii. Breach of an integrated agreement.

(a) When an agreement is integrated, a party's breach of its provisions can relieve the nonbreaching party from his or her alimony obligations. [*Patterson v. Taylor,* 140 N.C. App. 91, 535 S.E.2d 374 (2000) (citing *Nisbet v. Nisbet*, 102 N.C. App. 232, 402 S.E.2d 151 (1991)).]

(b) *See* Howell, *Separation and Property Settlement Agreements*, https://civil.sog.unc.edu/separation-and-property-settlement-agreements-when-does-breach-by-one-party-excuse-performance-by-the-other.

(c) For the procedure to determine whether an agreement is integrated, see Section IV.G.4.c.v, above.

g. Specific performance for breach of an unincorporated separation agreement.

i. Elements of specific performance.

(a) In addition to proving breach of contract, a party seeking specific performance must allege and prove that the remedy at law is inadequate, the defendant can perform some or all of his or her obligations, and the moving party has performed his or her obligations. [*Reeder v. Carter*, 226 N.C. App. 270, 740 S.E.2d 913 (2013) (citing 3 Lee's North Carolina Family Law § 14.35 (5th ed. 2002) and *Cavenaugh v. Cavenaugh,* 317 N.C. 652, 347 S.E.2d 19 (1986)); *Cavenaugh* (specific performance is available only if a party has alleged and proven that he has performed his obligations under the contract and that his remedy at law is inadequate). *Cf. Praver v. Raus,* 220 N.C. App. 88, 725 S.E.2d 379 (2012) (considering as dicta the statement in *Cavenaugh* that a moving party must prove the performance of his obligations; court of appeals declined to address the issue as defendant did not raise it at trial).]

(b) A provision in an unincorporated separation agreement providing for specific performance upon breach does not relieve the moving party of the burden of proving the required elements. Nor does defendant's failure to answer eliminate plaintiff's burden when the complaint fails to allege facts about a required element. Parties may not contract around an established legal standard. [*Reeder v. Carter*, 226 N.C. App. 270, 271, 740 S.E.2d 913, 915 (2013) (agreement provided, in part, that "an order of specific performance enforceable by contempt is an appropriate remedy for a breach by either party"; complaint did not allege facts about defendant's ability to pay).]

ii. Inadequate remedy at law.

(a) The remedy at law—meaning a money judgment—generally is inadequate when complete recovery would require a multiplicity of actions and legal processes. [*Praver v. Raus,* 220 N.C. App. 88, 725 S.E.2d 379 (2012); *Cavenaugh v. Cavenaugh,* 317 N.C. 652, 347 S.E.2d 19 (1986).] For this reason, specific performance generally is allowed to enforce agreements for future

periodic payments. [*Praver; Cavenaugh.*] In determining whether money damages are an adequate remedy at law, the court "considers factors which include the 'difficulty and uncertainty of collecting such damages after they are awarded.' " [*Lasecki v. Lasecki*, 809 S.E.2d 296, 306 (N.C. Ct. App. 2017) (quoting *Whalehead Props. v. Coastland Corp.,* 290 N.C. 144, 270, 283, 261 S.E.2d 899, 908 (1980)).]

(b) In *Reeder v. Carter*, 226 N.C. App. 270, 271, 740 S.E.2d 913, 915 (2013), and *Praver v. Raus,* 220 N.C. App. 88, 99 n.1, 725 S.E.2d 379, 386 n.1 (2012), the separation agreements each provided that "neither party has a plain, speedy, or adequate legal remedy to compel compliance with the provisions of this agreement." In *Reeder*, the court of appeals did not specifically address that language but held that the contractual specific performance clause, which included that language, did not eliminate plaintiff's burden on the required elements. In *Praver*, neither party "discussed the impact of this provision on the ability of the trial court to order specific performance," so the appellate court did "not address it or express any opinion on its effect."

(c) However, the remedy at law for past due arrears may or may not be adequate. In *Praver v. Raus,* 220 N.C. App. 88, 725 S.E.2d 379 (2012) (citing *Cavenaugh v. Cavenaugh,* 317 N.C. 652, 347 S.E.2d 19 (1986)), the court of appeals treated arrearages and prospective payments due under an unincorporated agreement differently, remanding for findings addressing whether plaintiff had an adequate remedy at law with respect to arrearages of child support and alimony, while affirming the portion of the order requiring future payment of those obligations without a finding as to the adequacy of plaintiff's remedy. According to *Praver*, findings addressing whether a plaintiff's remedy at law is adequate are not necessary for prospective payments, based on case law recognizing that a plaintiff generally must file multiple lawsuits to obtain judgments against a defendant who repeatedly fails to pay an ongoing obligation. While a money judgment for arrears generally is an adequate remedy, specific performance may be appropriate upon "evidence of a pattern of defaults, of unsatisfied judgments, and of conduct to keep assets from execution." [*Praver v. Raus*, 220 N.C. App. 88, 98, 725 S.E.2d 379, 386 (2012) (citing 3 Lee's North Carolina Family Law § 14.35b(ii) (5th ed. 2002)).]

(d) *See also Reeder v. Carter*, 226 N.C. App. 270, 740 S.E.2d 913 (2013) (citing *Moore v. Moore,* 297 N.C. 14, 252 S.E.2d 735 (1979), and *Stewart v. Stewart,* 61 N.C. App. 112, 300 S.E.2d 263 (1983)) (damages are usually an inadequate remedy at law when an unincorporated separation agreement is being enforced; noting that even one missed payment can indicate that the remedy at law is inadequate); *Stewart* (breachor's initial failure to comply establishes the inadequacy of the breachee's remedy at law; no abuse of discretion when specific performance was ordered when complaint alleged that defendant had stated he would not comply with agreement and failed to make first payment when due); *Condellone v. Condellone,* 129 N.C. App. 675, 501 S.E.2d 690 (when plaintiff obtained a money judgment in 1993 for

unpaid alimony, which was unsatisfied when plaintiff filed three subsequent actions for arrearages accruing post-1993, plaintiff did not have an adequate remedy at law with respect to the later actions), *review denied,* 349 N.C. 354, 517 S.E.2d 889 (1998).]

iii. Defendant's ability to perform.

(a) Plaintiff has the burden of proving that the defendant has the ability to perform some or all of the agreement. [*Reeder v. Carter*, 226 N.C. App. 270, 740 S.E.2d 913 (2013).] Plaintiff's evidentiary burden is less than that required in the contempt setting. [*Reeder v. Carter*, 226 N.C. App. 270, 740 S.E.2d 913 (2013) (citing 3 Lee's North Carolina Family Law § 14.35 (5th ed. 2002)); *Condellone v. Condellone,* 129 N.C. App. 675, 501 S.E.2d 690 (in finding defendant able to perform obligations under a separation agreement, the trial court was not required to make a specific finding of defendant's "present ability to comply" as used in civil contempt context; when findings supported conclusion that defendant had the ability to carry out the terms of the agreement, specific performance of obligations in the agreement for monthly payments was "feasible"), *review denied,* 349 N.C. 354, 517 S.E.2d 889 (1998); *Young v. Young,* 224 N.C. App. 388, 736 S.E.2d 538 (2012) (citing *Condellone*) (generally, specific performance may not be ordered unless such relief is feasible).]

(b) To meet plaintiff's burden on ability to pay, a plaintiff has two alternatives: present evidence of defendant's actual income or assets or show that defendant has depressed his income to avoid payment. [*See Lasecki v. Lasecki,* 246 N.C. App. 518, 786 S.E.2d 286 (2016) (trial court erred by considering husband's earning capacity without first concluding he was acting in bad faith); *Reeder v. Carter*, 226 N.C. App. 270, 740 S.E.2d 913 (2013) (specific performance properly denied when plaintiff failed to allege specific facts showing defendant's ability to perform and acknowledged that defendant had recently declared bankruptcy); *Condellone v. Condellone,* 129 N.C. App. 675, 501 S.E.2d 690 (order of specific performance supported by corporate records showing a deliberate pattern of conduct by defendant to depress his income and defeat plaintiff's rights under the separation agreement), *review denied,* 349 N.C. 354, 517 S.E.2d 889 (1998); *Praver v. Raus,* 220 N.C. App. 88, 725 S.E.2d 379 (2012) (even though defendant presented evidence of an inability to pay, because court found, based on other evidence, that he was voluntarily unemployed with the intent to deprive plaintiff of support due under the agreement, findings about defendant's present ability to comply with the agreement not required); *Cavenaugh v. Cavenaugh,* 317 N.C. 652, 347 S.E.2d 19 (1986) (if the court finds defendant unable to perform the obligations under the agreement, it may not order specific performance absent evidence that defendant has deliberately depressed his income or dissipated his resources).]

(c) Defendant's ability to pay may be demonstrated by evidence of actual income or by showing that defendant has depressed income to avoid payment, [*Reeder v. Carter*, 226 N.C. App. 270, 740 S.E.2d 913 (2013).]

by evidence of assets such as retirement plan valuations, home value, and tax returns, [*Condellone v. Condellone,* 129 N.C. App. 675, 501 S.E.2d 690, *review denied,* 349 N.C. 354, 517 S.E.2d 889 (1998).] or by evidence of available credit. [*Edwards v. Edwards,* 102 N.C. App. 706, 403 S.E.2d 530, *review denied,* 329 N.C. 787, 408 S.E.2d 518 (1991).]

(d) A defendant was found to have the ability to pay an obligation in an agreement even though he had a monthly shortfall of $400, when defendant's sworn testimony and financial affidavit indicated a comfortable lifestyle and showed a number of voluntary deductions for benefits. [*Martin v. Martin,* 204 N.C. App. 595, 696 S.E.2d 925 (2010) (**unpublished**). *See also Lasecki v. Lasecki*, 809 S.E.2d 296 (N.C. Ct. App. 2017) (defendant shown to have ability to pay).]

(e) When defendant has offered evidence tending to show that he is unable to fulfill his obligations under a separation agreement, the trial judge must make findings of fact concerning defendant's ability to carry out the terms of the agreement before ordering specific performance. [*Cavenaugh v. Cavenaugh,* 317 N.C. 652, 347 S.E.2d 19 (1986) (when trial judge did not make such findings, he could not have properly exercised his discretion in ordering specific performance of the separation agreement and payment of arrearages); *Reeder v. Carter*, 226 N.C. App. 270, 740 S.E.2d 913 (2013), and *Edwards v. Edwards,* 102 N.C. App. 706, 403 S.E.2d 530, *review denied,* 329 N.C. 787, 408 S.E.2d 518 (1991) (both citing *Cavenaugh*).]

iv. Plaintiff's performance under the agreement.

(a) In *Cavenaugh v. Cavenaugh,* 317 N.C. 652, 347 S.E.2d 19 (1986), the supreme court stated that specific performance is available only if a party has alleged and proven that he has performed his obligations under the contract and that his remedy at law is inadequate. [*Cf. Praver v. Raus,* 220 N.C. App. 88, 725 S.E.2d 379 (2012) (considering as dicta the statement in *Cavenaugh* that a moving party must prove the performance of his obligations; court of appeals declined to address the issue as defendant did not raise it at trial).]

(b) While the moving party must prove that she has not breached the terms of the separation agreement, an immaterial breach does not eliminate the possibility of specific performance. [*Reeder v. Carter*, 226 N.C. App. 270, 740 S.E.2d 913 (2013) (noting that a plaintiff in breach might be required to cure the breach or pay damages as a condition of the order for specific performance).]

(c) When the parties intended for all provisions of the unincorporated separation agreement to be independent of one another, a breach by plaintiff of the provisions allowing defendant visitation would not excuse defendant's performance of the provision requiring him to pay one-half of children's college expenses. [*Martin v. Martin,* 204 N.C. App. 595, 696 S.E.2d 925 (2010) (**unpublished**) (defendant properly ordered to perform his obligation to pay one-half of child's college expenses).] *See* Howell, *Separation*

and Property Settlement Agreements, https://civil.sog.unc.edu/separation-and-property-settlement-agreements-when-does-breach-by-one-party-excuse-performance-by-the-other.

(d) A material breach by defendant may excuse plaintiff's subsequent performance thereunder. [*See Ebert v. Ebert*, 223 N.C. App. 520, 735 S.E.2d 451 (2012) (**unpublished**) (defendant's material breach of the agreement (unilaterally reducing his alimony payment by more than one-half in September 2007) excused plaintiff's subsequent performance thereunder (her obligation to renegotiate the amount of alimony after October 2007)).]

v. Order for specific performance.

(a) The court may not modify an unincorporated separation agreement in an order of specific performance. [*Harris v. Harris,* 307 N.C. 684, 300 S.E.2d 369 (1983). *See Lasecki v. Lasecki*, 809 S.E.2d 296 (N.C. Ct. App. 2017) (order of specific performance of an amount less than contract amount does not relieve party of liability for full contract amount).]

(b) A court can order specific performance of all or only part of an unincorporated agreement. [*Harris v. Harris,* 307 N.C. 684, 300 S.E.2d 369 (1983) (a court may order specific performance of only that part of the agreement which defendant is able to perform); *Lasecki v. Lasecki*, 809 S.E.2d 296 (N.C. Ct. App. 2017).]

(c) An order requiring a party to specifically perform his or her obligations under an unincorporated separation agreement is enforceable by contempt. [*Gen. Motors Acceptance Corp. v. Wright,* 154 N.C. App. 672, 573 S.E.2d 226 (2002) (citing *McDowell v. McDowell,* 55 N.C. App. 261, 284 S.E.2d 695 (1981)). *See also Blackburn v. Bugg*, 723 S.E.2d 585 (N.C. Ct. App. 2012) (**unpublished**) (specific performance ordered of alimony provisions in a premarital agreement; in later proceeding defendant found in contempt for failure to increase alimony annually based on increases in the Consumer Price Index as provided for in the premarital agreement).]

(d) Specific performance is available to enforce either support or property settlement provisions in an unincorporated agreement. [*Moore v. Moore,* 297 N.C. 14, 252 S.E.2d 735 (1979) (enforcing support provision); *Rose v. Rose,* 66 N.C. App. 161, 310 S.E.2d 626 (1984) (enforcing property settlement provision).]

3. Enforcement of an incorporated separation agreement.

a. Separation agreements approved by the court on or after Jan. 11, 1983, are treated as court-ordered judgments. [*Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983) (applicable to all separation agreements incorporated by a court on or after Jan. 11, 1983).]

b. Remedies that are available to a party to a post-*Walters* incorporated agreement.

i. As an order of the court, the separation agreement is enforceable by contempt, execution, or both. [*Mitchell v. Mitchell,* 270 N.C. 253, 154 S.E.2d 71 (1967); *Doub v. Doub*, 313 N.C. 169, 326 S.E.2d 259 (1985) (per curiam); *Walters*

v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983) (as a court order, an incorporated separation agreement is enforceable by the contempt powers of the court); *Powers v. Powers,* 103 N.C. App. 697, 407 S.E.2d 269 (1991) (citing *Mitchell*); *Fucito v. Francis,* 175 N.C. App. 144, 622 S.E.2d 660 (2005) (proper method to enforce an incorporated agreement is by a motion for contempt); *Blount v. Lemaire*, 232 N.C. App. 521, 757 S.E.2d 527 (2014) (**unpublished**) (not paginated on Westlaw) (not paginated on Westlaw) (when father agreed in incorporated separation agreement to pay college expenses for "room, board and tuition" and "reasonable spending money" for each child, court properly entered money judgment for college costs that father failed to pay).]

ii. Property settlement provisions of an incorporated separation agreement are enforceable by contempt proceedings. [*Cobb v. Cobb,* 54 N.C. App. 230, 282 S.E.2d 591 (1981), *appeal dismissed, review denied,* 304 N.C. 724, 288 S.E.2d 809 (1982).]

iii. In a contempt proceeding, the trial court has the authority to interpret an agreement and is to apply "normal rules of interpreting or construing contracts." [*Holden v. Holden,* 214 N.C. App. 100, 110, 715 S.E.2d 201, 208 (2011) (quoting *Fucito v. Francis,* 175 N.C. App. 144, 150, 622 S.E.2d 660, 664 (2005)); *Fucito* (in an action for contempt, a court is permitted to use "normal rules of interpreting or construing contracts" when interpreting an incorporated agreement).]

iv. For a party to be in civil contempt, a trial court must find that a party's noncompliance was willful. Willfulness, in this context, means an ability to comply with the court order and a deliberate and intentional failure to do so. [*Clark v. Gragg,* 171 N.C. App. 120, 614 S.E.2d 356 (2005).] The court of appeals has noted in dicta that if the terms of an incorporated agreement are ambiguous, a finding of contempt generally will not be proper, as it is difficult for a party to willfully refuse to comply with a term that he or she does not understand. [*Holden v. Holden*, 214 N.C. App. 100, 715 S.E.2d 201 (2011).]

v. Before holding a defendant in civil contempt, a trial court must find that defendant has the present ability to comply with the order. [*Oakley v. Oakley,* 165 N.C. App. 859, 599 S.E.2d 925 (2004) (trial court's contempt order was reversed when no finding was made as to husband's present ability to comply with the alimony obligations in an incorporated agreement).] For that reason, a party cannot bring a civil contempt action to enforce an incorporated separation agreement against a person who is deceased when the contempt action is initiated. [*MacMillan v. Thompson,* 231 N.C. App. 170, 753 S.E.2d 741 (2013) (**unpublished**) (motion in the cause interpreted to initiate a civil contempt action).]

vi. For more on the use of contempt to enforce a court order, see the following chapters in Volume 1 of this Bench Book: *Enforcement of Child Support Orders*, Chapter 3, Part 4; *Child Custody*, Chapter 4; and *Equitable Distribution Overview and Procedure,* Chapter 6, Part 1.

vii. For more on contempt and the procedures of G.S. Chapter 5A, see *Contempt of Court*, Bench Book, Vol. 2, Chapter 4.

viii. For an online module on contempt, see Michael Crowell, *Contempt of Court* (UNC School of Government, Nov. 2010), https://sog.adobeconnect.com/p30019876/.

c. Remedies that are not available to a party to a post-*Walters* incorporated agreement.

i. Contract remedies. [*Griffith v. Curtis,* 205 N.C. App. 462, 696 S.E.2d 701 (2010); *Doub v. Doub*, 313 N.C. 169, 326 S.E.2d 259 (1985) (per curiam) (excluding the remedy of an independent action in contract); *Powers v. Powers,* 103 N.C. App. 697, 407 S.E.2d 269 (1991) (specific performance is not available).] While contract remedies are not available, traditional contract defenses such as fraud or duress may be asserted as grounds to set aside an incorporated agreement under G.S. 1A-1, Rule 60(b). [3 Lee's North Carolina Family Law § 14.57c (5th ed. 2002); *Griffith v. Curtis,* 205 N.C. App. 462, 466, 696 S.E.2d 701, 704 (2010) (citing *Yurek v. Shaffer,* 198 N.C. App. 67, 678 S.E.2d 738 (2009)) (upon incorporation, parties lose contract defenses; a party seeking to set aside an incorporated agreement is limited to proving "lack of consent, fraud, mutual mistake, or unilateral mistake under some misconduct"; unconscionability is a defense that could have been addressed before entry of the judgment so is barred by res judicata); *Coppley v. Coppley*, 128 N.C. App. 658, 496 S.E.2d 611 (error to deny wife's motion to set aside incorporated consent judgment pursuant to Rule 60(b) when wife clearly established that she was under duress when she entered into agreement), *review denied*, 348 N.C. 281, 502 S.E.2d 846 (1998).]

ii. A declaratory judgment action to interpret a provision in an incorporated agreement. [*Fucito v. Francis*, 175 N.C. App. 144, 622 S.E.2d 660 (2005) (trial court would have authority to construe the provision in question, a distributive award provision, in a contempt proceeding).]

4. Defenses to enforcement related to execution of the agreement.

a. The courts will subject a claim of fraud, duress, or undue influence to a far more searching scrutiny when a party was represented by counsel in the making of the agreement and throughout the negotiations leading up to its execution. [*Van Every v. Van Every,* 265 N.C. 506, 144 S.E.2d 603 (1965) (citing *Joyner v. Joyner*, 264 N.C. 27, 140 S.E.2d 714 (1965)) (fact that wife was represented by counsel at the conference resulting in a separation agreement and when she executed and acknowledged the agreement contradicts contention that she was incompetent to understand the arrangements, was ignorant of its terms, and did not know what she was doing).]

b. The statute of limitations on a claim to set aside an agreement on the grounds of fraud, duress, or undue influence is three years. However, if fraud is raised as a counterclaim in response to a breach of contract claim on a sealed instrument, the same ten-year statute of limitations will apply to both the breach of contract claim and the fraud counterclaim. [*Crogan v. Crogan,* 236 N.C. App. 272, 763 S.E.2d 163 (2014).]

c. Duress.

i. A separation agreement executed while a party is acting under duress is invalid and can be set aside. [*Goodwin v. Webb,* 357 N.C. 40, 577 S.E.2d 621 (2003), *rev'g per curiam for reasons stated in dissenting opinion in* 152 N.C. App. 650, 568 S.E.2d 311 (2002) (Greene, J., dissenting).]

ii. Duress is the result of coercion and "exists where one, by the *unlawful* act of another, is induced to make a contract or perform or forego some act under circumstances" that deprives a person of the exercise of free will. [*Stegall v. Stegall,* 100 N.C. App. 398, 401, 397 S.E.2d 306, 307 (1990) (emphasis in original) (quoting *Link v. Link,* 278 N.C. 181, 194, 179 S.E.2d 697, 705 (1971)), *review denied*, 328 N.C. 274, 400 S.E.2d 461 (1991); *Fletcher v. Fletcher,* 23 N.C. App. 207, 210, 208 S.E.2d 524, 527 (1974) ("[d]uress may take the form of unlawfully inducing one to make a contract or to perform some other act against his own free will").]

iii. The following factors are relevant in determining whether a victim's will was actually overcome:

(a) The age and physical and mental condition of the victim;

(b) Whether the victim had independent advice;

(c) Whether the transaction was fair;

(d) Whether there was independent consideration for the transaction;

(e) The relationship of the victim and the alleged perpetrator;

(f) The value of the item transferred compared with the total wealth of the victim; and

(g) Whether the perpetrator actively sought the transfer and whether the victim was in distress or in an emergency situation. [*Stegall v. Stegall,* 100 N.C. App. 398, 397 S.E.2d 306 (1990), *review denied*, 328 N.C. 274, 400 S.E.2d 461 (1991).]

iv. That a person was not threatened with physical force or violence is not conclusive on the issue of duress. [*Coppley v. Coppley,* 128 N.C. App. 658, 496 S.E.2d 611, *review denied,* 348 N.C. 281, 502 S.E.2d 846 (1998).] Findings supported the trial court's conclusion that defendant was not under duress when he executed a separation agreement when findings showed no evidence that defendant's alleged duress was based on actions of the plaintiff and when findings summarized admissions by defendant, including his admission that the agreement was fair, that he understood it, and that he voluntarily executed it and was not acting under duress when he signed it. [*Praver v. Raus,* 220 N.C. App. 88, 725 S.E.2d 379 (2012).]

v. Trial court erred in denying wife's motion to set aside a consent judgment pursuant to G.S. 1A-1, Rule 60(b) when wife clearly established that she was under duress when she entered into the agreement. [*Coppley v. Coppley,* 128 N.C. App. 658, 496 S.E.2d 611 (wife was at the mercy of her husband who, after discovering her infidelity, determined her rights to their children and manipulated her by threatening her relationship with the children if she did not sign the consent order and go along with his terms for custody, support, and the distribution of marital property), *review denied* 348 N.C. 281, 502 S.E.2d 846 (1998).]

vi. An agreement entered into under duress nevertheless may be enforceable if a party ratifies the agreement by accepting benefits under the agreement, so long as the party understands that the benefits arise from the separation agreement and the party is not under duress to accept those benefits. [*Goodwin v. Webb,*

357 N.C. 40, 577 S.E.2d 621 (2003), *rev'g per curiam for reasons stated in dissenting opinion in* 152 N.C. App. 650, 568 S.E.2d 311 (2002) (Greene, J., dissenting) (wife ratified agreement entered into under duress when she accepted money and real and personal property under the agreement, she was aware that she received those benefits pursuant to the agreement, and there was no evidence that she was under duress when she accepted the benefits). *See also Hill v. Hill,* 94 N.C. App. 474, 380 S.E.2d 540 (1989) (wife continued to accept benefits of the agreement, in the form of monthly support payments, long after she became aware of the alleged wrongdoing that induced her to enter into the agreement).]

d. Fraud.

i. The statute of limitations applicable to an action for fraud is three years; the cause of action is not deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. [G.S. 1-52(9). *But cf. Crogan v. Crogan,* 236 N.C. App. 272, 763 S.E.2d 163 (2014) (when fraud is brought as a counterclaim to a claim for breach of contract on a sealed instrument, the same ten-year statute of limitations will apply to both the breach of contract claim and the fraud counterclaim).]

ii. Constructive fraud requires a showing that the parties were in a fiduciary relationship at the time of the alleged fraud and that one party took advantage of the position of trust to his benefit. [*Searcy v. Searcy,* 215 N.C. App. 568 715 S.E.2d 853 (2011).]

iii. The failure of a husband or wife to accurately disclose or represent assets and debts in negotiating a separation or property settlement agreement can constitute fraud when the parties had a duty to disclose. [*Sidden v. Mailman,* 137 N.C. App. 669, 529 S.E.2d 266 (2000); *Searcy v. Searcy,* 215 N.C. App. 568, 715 S.E.2d 853 (2011) (summary judgment not proper when genuine issue of material fact existed as to whether defendant committed constructive fraud when he failed to include in his list of assets two parcels of marital real property, which he had a duty to disclose for equitable distribution purposes; moreover, at the time of disclosure the parties had not separated and neither party had retained an attorney, so fiduciary relationship arising from their marriage had not ended); *Harroff v. Harroff,* 100 N.C. App. 686, 398 S.E.2d 340 (1990) (summary judgment inappropriate when there were questions of fact as to whether the confidential relationship still existed and whether defendant had concealed assets or their true values), *review denied,* 328 N.C. 330, 402 S.E.2d 833 (1991).]

iv. Wife sufficiently alleged agreement procured by fraud when she alleged that the parties were married when the agreement was executed, which sufficiently alleged existence of a fiduciary duty, and husband admitted that he failed to disclose existence of his state retirement account, which served to amend the complaint to allege breach of that duty. [*Sidden v. Mailman,* 137 N.C. App. 669, 529 S.E.2d 266 (2000) (trial court erred in dismissing fraud claim based on plaintiff's failure to allege husband's breach of fiduciary duty).]

v. A contract or unincorporated settlement agreement cannot be attacked for fraud where the alleged misrepresentation or misstatement relates to a matter

of law. [*Dalton v. Dalton,* 164 N.C. App. 584, 596 S.E.2d 331 (2004) (husband sought to set aside unincorporated separation agreement that allocated the parties their respective retirement accounts pursuant to wife's representation that North Carolina law required each of them to retain their respective retirement accounts as their separate property; husband presumed to know the law). *See also Avriett v. Avriett,* 88 N.C. App. 506, 363 S.E.2d 875 (fraud cannot be based upon ignorance of the law), *aff'd per curiam,* 322 N.C. 468, 368 S.E.2d 377 (1988).]

vi. For more on a claim of failure to disclose, see Section IV.I.4.h, below.

e. Undue influence.

i. Where the court cannot find sufficient threat to constitute duress, it may still find the presence of undue influence. [*Coppley v. Coppley,* 128 N.C. App. 658, 496 S.E.2d 611, *review denied,* 348 N.C. 281, 502 S.E.2d 846 (1998).]

ii. Undue influence exists where there has been "a fraudulent influence over the mind and will of another to the extent that the professed action is not freely done but is in truth the act of the one who procures the result." [*Clark v. Foust-Graham,* 171 N.C. App. 707, 713, 615 S.E.2d 398, 402 (2005) (quoting *In re Estate of Loftin*, 285 N.C. 717, 722, 208 S.E.2d 670, 674–75 (1974)).] Undue influence has four general elements:

(a) A person who is subject to influence;

(b) An opportunity to exert influence;

(c) A disposition to exert influence; and

(d) A result indicating undue influence. [*Clark v. Foust-Graham,* 171 N.C. App. 707, 713–14, 615 S.E.2d 398, 402 (2005) (considering undue influence in an annulment action but noting that undue influence has been recognized as a "potential ground for nullifying documents executed by persons in anticipation of marriage or divorce").]

iii. No undue influence where parties first executed an informal agreement, followed by a formal agreement two weeks later, wife was advised by husband's attorney that she could have an attorney review the agreement before execution, and wife was given time to review agreement in private before she signed it. [*Sidden v. Mailman,* 137 N.C. App. 669, 529 S.E.2d 266 (2000).]

iv. Evidence by wife that husband told her that the separation agreement was temporary, that he needed the agreement to effect a loan, that he loved her, and that he would resolve any difficulties and resume marital relations was insufficient to find undue influence. [*Murphy v. Murphy,* 34 N.C. App. 677, 239 S.E.2d 597 (1977), *aff'd in part, rev'd in part on other grounds,* 295 N.C. 390, 245 S.E.2d 693 (1978).]

f. Mistake.

i. Generally.

(a) The statute of limitations applicable to an action for relief on the ground of mistake is three years; the cause of action is not deemed to have accrued

until the discovery by the aggrieved party of the facts constituting the mistake. [G.S. 1-52(9).]

(b) Neither unilateral mistakes of fact nor mutual mistakes of law are, standing alone, sufficient to set aside or reform an unincorporated agreement. [*Herring v. Herring,* 231 N.C. App. 26, 752 S.E.2d 190 (2013) (citing *Stevenson v. Stevenson,* 100 N.C. App. 750, 398 S.E.2d 334 (1990)).]

(c) The party seeking to reform or rescind an unincorporated agreement bears the burden of proving the existence of a mutual mistake by clear, cogent, and convincing evidence. [*Herring v. Herring,* 231 N.C. App. 26, 752 S.E.2d 190 (2013) (citing *Smith v. First Choice Servs.,* 158 N.C. App. 244, 580 S.E.2d 743 (2003)).]

ii. Mutual mistake as to a material fact.

(a) A mutual mistake as to a material fact comprising the essence of an agreement provides grounds to rescind a contract. [*Lancaster v. Lancaster,* 138 N.C. App. 459, 530 S.E.2d 82 (2000); *Stevenson v. Stevenson,* 100 N.C. App. 750, 752, 398 S.E.2d 334, 336 (1990) (contract may be avoided based on mutual mistake where the mistake is common to both parties and where, because of it, "each has done what neither intended"); *Herring v. Herring,* 231 N.C. App. 26, 752 S.E.2d 190 (2013) (citing *Lancaster*) (husband's unilateral assertions, that the parties intended to use the actual value of wife's state retirement in calculating the distributional award in their separation agreement and that neither party was aware that the pension was worth more than wife's contributions to her defined benefit plan when they entered into the agreement, were insufficient to establish a mutual mistake of material fact).]

(b) A contract or unincorporated settlement agreement cannot be set aside for a mutual mistake as to a material fact when the parties make a mistake of law, not of fact. [*Dalton v. Dalton,* 164 N.C. App. 584, 596 S.E.2d 331 (2004) (separation agreement distributed the parties' retirement accounts pursuant to wife's representation that North Carolina law required each of them to retain their respective retirement accounts as their separate property; no mistake of fact); *Herring v. Herring,* 231 N.C. App. 26, 752 S.E.2d 190 (2013) (citing *Dalton*) (allegation that parties misunderstood the value of wife's state retirement account because they did not treat it as a defined benefit plan and calculate its value accordingly, if a mutual mistake, was a mistake of law, not warranting rescission).]

iii. Mistake by one party and inequitable conduct by the other.

(a) A unilateral mistake, unaccompanied by fraud, imposition, or like circumstances, is not sufficient to avoid a contract. [*Stevenson v. Stevenson,* 100 N.C. App. 750, 398 S.E.2d 334 (1990) (consent judgment, which parties had revised several times, enforced as written when wife failed to show that husband attempted to conceal alteration of a formula to value the marital residence or that any pressure was applied to get wife and her attorney

to sign the judgment without being able to properly review it); *Herring v. Herring,* 231 N.C. App. 26, 752 S.E.2d 190 (2013) (citing *Stevenson*).]

(b) When plaintiff alleged that she mistakenly executed a memorandum of judgment during family financial mediation, which was later incorporated into a consent judgment, she alleged a unilateral mistake rather than the mutual mistake required to set aside the judgment under G.S. 1A-1, Rule 60(b). [*Griffith v. Curtis*, 205 N.C. App. 462, 696 S.E.2d 701 (2010).]

(c) An instrument that fails to express the true intention of the parties may be reformed to express such intention when the failure is due to the mistake of one party induced by fraud on the part of the other or due to a mistake of the draftsman. [*Fountain v. Fountain*, 83 N.C. App. 307, 350 S.E.2d 137 (1986) (citing *McBride v. Johnson Oil & Tractor Co.*, 52 N.C. App. 513, 279 S.E. 2d 117 (1981)), *review denied*, 319 N.C. 224, 353 S.E.2d 407 (1987).]

(d) Separation agreement could be reformed when parties had made an oral agreement and one party knew that the other party mistakenly believed that the written agreement conformed to the oral understanding. [*Fountain v. Fountain*, 83 N.C. App. 307, 350 S.E.2d 137 (1986) (summary judgment in wife's favor to enforce agreement as written reversed when husband presented uncontradicted evidence that he was mistaken as to the actual effect of a formula providing for annual increases in alimony and jury could find that wife was aware of husband's mistaken belief), *review denied*, 319 N.C. 224, 353 S.E.2d 407 (1987).]

g. Lack of mental capacity.

i. A separation agreement is voidable if one party lacks mental capacity at the time the agreement is executed. [*Lawson v. Bennett,* 240 N.C. 52, 81 S.E.2d 162 (1954) (wife's mental incapacity at the time she entered into the deed of separation established). *See also Holton v. Holton,* 813 S.E.2d 649, 656 (N.C. Ct. App. 2018) (plaintiff stated a claim for rescission where complaint alleged that she "was on post-surgery medications that affected her memory and reasoning" at the time of execution).]

ii. Trial court did not err in refusing to set aside a separation agreement, based in part on defendant's contentions that he lacked the ability to contract because he was depressed and was on medication for that condition and for sleep problems. The trial court properly considered defendant's testimony but, according to the appellate court, determined that "it was not entitled to much weight." [*Praver v. Raus,* 220 N.C. App. 88, 92, 725 S.E.2d 379, 382–83 (2012).]

iii. Trial court did not err in refusing to rescind the parties' agreement on the ground of wife's lack of capacity to contract. [*Sidden v. Mailman,* 137 N.C. App. 669, 529 S.E.2d 266 (2000) (even though there was conflicting evidence regarding wife's mental state, competent evidence supported finding that wife was not mentally impaired).]

h. Failure to disclose.

i. Where a fiduciary relationship exists between spouses, each spouse has a duty to disclose all material facts to the other. [*Lancaster v. Lancaster,* 138 N.C. App.

459, 530 S.E.2d 82 (2000); *Harroff v. Harroff*, 100 N.C. App. 686, 398 S.E.2d. 340 (1990), *review denied*, 328 N.C. 330, 402 S.E.2d 833 (1991); *Daughtry v. Daughtry*, 128 N.C. App. 737, 497 S.E.2d 105 (1998) (rejecting the argument that every spouse who is a party to a separation and/or property settlement agreement has an affirmative obligation to make a full and accurate disclosure of his or her assets and debts; rather, when parties are in a confidential relationship, duty is to disclose all material facts). *But see Dawbarn v. Dawbarn,* 175 N.C. App. 712, 718, 625 S.E.2d 186, 191 (2006) (describing the duty of spouses in a fiduciary relationship as "a duty of full disclosure to the other").]

ii. A party may voluntarily waive his or her right to disclosure:

(a) By language in the agreement. [*See Daughtry v. Daughtry*, 128 N.C. App. 737, 497 S.E.2d 105 (1998) (agreement provided that each party had disclosed all information regarding property and finances requested by the other and that each party waived further disclosure).]

(b) By his or her conduct. [*See Sidden v. Mailman,* 150 N.C. App. 373, 563 S.E.2d 55 (2002) (wife waived any duty husband may have had to disclose the value of his retirement account (1) by signing the separation agreement without obtaining legal advice and without inquiring as to the value of the account, when agreement awarded all retirement accounts to husband, and (2) by refusing to participate in the process of disclosure and to look at what husband attempted to disclose), *cert. denied,* 356 N.C. 678, 577 S.E.2d 888 (2003).]

(c) By ratification of the agreement. [*Honeycutt v. Honeycutt,* 208 N.C. App. 70, 701 S.E.2d 689 (2010) (plaintiff became aware of husband's alleged failure to disclose assets shortly after execution of the property settlement agreement but accepted substantial benefits under the agreement for nearly two years; plaintiff ratified the agreement by accepting and retaining property worth in excess of $1,000,000 with full understanding that the benefits arose from the separation agreement, and her acceptance of benefits was not made under duress or due to any other wrongdoing); *Rolls v. Rolls,* 208 N.C. App. 569, 706 S.E.2d 842 (2010) (**unpublished**) (when defendant executed a qualified domestic relations order directing transfer of one-half of wife's IRA to defendant, which enforced a provision in the parties' separation agreement, defendant ratified the separation agreement; summary judgment for plaintiff proper on defendant's claim that plaintiff failed to disclose assets when agreement entered into), *review denied,* 365 N.C. 70, 706 S.E.2d 238 (2011).]

iii. When the parties are no longer in a fiduciary relationship, the duty to disclose ends. However, "[i]n North Carolina, there is no bright line that marks the end of the fiduciary relationship." [3 Lee's North Carolina Family Law § 14.45 (5th ed. 2002).]

iv. Courts have found that the fiduciary relationship, and thus the duty of a spouse to disclose, ends:

(a) When the parties separate and become adversaries negotiating over the terms of their separation. [*Lancaster v. Lancaster,* 138 N.C. App. 459, 530 S.E.2d 82 (2000) (parties were adversarial when wife moved out of house because she feared husband, husband hired an attorney, and parties argued about alimony provision in separation agreement).]

(b) When one or both spouses is represented by legal counsel and negotiates through that attorney with the other spouse as an adversary. [*Joyner v. Joyner*, 264 N.C. 27, 140 S.E.2d 714 (1965); *Dawbarn v. Dawbarn,* 175 N.C. App. 712, 625 S.E.2d 186 (2006) (fiduciary duty terminated when wife retained counsel to prepare postnuptial agreement); *Avriett v. Avriett,* 88 N.C. App. 506, 363 S.E.2d 875 (use of an attorney by one party but not the other established that the parties had become adversaries and that the confidential relationship that formerly existed between them was terminated), *aff'd per curiam,* 322 N.C. 468, 368 S.E.2d 377 (1988); *Daughtry v. Daughtry*, 128 N.C. App. 737, 497 S.E.2d 105 (1998) (when both parties had attorneys during negotiations, no confidential relationship existed); *Harton v. Harton,* 81 N.C. App. 295, 344 S.E.2d 117 (termination of the fiduciary relationship is firmly established when one or both of the parties is represented by counsel), *review denied,* 317 N.C. 703, 347 S.E.2d 41 (1986).]

(c) On the effective date of the separation agreement. [*Searcy v. Searcy,* 215 N.C. App. 568, 715 S.E.2d 853 (2011) (parties separated on April 13; separation agreement executed on June 10 provided it was effective as of April 13).]

v. A fiduciary relationship does not end:

(a) When, before the parties separated or hired attorneys, the parties exchanged lists of assets and liabilities for consideration at a future mediation. [*Searcy v. Searcy,* 215 N.C. App. 568, 715 S.E.2d 853 (2011) (plaintiff's fraud claim based on defendant's failure to include in his assets two parcels of marital real property improperly dismissed upon defendant's summary judgment motion; parties were still in a fiduciary relationship when lists were exchanged).]

(b) Upon representation by an attorney when the attorney functions merely as a scrivener. [*Sidden v. Mailman,* 137 N.C. App. 669, 678 n.1, 529 S.E.2d 266, 272 n.1 (2000) (citing *Harroff v. Harroff,* 100 N.C. App. 686, 691, 398 S.E.2d 340, 343 (1990), *review denied,* 328 N.C. 330, 402 S.E.2d 833 (1991)) ("[r]epresentation by an attorney does not automatically end the confidential relationship of spouses if the attorney's role [i]s merely to record the agreement the spouses agreed to while living in the confidential relationship"); *Harroff* (where both parties retained one attorney to act as a scrivener to draft the parties' agreement, confidential relationship not automatically ended; there was a question of fact as to whether the confidential relationship still existed).]

(c) Automatically upon separation. [*Harroff v. Harroff*, 100 N.C. App. 686, 398 S.E.2d. 340 (1990) (citing *Link v. Link,* 278 N.C. 181, 179 S.E.2d 697 (1971)) (confidential relationship can continue to exist after one spouse has left the home), *review denied*, 328 N.C. 330, 402 S.E.2d 833 (1991); *Lancaster v. Lancaster,* 138 N.C. App. 459, 530 S.E.2d 82 (2000) (citing *Haroff* and *Sidden v. Mailman,* 137 N.C. App. 669, 529 S.E.2d 266 (2000)) (when one party moves out of the marital home, this is evidence that the confidential relationship is over, although it is not controlling).]

vi. When parties address the duty to disclose in a separation agreement, the agreement controls. [*See Lee v. Lee,* 93 N.C. App. 584, 378 S.E.2d 554 (1989) (finding material breach when agreement required disclosure of assets worth $100 or more and husband failed to disclose substantial loan he made to corporation in which he was majority shareholder); *Daughtry v. Daughtry*, 128 N.C. App. 737, 497 S.E.2d 105 (1998) (where agreement provided that each party had disclosed all information regarding property and finances requested by the other, the parties were obligated to make a full and accurate disclosure only with respect to information requested and were not obligated to make a full disclosure with respect to all marital property; parties not in a confidential relationship when agreement entered into).]

vii. A claim of failure to disclose may also be analyzed under the doctrines of unconscionability or fraud. [See Section IV.I.4.i, immediately below, on unconscionability and Section IV.I.4.d, above, on fraud.]

i. Unconscionability.

i. To be unconscionable, a court must find that the agreement is both substantively and procedurally unconscionable. [*Sidden v. Mailman*, 137 N.C. App. 669, 529 S.E.2d 266 (2000) (citing *King v. King,* 114 N.C. App. 454, 442 S.E.2d 154 (1994)) (assuming that husband's failure to disclose state retirement account amounted to procedural unconscionability, when wife abandoned argument on appeal that agreement was substantively unconscionable, court of appeals did not address that issue and upheld trial court's conclusion that agreement was substantively fair); *Daughtry v. Daughtry*, 128 N.C. App. 737, 497 S.E.2d 105 (1998) (citing *King*) (procedural unconscionability, combined with substantive unconscionability, justifies relief from the terms of the agreement); *King*.]

ii. Substantive unconscionability consists of contracts that are harsh, oppressive, and one-sided. [*Lancaster v. Lancaster,* 138 N.C. App. 459, 530 S.E.2d 82 (2000) (citing *King v. King,* 114 N.C. App. 454, 442 S.E.2d 154 (1994)); *Sidden v. Mailman,* 137 N.C. App. 669, 675, 529 S.E.2d 266, 271 (2000) (citing *King*) (substantive unconscionability involves "inequality of the bargain").]

(a) The inequality of the bargain must be "so manifest as to shock the judgment of a person of common sense, and . . . the terms . . . so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other." [*King v. King,* 114 N.C. App. 454, 458, 442 S.E.2d 154, 157 (1994) (quoting *Brenner v. Sch. House, Ltd.,* 302 N.C. 207, 213, 274 S.E.2d 206, 210 (1981)).]

iii. Procedural unconscionability consists of fraud, coercion, undue influence, misrepresentation, inadequate disclosure, duress, and overreaching. [*Lancaster v. Lancaster,* 138 N.C. App. 459, 530 S.E.2d 82 (2000) (citing *King v. King,* 114 N.C. App. 454, 442 S.E.2d 154 (1994)); *Sidden v. Mailman,* 137 N.C. App. 669, 675, 529 S.E.2d 266, 271 (2000) (citing *King*) (procedural unconscionability involves "bargaining naughtiness").]

iv. Even spouses who are not in a confidential relationship are prohibited from engaging in unconscionable behavior when entering into a separation agreement. [*Lancaster v. Lancaster,* 138 N.C. App. 459, 530 S.E.2d 82 (2000) (citing *King v. King,* 114 N.C. App. 454, 442 S.E.2d 154 (1994)); *Daughtry v. Daughtry*, 128 N.C. App. 737, 497 S.E.2d 105 (1998) (when parties are not in a confidential relationship and there is no language in the agreement addressing the duty to disclose, inadequate or fraudulent disclosure by either party in the bargaining process can constitute procedural unconscionability).]

v. The failure of a party to accurately disclose his assets and debts when negotiating a separation and/or a property agreement can constitute procedural unconscionability, even if the party's failure to disclose does not equal fraud. [*Sidden v. Mailman,* 137 N.C. App. 669, 529 S.E.2d 266 (2000) (citing *Daughtry v. Daughtry*, 128 N.C. App. 737, 497 S.E.2d 105 (1998)).]

vi. Cases finding agreement not unconscionable.

(a) *Lancaster v. Lancaster,* 138 N.C. App. 459, 465, 530 S.E.2d 82, 86 (2000) (finding no evidence of fraud, duress, or undue influence and not finding that the agreement was so inequitable as to be unconscionable; noting that a "separation agreement is not invalid merely because one party later decides that what she bargained for is not as good as she would have liked").

(b) *King v. King,* 114 N.C. App. 454, 459, 442 S.E.2d 154, 158 (1994) (even though agreement vested husband with personal and real property valued at $11,000 and debts valued at $24,040, and wife received personal and real property valued at $54,600 and debts valued at $6,000, court did not find based on the record before it that the distribution "shock[s] the judgment of a person of common sense;" agreement not substantively unconscionable).

vii. A party may not seek to set aside an incorporated agreement based on unconscionability. [*Griffith v. Curtis,* 205 N.C. App. 462, 466, 696 S.E.2d 701, 704 (2010) (citing *Yurek v. Shaffer,* 198 N.C. App. 67, 678 S.E.2d 738 (2009)) (upon incorporation, parties lose contract defenses; a party seeking to set aside an incorporated agreement is limited to proving "lack of consent, fraud, mutual mistake, or unilateral mistake under some misconduct"; in context of an incorporated consent judgment, unconscionability is a defense that could have been addressed before entry of the judgment so is barred by res judicata).]

5. Defenses to enforcement related to agreement itself.

a. Vagueness.

i. A separation agreement is not enforceable if its terms are so vague and uncertain that no definite meaning can be ascertained. [*Matthews v. Matthews*, 2 N.C. App. 143, 162 S.E.2d 697 (1968) (postnuptial agreement wherein husband

promised that if he ever left wife, everything he had would be hers was vague and uncertain; a more compelling reason to deny enforcement was that the agreement was void as against public policy for providing an economic inducement to leave the marriage).]

ii. A court will not, however, deny relief because of vagueness or uncertainty if the intent of the parties can be determined from the plain language of the separation agreement, and any ambiguities creating questions of fact may properly be resolved with the use of parol evidence. [*Jackson v. Jackson,* 360 N.C. 56, 620 S.E.2d 862, *rev'g per curiam for reasons stated in dissenting opinion in* 169 N.C. App. 46, 610 S.E.2d 731 (2005) (Hunter, J., dissenting).]

(a) " 'When a contract is in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law.' " [*Hagler v. Hagler*, 319 N.C. 287, 294, 354 S.E.2d 228, 234 (1987) (quoting *Bicycle Transit Auth. v. Bell,* 314 N.C. 219, 227, 333 S.E.2d 299, 304 (1985)).]

(b) When the terms of a contract are not ambiguous, extrinsic evidence may not be used to explain the parties' intention behind the agreement. [*Hartman v. Hartman,* 80 N.C. App. 452, 343 S.E.2d 11 (1986); *Martin v. Martin,* 204 N.C. App. 595, 696 S.E.2d 925 (2010) (**unpublished**) (citing *Hartman*).]

(c) If the language of the agreement is ambiguous, the court may admit parol evidence to explain those terms. [*Jackson v. Jackson*, 360 N.C. 56, 620 S.E.2d 862, *rev'g per curiam for reasons stated in dissenting opinion in* 169 N.C. App. 46, 610 S.E.2d 731 (2005) (Hunter, J., dissenting) (trial court erred by finding separation agreement vague and unenforceable when intent of the parties could be determined by the agreement's plain language and use of parol evidence); *Patterson v. Taylor*, 140 N.C. App. 91, 535 S.E.2d 374 (2000) (court may consider extrinsic evidence to determine the parties' intention behind an ambiguous term).]

(d) See Section IV.E.2, above, on use of extrinsic evidence.

iii. An incorporated separation agreement that offered no "specific language" about the distribution of retirement benefits and provided only that retirement issues would be addressed "at a later date" was not too vague to establish the wife's right to seek a portion of the husband's military retirement pay. [*Brenenstuhl v. Brenenstuhl,* 169 N.C. App. 433, 610 S.E.2d 301 (2005) (trial court correctly applied G.S. 50-20.1(d) to determine wife's portion of husband's military pay).]

b. Additional documents called for by the separation agreement were never executed.

i. Separation agreement that called for the parties to execute a separate right of first refusal agreement was not enforceable when the separate agreement was never executed. [*Cty. of Jackson v. Nichols,* 175 N.C. App. 196, 623 S.E.2d 277 (2005) (concluding that the parties did not intend to be bound by the separation agreement until the right of first refusal agreement was executed).]

6. Defenses to enforcement related to post-execution events or conduct of the parties.

a. Subsequent remarriage of the parties.

i. Unless there is evidence to the contrary, when a married couple enters into a separation agreement, later divorces, and then remarries, each party to the marriage regains all rights and privileges incident to marriage. [*Batten v. Batten,* 125 N.C. App. 685, 482 S.E.2d 18 (1997) (where parties' remarriage created a new marriage contract and legal status, and no provision in the separation agreement from their first marriage indicated an intent for it to remain in force in the event that the parties reconciled, provisions of the separation agreement were no longer effective upon remarriage; wife entitled to inherit from husband's real and personal property upon his death).]

b. Party's performance excused by breach of the party seeking enforcement.

i. Breach by one party does not automatically excuse the other party's performance under a separation agreement. [*Long v. Long,* 160 N.C. App. 664, 588 S.E.2d 1 (2003).]

ii. Breach by one party will relieve the other party of the obligation to perform if:

(a) The promises to perform are interdependent rather than independent and

(b) The breach was of a substantial nature, not caused by the fault of the other party, and was committed in bad faith. [*Smith v. Smith,* 225 N.C. 189, 34 S.E.2d 148 (1945). *See also Patterson v. Taylor,* 140 N.C. App. 91, 535 S.E.2d 374 (2000) (citing *Nisbet v. Nisbet*, 102 N.C. App. 232, 402 S.E.2d 151 (1991)) (when the agreement is integrated, a party's breach of its provisions can relieve the nonbreaching party from her alimony obligations).]

iii. If the agreement unequivocally provides that provisions are dependent on each other, the language controls. [*Wheeler v. Wheeler,* 299 N.C. 633, 263 S.E.2d 763 (1980) (when agreement provided that husband had contracted to pay alimony only so long as wife "performs the conditions of this contract," each party's respective duties were clearly interdependent).] For the procedure to determine whether an agreement is integrated, see Section IV.G.4.c.v, above.

iv. When it is not clear whether or not the provisions of a separation agreement are integrated, summary judgment is not appropriate. [*Nisbet v. Nisbet*, 102 N.C. App. 232, 402 S.E.2d 151 (where agreement did not address whether provisions requiring husband to pay alimony were dependent on wife's compliance with provisions in the same agreement dealing with visitation, noncohabitation, and nonharassment, trial court erred in granting motion for summary judgment on wife's claim for alimony arrearages), *review denied,* 329 N.C. 499, 407 S.E.2d 538 (1991); *White v. Bowers,* 101 N.C. App. 646, 400 S.E.2d 760 (1991) (where no clause in the agreement in question addressed integration, court must look to intention of the parties, making summary judgment inappropriate).]

v. When an agreement does not clearly and unequivocally state the parties' intent, the court must hold an evidentiary hearing and apply a presumption of separability.

vi. Cases finding provisions independent.

(a) Provisions for custody and visitation were independent from provisions for support and maintenance; wife's breach of the visitation provision did not

relieve husband of obligation to pay support and maintenance. [*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); *Martin v. Martin,* 204 N.C. App. 595, 696 S.E.2d 925 (2010) (**unpublished**) (parties intended for all provisions of the unincorporated separation agreement to be independent of each other; breach by plaintiff of provisions allowing defendant visitation did not excuse defendant's obligation to pay one-half of children's college expenses).]

(b) Husband's duty to pay alimony was independent of wife's duty not to interfere with husband; husband's duty to pay certain sums as provided in the agreement in lieu of support not excused by wife's breach of the "no molestation" clause. [*Smith v. Smith,* 225 N.C. 189, 34 S.E.2d 148 (1945).]

(c) "No interference" provision was independent from any other provision of the agreement; husband's breach of the provision was not excused by a finding that wife also had breached the agreement by conducting herself in a manner that was not best for the parties' children. [*Long v. Long,* 160 N.C. App. 664, 588 S.E.2d 1 (2003).]

vii. Waiver/ratification of a breach.

(a) A breach that might otherwise excuse performance will not do so if waived by the nonbreaching party. [*Wheeler v. Wheeler,* 299 N.C. 633, 263 S.E.2d 763 (1980) (where husband paid alimony to wife, when she only partially performed the child visitation provisions of their separation agreement, husband could not assert wife's breach in defense of her action for back alimony; by continuing to accept wife's partial performance and continuing to perform his alimony obligation over a period of time, husband had waived his right to assert wife's breach).]

7. Statute of limitations.

a. The statute of limitations applicable to an incorporated agreement is the statute of limitations applicable to judgments, which is ten years. [G.S. 1-47(1).]

8. Application of foreign law is prohibited if it results in a violation of constitutional rights.

a. The application of foreign law in cases under G.S. Chapters 50 (Divorce and Alimony) and 50A (Uniform Child Custody Jurisdiction and Enforcement Act) is prohibited when it would violate a fundamental right of a person under the federal or state constitution. A motion to transfer a proceeding to a foreign venue must be denied when doing so would have the same effect. [See G.S. 1-87.14, 1-87.17, and other provisions in Article 7A in G.S. Chapter 1, *added by* S.L. 2013-416, effective Sept. 1, 2013, and applicable to proceedings, agreements, and contracts entered into on or after that date.]

9. Estoppel/Ratification.

a. A party may be estopped from denying the validity of a separation agreement if:

i. That party has performed under or accepted benefits of the agreement over time. [*Spencer v. Spencer,* 156 N.C. App. 1, 575 S.E.2d 780 (2003) (father was estopped from denying an obligation to pay half of daughter's college expenses when he had paid them for three years; father accepted the benefit of the

agreement that allowed him to claim the child as a tax dependent while in college); *Moore v. Moore,* 108 N.C. App. 656, 424 S.E.2d 673 (husband estopped from asserting that notarization of an agreement was invalid since he treated it as valid for two years and enjoyed the benefits of the agreement), *aff'd per curiam,* 334 N.C. 684, 485 S.E.2d 71 (1993).]

ii. However, ratification does not occur until the duress has ended. [*See Pilos-Narron v. Narron*, 239 N.C. App. 573, 771 S.E.2d 633 (2015) (**unpublished)** (ratification did not occur because duress continued throughout the time defendant accepted benefits under the contract).]

iii. That party "engage[d] in positive acts that amount[ed] to ratification resulting in prejudice to an innocent party." [*Chance v. Henderson,* 134 N.C. App. 657, 664, 518 S.E.2d 780, 784 (1999) (citing *Howard v. Boyce,* 254 N.C. 255, 118 S.E.2d 897 (1961)) (husband's positive acts included failing to perfect two appeals directed at the order, acquiescing in his counsel's reliance upon the order to deter action by the Department of Social Services, twice filing motions for modification or correction of the order, and, most significantly, seeking to have wife held in contempt for violation of the consent order).] For cases discussing ratification in the context of a party's failure to disclose, see *Honeycutt v. Honeycutt,* 208 N.C. App. 70, 701 S.E.2d 689 (2010), and *Rolls v. Rolls,* 208 N.C. App. 569, 706 S.E.2d 842 (2010) (**unpublished**), *review denied,* 365 N.C. 70, 706 S.E.2d 238 (2011), discussed in Section IV.I.4.h.ii.(c), above.

iv. The other party relied upon and performed obligations under the agreement. [*Amick v. Amick,* 80 N.C. App. 291, 341 S.E.2d 613 (1986) (wife had performed her obligations, relied on the agreement, and formed expectations of future support from husband based on his partial compliance with agreement's terms for four years; husband also estopped from denying the validity of the agreement by his own conduct).]

b. However, a void contract cannot be the basis for ratification or estoppel. [*Kelley v. Kelley*, 798 S.E.2d 771 (N.C. Ct. App. 2017) (husband was not estopped from asserting the invalidity of an agreement due to his performance under the contract for years; estoppel and ratification cannot be used to enforce an agreement that was void when executed).]

c. A party may be estopped from asserting the invalidity of a bigamous marriage.

i. While wife's bigamous marriage was not a "remarriage" as that term was used in the separation agreement, wife was estopped from asserting the invalidity of that marriage so that she could continue to receive alimony from her first husband on the ground that she had not remarried. [*Taylor v. Taylor,* 321 N.C. 244, 362 S.E.2d 542 (1987) (wife's bigamous second marriage could not be used as a defense to first husband's action to terminate his obligation for spousal support pursuant to the parties' separation agreement).]

J. Effect of Bankruptcy

Important Note: Except as noted, this section describes provisions of the federal bankruptcy law effective Oct. 17, 2005.

1. Bankruptcy reform legislation.
    a. On Apr. 20, 2005, the federal Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [Pub. L. No. 109-8, 119 Stat. 23 (2005) (hereinafter the "Bankruptcy Reform Act")] was signed into law. It amended certain provisions of the Bankruptcy Code. The amendments relating to family law were effective Oct. 17, 2005, and apply to bankruptcy cases commenced on or after that date.
    b. For an overview of the Bankruptcy Reform Act in the area of family law, see John L. Saxon, *Impact of the New Bankruptcy Reform Act on Family Law in North Carolina*, Fam. L. Bull. No. 20 (UNC School of Government, June 2005) (hereinafter 2005 Saxon Bulletin).
    c. The provisions of the Bankruptcy Code in effect before passage of the Bankruptcy Reform Act relating to family law matters will continue to apply in bankruptcy cases filed before Oct. 17, 2005, and pending on or after that date.
    d. Additionally, provisions of the Bankruptcy Code in effect before passage of the Bankruptcy Reform Act that were not amended or repealed will continue to apply in bankruptcy cases that are filed on or after Oct. 17, 2005.
    e. For the effect of bankruptcy in an equitable distribution proceeding, see *Equitable Distribution Overview and Procedure*, Bench Book, Vol. 1, Chapter 6, Part 1.
    f. For the effect of bankruptcy in child support enforcement proceedings, see *Enforcement of Child Support Orders*, Bench Book, Vol. 1, Chapter 3, Part 4.
    g. For the effect of bankruptcy when alimony is at issue, see *Postseparation Support and Alimony*, Bench Book, Vol. 1, Chapter 2.
2. Definitions.
    a. Domestic support obligation.
        i. A "domestic support obligation" is a debt that:
            (a) Accrues before, on, or after the date of the order for relief in the bankruptcy case, including interest that accrues on that debt as provided under applicable nonbankruptcy law, notwithstanding any other provision of Title 11; [11 U.S.C. § 101(14A).]
            (b) Is owed to or recoverable by the debtor's spouse, former spouse, or child, the child's parent, legal guardian, or responsible relative, or a governmental unit; [11 U.S.C. § 101(14A)(A).]
            (c) Is in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) for a debtor's spouse, former spouse, or child, or for the child's parent; [11 U.S.C. § 101(14A)(B).]
            (d) Has been established or is subject to establishment before, on, or after the date of the order for relief by a court order, divorce decree, separation agreement, property settlement agreement, or determination by a governmental unit in accordance with applicable nonbankruptcy law; [11 U.S.C. § 101(14A)(C).] and

(e) Has not been assigned to a nongovernmental entity, unless the assignment is voluntary and for the purpose of collecting the debt. [11 U.S.C. § 101(14A)(D).]

ii. The following language in a separation agreement was found to create a domestic support obligation in husband's proceeding under Chapter 13 of the Bankruptcy Code: "In lieu of periodic spousal support payments to WIFE, HUSBAND shall pay monthly to WIFE an amount equal to one-half of the minimum monthly payments for the joint marital debts" listed elsewhere in the agreement. "In consideration of, and expressly dependent upon these terms, WIFE agrees that she shall release and forever discharge the HUSBAND from any and all claims, demands, or actions for support, subsistence and maintenance, alimony or claims and demands of any nature whatever arising out of the marital relationship between the parties hereto." [*In re Deberry,* 429 B.R. 532, 535 n.3 (Bankr. M.D.N.C. 2010) (other portions of wife's claim found not to constitute a domestic support obligation).]

b. Debts arising from a separation or divorce other than those that qualify as a domestic support obligation.

i. 11 U.S.C. § 523(a)(15) identifies a second type of divorce-related debt, that is, a debt to a spouse, former spouse, or child of the debtor, that is not a domestic support obligation, which is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree, or other order of a court of record.

ii. Debts under 11 U.S.C. § 523(a)(15) commonly are referred to as being in the form of a property settlement, while debts under § 523(a)(5) commonly are referred to as alimony or support. [*See In re Zeitchik*, 369 B.R. 900, 903 (Bankr. E.D.N.C. 2007) (not subject to the Bankruptcy Reform Act) (court had to determine whether payments at issue were "in the form of alimony or support or [we]re in the form of a property settlement").] A § 523(a)(15) debt is sometimes referred to herein as "a divorce-related debt that does not qualify as a domestic support obligation."

iii. Whether a debt is classified under 11 U.S.C. § 523(a)(5) as a domestic support obligation or under § 523(a)(15) as a divorce-related debt that does not qualify as a domestic support obligation is significant in several contexts, including the priority given to, and the dischargeability of, the debt. [*See* 2005 Saxon Bulletin; *In re Deberry,* 429 B.R. 532 (Bankr. M.D.N.C. 2010) (citing *In re Johnson,* 397 B.R. 289 (Bankr. M.D.N.C. 2008)) (if an obligation of the debtor is deemed a domestic support obligation pursuant to § 523(a)(5), then the claim is entitled to priority treatment under 11 U.S.C. § 507(a)(1)(A), and any Chapter 13 plan must provide for its full payment pursuant to 11 U.S.C. § 1322(a)(2)).]

3. Dischargeability of support and other divorce-related claims.

a. Discharge in a Chapter 7 case commenced on or after Oct. 17, 2005.

i. A debt for a domestic support obligation (DSO) is nondischargeable in a Chapter 7 case. [11 U.S.C. § 523(a)(5); 2005 Saxon Bulletin.]

ii. A divorce-related debt that is not a DSO is nondischargeable in a Chapter 7 case. [11 U.S.C. § 523(a)(15); 2005 Saxon Bulletin.]

iii. Thus, distinctions between a DSO, governed by 11 U.S.C. § 523(a)(5), and other types of divorce-related debts, governed by 11 U.S.C. § 523(15), are immaterial in a Chapter 7 case, as both types of debts are nondischargeable. [*In re Johnson,* 397 B.R. 289 (Bankr. M.D.N.C. 2008) (citing *In re Douglas,* 369 B.R. 462 (Bankr. E.D. Ark. 2007)).]

b. Discharge in a Chapter 13 case commenced on or after Oct. 17, 2005.

i. A debt for a domestic support obligation (DSO) is nondischargeable in a Chapter 13 case. [11 U.S.C. § 523(a)(5); 11 U.S.C. § 1328(a)(2).]

ii. A divorce-related debt that does not qualify as a DSO is dischargable in a Chapter 13 case. [11 U.S.C. § 1328(a) (no exception for a § 523(a)(15) debt).]

iii. **EXCEPTION:** A divorce-related debt that does not qualify as a DSO is not discharged in a Chapter 13 case when the debtor applies for and is granted a discharge pursuant to 11 U.S.C. § 1328(b), referred to sometimes as a hardship or best efforts discharge. [11 U.S.C. § 523(a); *In re Knox*, No. 07-11082, 2007 WL 1541957 (Bankr. E.D. Tenn. May 23, 2007).]

K. Effect of Cohabitation by the Dependent Spouse

1. Law applicable to actions filed before Oct. 1, 1995, and to actions not subject to G.S. 50-16.9(b).

a. Under the law in effect before Oct. 1, 1995, in the absence of a specific agreement between the parties, a trial court had no authority to include a provision in its alimony award that alimony could automatically terminate upon a spouse's cohabitation with someone of the opposite sex. [*Bookholt v. Bookholt,* 136 N.C. App. 247, 523 S.E.2d 729 (1999) (automatic termination of alimony for cohabitation under G.S. 50-16.9(b) only applicable to actions filed on or after Oct. 1, 1995).]

b. Under this earlier law, a party was relieved of obligations under an unincorporated separation agreement based on the other party's cohabitation only if the separation agreement so provided. [*Sethness v. Sethness*, 62 N.C. App. 676, 303 S.E.2d 424 (1983) (the agreement here did not make cohabitation by wife a breach of the agreement or grounds for termination of husband's support obligation).]

c. Upon sufficient showing of wife's cohabitation, husband's alimony obligation terminated pursuant to an incorporated separation agreement that provided alimony terminated on cohabitation. [*Rehm v. Rehm,* 104 N.C. App. 490, 409 S.E.2d 723 (1991).]

2. In actions filed on or after Oct. 1, 1995, court-ordered support obligations are terminated by cohabitation of the dependent spouse. [G.S. 50-16.9(b), *amended by* S.L. 1995-319, §§ 7 and 12, applicable to actions filed on or after Oct. 1, 1995.]

3. Cohabitation:

a. Means the act of two adults dwelling together continuously and habitually in a private heterosexual relationship, even if not solemnized by marriage, or a private homosexual relationship; and

b. Is evidenced by the voluntary mutual assumption of those marital rights, duties, and obligations that are usually manifested by married people and that include, but are not necessarily dependent on, sexual relations. [G.S. 50-16.9(b), *amended by* S.L. 1995-319, §§ 7 and 12, applicable to actions filed on or after Oct. 1, 1995.]

c. For more on cohabitation, including the two methods used to determine whether parties have cohabitated and the use of summary judgment, see *Postseparation Support and Alimony*, Bench Book, Vol. 1, Chapter 2. For a North Carolina Supreme Court case on cohabitation, see *Bird v. Bird,* 363 N.C. 774, 688 S.E.2d 420 (2010) (court-ordered alimony).

4. Procedural issues.

a. A supporting spouse cannot automatically cease paying court-ordered support based on the dependent spouse's cohabitation or remarriage without a court order. The supporting spouse must first file a motion with the trial court, notify the dependent spouse, and obtain a court order terminating support as of a date certain. [*Williamson v. Williamson,* 142 N.C. App. 702, 543 S.E.2d 897 (2001) (trial court terminated obligation as of date cohabitation was found to exist).]

b. A motion to terminate alimony based on cohabitation should be made pursuant to G.S. 50-16.9, not G.S. 1A-1, Rule 60(b)(1). [*Oakley v. Oakley,* 165 N.C. App. 859, 599 S.E.2d 925 (2004) (incorporated separation agreement).]

5. Incorporated agreements.

a. Court-ordered alimony terminates upon cohabitation even if parties attempt to provide otherwise in an incorporated agreement. [*Underwood v. Underwood,* 365 N.C. 235, 717 S.E.2d 361 (2011).]

b. Where payments required pursuant to incorporated agreement were "true" alimony, payments terminated upon cohabitation under G.S. 50-16.9(b) despite fact that parties included an integration clause in the agreement. [*Underwood v. Underwood,* 365 N.C. 235, 717 S.E.2d 361 (2011).]

6. When unincorporated separation agreement is involved.

a. While cohabitation will result in the termination of a support order entered by a court, either as the result of a contested hearing or by a consent order, cohabitation will not terminate a support obligation arising from an unincorporated separation agreement unless so specified in the contract. [*See Jones v. Jones*, 144 N.C. App. 595, 548 S.E.2d 565 (2001) (where parties were subject to a court-ordered consent judgment and an earlier unincorporated separation agreement, the provision in the consent order for alimony terminated upon the wife's cohabitation pursuant to G.S. 50-16.9 but her cohabitation did not terminate the contractual support provision in the agreement).].

b. When unincorporated separation agreement provided that husband's obligation for "family support" would terminate upon wife's cohabitation as defined in G.S. 50-16.9(b), summary judgment in favor of wife was reversed when evidence of cohabitation was conflicting. [*Craddock v. Craddock,* 188 N.C. App. 806, 656 S.E.2d 716 (2008) (conflicting evidence was presented on number of nights per week third party stayed overnight at wife's residence, whether third party permanently kept his

clothes at wife's residence, and the extent to which third party used wife's residence as the base for his appraisal business).]

c. When unincorporated separation agreement permitted termination of alimony payments upon cohabitation by wife as defined in G.S. 50-16.9, to conclude that cohabitation has occurred, a trial court must make findings that the types of acts set out in G.S. 50-16.9 took place. [*Long v. Long,* 160 N.C. App. 664, 588 S.E.2d 1 (2003) (trial court's order lacked adequate findings to support a conclusion of cohabitation; findings were mere recitations of testimony and evidence).]

7. Cases findings no cohabitation.

a. No cohabitation by wife when evidence did not show activities beyond a sexual relationship with a boyfriend and their occasional trips and dates. [*Oakley v. Oakley,* 165 N.C. App. 859, 599 S.E.2d 925 (2004) (objective evidence on cohabitation not conflicting, so subjective intent of parties not examined).]

b. No cohabitation by wife when findings primarily revealed (1) that boyfriend assisted in some ways with wife's children; boyfriend and wife had a dating and sexual relationship; the two had dinners together when boyfriend was in town and spent time together shopping, attending church, and traveling; (2) that boyfriend maintained his own "lived in" residence and did not keep toiletries or clothing in wife's home, did not receive mail there, and did not pay household expenses; and (3) that wife and boyfriend did not maintain financial accounts together. [*Shaw v. Shaw,* 182 N.C. App. 347, 641 S.E.2d 867 (2007) (**unpublished**) (facts did not show a mutual assumption of marital rights, duties, and obligations usually manifested by married persons).]

8. Whether support payments are dependent on the other parent's compliance with provisions in the separation agreement, including a provision that prohibits cohabitation in the presence of the children.

a. A parent's contractual obligation to pay **child support** pursuant to an unincorporated separation agreement was not dependent on the other parent's compliance with provisions in the same agreement addressing visitation, nonharassment, or noncohabitation. [*Nisbet v. Nisbet,* 102 N.C. App. 232, 402 S.E.2d 151, *review denied,* 329 N.C. 499, 407 S.E.2d 538 (1991).]

b. But the question of whether a spouse's contractual obligation to pay **alimony** was dependent on the other spouse's compliance with provisions in the same agreement addressing visitation, nonharassment, or noncohabitation was a factual issue to be resolved by determining the intent of the parties when they signed the agreement. [*Nisbet v. Nisbet,* 102 N.C. App. 232, 402 S.E.2d 151 (unincorporated agreement was silent on the question of whether provisions were dependent; trial court erred in granting summary judgment on wife's claim for alimony arrearages), *review denied,* 329 N.C. 499, 407 S.E.2d 538 (1991).]

9. For more on cohabitation, see *Postseparation Support and Alimony*, Bench Book, Vol. 1, Chapter 2.

L. Effect of Remarriage of the Dependent Spouse

1. Court-ordered support obligations are automatically terminated by remarriage of the dependent spouse. [G.S. 50-16.9(b); *Garner v. Garner,* 88 N.C. App. 472, 363 S.E.2d 670

(1988) (construing unambiguous incorporated agreement that was silent on effect of remarriage, alimony payments terminated pursuant to statute upon wife's remarriage).]

a. Support arrearages that accrued before the dependent spouse's remarriage and remain unpaid on the date of remarriage may be recovered after remarriage from the supporting spouse. Periodic payments of alimony that were not yet due and payable on the date of remarriage were terminated upon the dependent spouse's remarriage. [*Potts v. Tutterow*, 340 N.C. 97, 98, 455 S.E.2d 156, 156 (1995) (using dictionary definition of accrued alimony as "[a]limony which is due but not yet paid").]

b. Court-ordered support payments that are part of an integrated agreement are not true alimony and do not terminate as a matter of law upon remarriage of the dependent spouse. [*Lemons v. Lemons,* 112 N.C. App. 110, 434 S.E.2d 638 (1993), *review denied,* 335 N.C. 556, 441 S.E.2d 117 (1994); *Hayes v. Hayes,* 100 N.C. App. 138, 394 S.E.2d 675 (1990) (citing *Marks v. Marks,* 316 N.C. 447, 342 S.E.2d 859 (1986)).]

c. Payments that are part of a complete property settlement rather than alimony do not terminate upon the dependent spouse's remarriage. [*Allison v. Allison,* 51 N.C. App. 622, 277 S.E.2d 551 (periodic payments to wife that were part of a property settlement in which wife released rights to jointly held property did not terminate upon wife's remarriage), *review denied,* 303 N.C. 543, 281 S.E.2d 660 (1981); *Michael v. Michael,* 198 N.C. App. 703, 681 S.E.2d 866 (2009) (**unpublished**) (when plain language of an incorporated separation agreement clearly stated in the section of the agreement entitled "Property Settlement" that husband's monthly payments were intended to be part of the property settlement and not alimony or other spousal support, and when parties specifically waived alimony in the agreement, payments were part of a property settlement and did not terminate on wife's remarriage).]

d. A bigamous marriage is void *ab initio*, or from the outset, so it is not a "remarriage" that bars a dependent spouse from receiving alimony. [*Taylor v. Taylor,* 321 N.C. 244, 362 S.E.2d 542 (1987) (however, the dependent spouse who knowingly entered a bigamous marriage was estopped from asserting its invalidity so that she could continue to receive alimony from her first husband on the ground that she had not remarried).]

2. Law applicable to actions not subject to G.S. 50-16.9(b).

a. Unless a contrary intention is expressed, a dependent spouse's remarriage terminates the supporting spouse's obligation of support under an unincorporated separation agreement that is silent on the issue. [*Medders v. Medders,* 40 N.C. App. 681, 254 S.E.2d 44 (1979) (applying South Carolina law to an unincorporated separation agreement that was silent on the question of the wife's remarriage; finding by trial court that support payments terminated upon wife's remarriage upheld).]

M. Effect of Death of a Party

1. Effect of death on postseparation support and alimony obligations.

a. Court-ordered postseparation support or alimony terminates upon the death of either the supporting or the dependent spouse. [G.S. 50-16.9(b).]

b. A contractual support obligation may be enforced after the death of a spouse. [*See White v. Graham,* 72 N.C. App. 436, 325 S.E.2d 497 (1985) (noting that the

death of husband did not terminate his obligation in an unincorporated separation agreement to support wife while she obtained a college degree, which his estate could satisfactorily perform).]

2. Effect of death on child support obligations.
   a. Obligation for child support pursuant to a court or administrative order, or pursuant to G.S. 110-132 or -133, terminates:
      i. On the death of the minor child. [G.S. 50-13.10(d)(1).] The supporting parent remains liable for child support arrearages that accrued before the child's death.
      ii. On the supporting parent's death. [G.S. 50-13.10(d)(2).] The supporting parent's estate remains liable for child support arrearages that accrued before the parent's death.
   b. A parent may create in a separation agreement an obligation to furnish child support that survives the parent's death and becomes an obligation of the parent's estate. [*See Bradshaw v. Smith*, 48 N.C. App. 701, 269 S.E.2d 750 (1980) (recognizing that father's common law duty to support his children terminated on his death but finding that father had by separation agreement obligated himself to pay support, which obligation survived his death and for which his estate was liable).]
   c. A parent's obligation to pay child support survives death of the custodial parent. [*Shutt v. Butner,* 62 N.C. App. 701, 303 S.E.2d 399 (support payments required of husband under an incorporated separation agreement were properly ordered to be paid to new custodian, child's maternal grandparent), *review denied,* 309 N.C. 462, 307 S.E.2d 367 (1983).]
3. Effect of death on provisions dividing property.
   a. Separation agreement providing for division and sale of entirety property within certain period following divorce was enforceable as a contract, even though husband died before divorce. [*Riley v. Riley,* 86 N.C. App. 636, 359 S.E.2d 252 (noting that unexpected and untimely death is a constant possibility and in the absence of indications to the contrary, the law assumes that parties make their contracts in light thereof), *review denied,* 321 N.C. 121, 361 S.E.2d 596 (1987).]
   b. Agreement that gave wife possession of the marital residence until the minor son's death, marriage, or emancipation, whereupon the parties to the agreement agreed that marital residence would be sold and proceeds divided, was enforceable, even though wife died before son reached majority. Though husband became record fee simple owner of the entirety held realty by operation of law upon the death of wife, he was bound to sell house and divide proceeds with wife's estate when son no longer lived there. [*Shutt v. Butner,* 62 N.C. App. 701303 S.E.2d 399 (husband's obligations under an incorporated separation agreement regarding the sale of the marital residence were not terminated by the death of his former wife; consent judgment incorporating the agreement provided that the judgment could be enforced against the parties or their personal representatives), *review denied,* 309 N.C. 462, 307 S.E.2d 367 (1983).]
   c. Payments that are part of a complete property settlement rather than alimony do not terminate upon a spouse's death. [2 Lee's North Carolina Family Law § 9.86 (5th ed.

1999) (death has no effect on the right to future payments of an award of property; the estate of the spouse has a claim for any portion of a property award that remains unpaid).]

4. Effect of death on availability of civil contempt.

   a. Because a trial court must find that an alleged contemnor has the present ability to comply, a party cannot bring a civil contempt action to enforce an incorporated separation agreement against a person who is deceased when the contempt action is initiated. [*MacMillan v. Thompson,* 231 N.C. App. 170, 753 S.E.2d 741 (2013) (**unpublished**) (motion in the cause interpreted to initiate a civil contempt action).]

N. Effect of Divorce

1. Divorce does not invalidate support provisions in a separation agreement unless the agreement so provides. [*Hamilton v. Hamilton,* 242 N.C. 715, 89 S.E.2d 417 (1955) (unincorporated separation agreement terminated monthly support payments to wife only upon remarriage, not upon entry of a decree of divorce). *See also Haynes v. Haynes,* 45 N.C. App. 376, 263 S.E.2d 783 (1980) (citing *Hamilton*) (agreement in a consent judgment, whereby wife was to receive permanent alimony until her death or remarriage, was a contractual right not terminated by subsequent divorce judgment).]

2. A party's failure to file a claim for alimony before divorce did not bar enforcement of a contractual alimony obligation contained in an unincorporated separation agreement. [*Long v. Long,* 102 N.C. App. 18, 401 S.E.2d 401 (1991).]

O. Attorney Fees

1. General rule; exception for separation agreements.

   a. As a general rule, contractual provisions for attorney fees are invalid in the absence of statutory authority. [*Carswell v. Hendersonville Country Club,* 169 N.C. App. 227, 609 S.E.2d 460 (2005).]

   b. The North Carolina Supreme Court has recognized an exception for contractual provisions for attorney fees contained in separation agreements. [*Carswell v. Hendersonville Country Club,* 169 N.C. App. 227, 609 S.E.2d 460 (2005) (citing *Bromhal v. Stott,* 341 N.C. 702, 462 S.E.2d 219 (1995)); *Potter v. Hileman Labs.,* 150 N.C. App. 326, 564 S.E.2d 259 (2002) (citing *Bromhal* as an exception to the general rule, as *Bromhal* permitted the enforcement of attorney fees provisions contained in a separation agreement based on public policy interests); *Lee Cycle Ctr. v. Wilson Cycle Ctr.,* 143 N.C. App. 1, 11 n.2, 545 S.E.2d 745, 752 n.2 (noting that the North Carolina Supreme Court has carved out an exception to the general rule and permits the enforcement of attorney fees provisions contained in separation agreements), *aff'd per curiam,* 354 N.C. 565, 556 S.E.2d 293 (2001).]

   c. The trial court can enforce an attorney fee provision in a separation agreement by order of specific performance. [*Lasecki v. Lasecki*, 809 S.E.2d 296 (N.C. Ct. App. 2017).]

2. The *Bromhal v. Stott,* 341 N.C. 702, 462 S.E.2d 219 (1995) decision.

a. The North Carolina Supreme Court has interpreted G.S. 52-10.1 to authorize a married couple to include a provision for attorney fees in a separation agreement. [*Bromhal v. Stott,* 341 N.C. 702, 462 S.E.2d 219 (1995) (holding that provisions within separation agreements requiring the payment of attorney fees upon a breach by one of the parties are not inconsistent with the public policy of our state and are legal, valid, and binding under G.S. 52-10.1).]

b. Public policy supports the inclusion of a provision in a separation agreement requiring the payment of attorney fees upon a breach by one of the parties. [*Bromhal v. Stott,* 341 N.C. 702, 462 S.E.2d 219 (1995) (recognizing that separation agreements are different than other types of contracts where courts have frowned upon contractual obligations for attorney fees).]

3. Specific provisions that supported an award of attorney fees.

a. Agreement provided that a party was entitled to recover reasonable attorney fees and other expenses incurred in an action to enforce provisions of the agreement. [*Bromhal v. Stott,* 341 N.C. 702, 462 S.E.2d 219 (1995) (trial court made extensive findings and conclusions as to the necessity of plaintiff bringing a lawsuit to enforce the agreement and as to the substantial attorney fees and costs incurred in the enforcement effort).]

b. Agreement provided that if a party failed to perform an obligation under the agreement and the failure caused the other party to incur expenses, including reasonable attorney fees, to enforce the obligation, the defaulting party must indemnify and hold the other harmless from any such expense. [*Edwards v. Edwards,* 102 N.C. App. 706, 403 S.E.2d 530 (no error in award of attorney fees in an action for specific performance of alimony provisions in a separation agreement where the parties specifically contracted for indemnification of such fees in the agreement), *review denied,* 329 N.C. 787, 408 S.E.2d 518 (1991).]

c. An award of attorney fees to husband in civil contempt action for wife's failure to comply with an order requiring wife to specifically perform her obligations under an unincorporated separation agreement was upheld. [*Gen. Motors Acceptance Corp. v. Wright,* 154 N.C. App. 672, 573 S.E.2d 226 (2002) (in an unincorporated separation, agreement parties assigned a car and related debt to wife; in a consent judgment adopted by the court as an order, wife was ordered to specifically perform her payment obligations under the agreement; in a civil contempt proceeding, award of attorney fees to husband for wife's failure to pay was upheld; award of fees was akin to a court awarding attorney fees through a contempt proceeding for a spouse's failure to pay a marital debt arising out of an equitable distribution award, for which an award of attorney fees is permitted).]

d. Agreement provided that a party who failed to, among other things, perform any act reasonably necessary to carry out the agreement without undue delay or expense must reimburse the other party for any expense, including court costs, attorney fees, and travel expenses which, as a result of this failure, become reasonably necessary to carry out the agreement. [*Danai v. Danai,* 166 N.C. App. 279, 603 S.E.2d 168 (2004) (**unpublished**) (husband's attempt to frustrate the separation agreement's terms created a proper basis to award attorney fees under the separation agreement).]

e. Agreement contained an "Enforcement" clause that allowed either party to recover attorney fees if he or she sued to enforce the agreement. [*Moon v. Moon,* 160 N.C. App. 708 (2003) (**unpublished**) (citing *Bromhal v. Stott,* 341 N.C. 702, 462 S.E.2d 219 (1995)) (award of attorney fees for the portion of wife's claim attributable to specific performance upheld), *cert. denied,* 358 N.C. 544, 599 S.E.2d 399 (2004). *Cf. Hennessey v. Duckworth,* 231 N.C. App. 17, 752 S.E.2d 194 (2013) (provision in unincorporated agreement, that losing party was solely responsible for all legal fees and costs upon breach or in a suit for enforcement, was not applicable when later action between the parties was not one for breach or specific performance of the agreement but became a G.S. Chapter 50 custody action).]

f. Attorney fees provision in an unincorporated agreement that "expresse[d] the general intent 'that the losing party pays all reasonable fees and costs that either side may incur' in litigation" did not preclude an award of statutory fees. [*Hennessey v. Duckworth,* 231 N.C. App. 17, 22, 752 S.E.2d 194, 198 (2013) (provision in agreement was not applicable to later action between the parties, but award of fees under G.S. 50-13.6 upheld).]

g. When attorney fees are authorized by an enforcement provision in an incorporated separation agreement, the trial court is not required to make the findings and conclusions required by G.S. 50-16.4. [*See Jackson v. Penton*, 206 N.C. App. 761, 699 S.E.2d 141 (2010) (**unpublished**) (provision provided that "Husband (defendant) shall pay to Wife (plaintiff) any and all reasonable attorney's fees incurred in enforcing this [alimony] obligation"; G.S. 50-16.4 not applicable).]

h. However, attorney fees are not allowed for research on the enforceability of an alimony escalation provision that the trial court found contrary to public policy. [*Jackson v. Penton,* 206 N.C. App. 761, 699 S.E.2d 141 (2010) (**unpublished**) (provision in incorporated separation agreement on which award of fees was based required that fees be reasonable; court found fees awarded to enforce a provision that was not enforceable were not reasonable).]

4. For attorney fees in alimony actions, see *Postseparation Support and Alimony*, Bench Book, Vol. 1, Chapter 2.

5. For attorney fees in child support actions, see *Child Support Liability and Amount*, Bench Book, Vol. 1, Chapter 3, Part 1.

6. For attorney fees in child custody actions, see *Child Custody*, Bench Book, Vol. 1, Chapter 4.

7. For attorney fees in equitable distribution actions, see *Equitable Distribution Overview and Procedure*, Bench Book, Vol. 1, Chapter 6, Part 1.

P. Appeal

1. Right to take an immediate appeal.

a. A final order may be appealed as a matter of right to the court of appeals. [G.S. 7A-27(b)(2), *added by* S.L. 2013-411, § 1, effective Aug. 23, 2013; 1-277(a).] A final judgment is one that disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. [*Hausle v. Hausle,* 226

N.C. App. 241, 739 S.E.2d 203 (2013); *Duncan v. Duncan,* 366 N.C. 544, 742 S.E.2d 799 (2013) (final judgment generally is one that ends the litigation on the merits).]

i. An alimony order was final and immediately appealable as of right pursuant to G.S. l-277(a), even though it reserved the issue of attorney fees. Attorney fees and costs are collateral issues and not part of the parties' substantive claims. [*Duncan v. Duncan,* 366 N.C. 544, 742 S.E.2d 799 (2013) (citing *Budinich v. Becton Dickinson & Co.,* 486 U.S. 196, 202–03, 108 S. Ct. 1717, 1722 (1988)) (announcing a bright-line rule applicable to any civil case disposing of the parties' substantive claims but leaving open the issue of attorney fees and costs); *Lucas v. Lucas,* 209 N.C. App. 492, 706 S.E.2d 270 (2011) (citing *Bumpers v. Cmty. Bank of N. Va.,* 364 N.C. 195, 695 S.E.2d 442 (2010)) (alimony and equitable distribution judgment final for purposes of appeal, even if a claim for attorney fees under G.S. 50-16.4 remained pending; claim for attorney fees under G.S. 50-16.4 is not a substantive issue or part of the merits of an alimony claim under G.S. 50-16.3A). *See also Ray Haluch Gravel Co. v. Cent. Pension Fund,* 571 U.S. 177, 134 S. Ct. 773 (2014) (holding, for federal appellate jurisdictional purposes, that whether a claim for attorney fees is based on a statute, a contract, or both, a pending claim for fees and costs does not prevent, as a general rule, the merits judgment from becoming "final" for purposes of appeal).]

ii. But when a custody order is appealed, the trial court loses jurisdiction to consider a request for attorney fees arising from the custody case. [*Balawejder v. Balawejder,* 216 N.C. App. 301, 721 S.E.2d 679 (2011); *In re Scearce,* 81 N.C. App. 662, 345 S.E.2d 411, *review denied,* 318 N.C. 415, 349 S.E.2d 590 (1986). *But see Duncan v. Duncan,* 366 N.C. 544, 742 S.E.2d 799 (2013), discussed in Section IV.P.1.a.i, immediately above.]

b. Generally there is no right of immediate appeal of an interlocutory order. An interlocutory order is one made during the pendency of an action that does not dispose of the case but leaves it for further action by the trial court in order to settle and determine the entire controversy. [*Hausle v. Hausle,* 226 N.C. App. 241, 739 S.E.2d 203 (2013).]

c. The court of appeals has held that an order setting aside a separation agreement was an interlocutory order not subject to immediate appeal because setting aside the agreement allowed plaintiff's claims for equitable distribution and alimony to go forward. [*Johnson v. Johnson,* 208 N.C. App. 118, 701 S.E.2d 722 (2010).] *But see* S.L. 2018-86, § 1, effective June 25, 2018, applicable to appeals filed on or after that date, amending G.S. 50-19.1 to provide that an order or judgment pertaining to the validity of a premarital agreement as defined by G.S. 52B-2(1) is immediately appealable if the order would be a final order but for other claims remaining pending in the action.

d. Immediate appeal of an interlocutory order generally is allowed in three instances:

i. When the order affects a substantial right. [G.S. 7A-27(b)(3)a., *added by* S.L. 2013-411, § 1, effective Aug. 23, 2013; 1-277(a).]

(a) A substantial right is one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment. [*Peters v. Peters,* 232 N. C. App. 444, 754 S.E.2d 437 (2014). *See France*

v. France, 209 N.C. App. 406, 705 S.E.2d 399 (2011) (appeal from an order that directed that sealed documents be unsealed affected a substantial right and was immediately appealable).]

ii. In cases involving multiple parties or claims, when the order is final as to some but not all of the claims or parties and the trial judge certifies the order for immediate appeal by including in the order "that there is no just reason for delay." [G.S. 1A-1, Rule 54(b); *Duncan v. Duncan,* 366 N.C. 544, 742 S.E.2d 799 (2013) (certification under Rule 54(b) permits an interlocutory appeal from orders that are final as to a specific portion of the case but which do not dispose of all claims as to all parties).]

(a) Appeal of an alimony order that was interlocutory when filed because of pending child support and equitable distribution (ED) claims was no longer interlocutory when those claims had been resolved by the time the appeal was heard. [*Crowley v. Crowley,* 203 N.C. App. 299, 691 S.E.2d 727 (granting defendant's motion to amend the record on appeal to reflect entry of a judgment resolving claims for ED, child support, and attorney fees), *review denied,* 364 N.C. 749, 700 S.E.2d 749 (2010).]

iii. In cases involving multiple claims where immediate appeal is allowed by G.S. 50-19.1, S.L. 2018-86, § 1, effective June 25, 2018, applicable to appeals filed on or after that date, amended G.S. 50-19.1 to provide that an order or judgment pertaining to the validity of a premarital agreement as defined by G.S. 52B-2(1) is immediately appealable if the order would be a final order but for other claims remaining pending in the action.

e. Note also that the court of appeals has discretion to treat an appeal as a petition for certiorari to review an interlocutory appeal. [N.C. R. App. P. 21(a)(1).]

f. For more on interlocutory appeals, see Cheryl Howell, *Trial Court Jurisdiction Following Appeal of an Interlocutory Order,* UNC Sch. of Gov't: On the Civil Side Blog (June 15, 2016), http://civil.sog.unc.edu/trial-court-jurisdiction-following-appeal-of-an-interlocutory-order.

2. Treatment of findings of fact and conclusions of law by an appellate court.

a. When reviewing findings of fact, an appellate court is strictly limited to determining whether the trial judge's underlying findings are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law. [*Reeder v. Carter*, 226 N.C. App. 270, 740 S.E.2d 913 (2013); *Praver v. Raus,* 220 N.C. App. 88, 725 S.E.2d 379 (2012) (citing *Shipman v. Shipman,* 357 N.C. 471, 586 S.E.2d 250 (2003)) (findings of fact reviewed to determine whether they are supported by substantial evidence).]

b. A trial court's conclusions of law are reviewed de novo and are subject to full review. [*Reeder v. Carter*, 226 N.C. App. 270, 740 S.E.2d 913 (2013).]

3. Standard of review.

a. The standard of review of an order entered following a bench trial is "whether there is competent evidence to support the trial court's findings of fact and whether the

findings support the conclusions of law and ensuing judgment." [*Ebert v. Ebert*, 223 N.C. App. 520, 735 S.E.2d 451 (2012) (**unpublished**) (citing *Curran v. Barefoot,* 183 N.C. App. 331, 334, 645 S.E.2d 187, 190 (2007)).]

b. In reviewing the equitable remedy of specific performance, the appellate court is limited to an abuse of discretion standard. [*Ebert v. Ebert*, 223 N.C. App. 520, 735 S.E.2d 451 (2012) (**unpublished**) (citing *Harborgate Prop. Owners Ass'n v. Mountain Lake Shores Dev. Corp.,* 145 N.C. App. 290, 551 S.E.2d 207 (2001)).]

4. Effect of an appeal on jurisdiction.

a. Pursuant to G.S. 1-294, when an appeal is perfected, the trial court is divested of jurisdiction "upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure." [G.S. 1-294, *amended by* S.L. 2015-25, § 2, effective May 21, 2015. *See France v. France*, 209 N.C. App. 406, 705 S.E.2d 399 (2011) (appeal of an order entered November 2009, denying motions to close court proceedings pursuant to provisions contained in a separation agreement and for a preliminary injunction, divested the trial court of jurisdiction over the second matter, a proceeding by media movants for access to proceedings and sealed documents; judge's second order, in December 2009, providing for open proceedings and unsealing of documents vacated for lack of jurisdiction).] **EXCEPTION**: Notwithstanding the provisions of G.S. 1-294, certain orders are enforceable by civil contempt pending appeal. [G.S. 50-13.3(a) (orders for custody and visitation); 50-13.4(f)(9) (orders for child support); 50-16.7(j) (orders for alimony).] See Section IV.I.3, above, for more on contempt.

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