The Contingent Fee Contract in Domestic Relations Cases - Thompson v. Thompson

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INTRODUCTION

A contingent fee contract between an attorney and client is not illegal in North Carolina. The contract will be upheld if it is made in good faith, "without suppression or reserve of fact or of apprehended difficulties," and if it is totally free from undue influence. Another requirement is that the compensation bargained for must be just and fair.

Before Thompson v. Thompson, the question as to the validity of a contingent fee contract in a domestic relations case had never been decided by a North Carolina court. The Thompson court, faced with such a contract, followed the majority of jurisdictions in the United States and held that a contract between attorney and client for the payment of an attorney's fee which is "contingent upon the securing of a separation or divorce or contingent in amount upon the amount of alimony, support or property settlement obtained is void as against public policy."

This Note will sketch the background of the contingent fee in North Carolina and then examine contingent fee agreements in domestic relations actions in other jurisdictions. The Note will then examine the Thompson court's holding and look at some unanswered questions. The Note concludes that, based on the public policy of North Carolina and of the majority of other jurisdictions, the court reached the correct decision in holding that contingent fee contracts in domestic relations actions are against public policy.

THE CASE

The law firm of Stepp, Groce, Pinales & Cosgrove, the inter-

2. Id., 109 S.E. at 383.
3. Id.
5. Id. at 154, 319 S.E.2d at 320.
6. Id. at 149, 319 S.E.2d at 317.
venor-plaintiff, agreed to represent Mrs. Thompson, the defendant, in connection with a contemplated domestic relations action against Mrs. Thompson's then-husband, Donald O. Thompson. The law firm and Mrs. Thompson entered into a contingent fee contract, the validity of which was the issue in this appeal. Shortly after the contingent fee contract was entered into, Mrs. Thompson discharged the intervenor law firm and retained another attorney to handle her domestic case. The underlying domestic action was instituted by Carol Thompson against Donald Thompson and L & O, Inc. Stepp, Groce, Pinales & Cosgrove filed a motion to intervene in this action. In their motion, they alleged that they were the discharged attorneys of Mrs. Thompson and that they had a one-fourth contingent fee contract with her which gave them a proprietary interest in the subject matter of the controversy. They also alleged that they were entitled to a percentage of the recovery in the domestic action. In its discretion, the district court of Henderson County allowed the intervention "under the permissive right to intervene provisions of Rule 24 of the Rules of Civil Procedure."

The intervenor-plaintiff law firm served Mrs. Thompson with a complaint which alleged, inter alia, that an offer to settle the Thompsons' domestic case was offered to Mrs. Thompson by a letter from Mr. Thompson's attorney and that based upon the contingent fee contract the firm was entitled, as the discharged legal

7. The firm agreed to represent Mrs. Thompson in early January, 1981. Id. at 147, 319 S.E.2d at 316.
8. Id.
9. The contingent fee was executed on January 27, 1981. Id.
10. Id.
11. Id.
12. "The underlying domestic action was instituted on February 27, 1981." Id.
13. L & O, Inc. was a family owned business. In the divorce action, Mrs. Thompson was asking for "alimony pendente lite, and the setting aside of certain purportedly fraudulent conveyances and stock transfers involving the family business and properties." Id.
14. The firm filed their motion on March 12, 1981. Id. at 147-48, 319 S.E.2d at 316.
15. Id. at 148, 319 S.E.2d at 316.
16. Id.
17. Id. (citing the district court judge).
18. The complaint was filed on March 13, 1981. Id.
19. The offer was made on February 9, 1981. Id. The amount offered was more than $1,000,000. Id. at 151, 319 S.E.2d at 318.
counsel, to one-fourth of the value of the offer. The trial court concluded that the intervenor law firm did a "considerable amount of work in a complex case" during a period of about six weeks which culminated the settlement offer which was "substantially accepted" by Mrs. Thompson prior to the discharge of the firm. The trial court held that the contingent fee contract was fair and reasonable and the amount of the fee under the contract was $250,000. Considering the amount of time involved and the standing of the lawyer, the trial court concluded, using the relevant hourly basis as a guide, that a reasonable fee would be at least $20,000. The trial court concluded, as a matter of law, that the plaintiff law firm was entitled to $85,000 as a reasonable fee, less credit for $37,000 Mrs. Thompson paid to the attorney she hired after she discharged the plaintiffs.

The North Carolina Court of Appeals held that "the contract sued upon by the intervenor law firm is unenforceable exclusively by virtue of the fact that it violates the public policy of this state." The court decided that the law firm should be allowed to recover in quantum meruit so the case was reversed and remanded for a new trial to determine the reasonable value of the services provided by the law firm "free of the taint of the unenforceable contingency fee agreement."

BACKGROUND

In 1921, the Supreme Court of North Carolina, in deciding two separate cases, set out the initial guidelines to be used in cases

20. Id. at 148, 319 S.E.2d at 316.
21. Id. at 152, 319 S.E.2d at 318. Mr. Stepp and Mr. Thompson's attorney, Mr. Boyd B. Massagee, believed that the Thompson case was both "complicated and complex." It presented "questions involving the law of partnership, trusts, fraud, alimony, child custody, support, joint bank accounts and the confidential relationship between husband and wife." Id. at 151, 319 S.E.2d at 318.
23. Id. (quoting the trial court).
24. The court took into consideration that Mrs. Thompson "had very little money, if any, to pay an attorney upon a flat fee basis at the time she employed said plaintiff law firm." Id. (quoting the trial court).
25. Id.
26. Id.
27. Id.
28. Id. at 157, 319 S.E.2d at 322.
29. Id. at 158, 319 S.E.2d at 322.
involving contingent fee contracts. In *Stern v. Hyman*, the court stated that it was well-settled that "if the contract sued upon by the attorney is made during the existence of the [attorney-client] relationship, and more especially when the contract is for a portion of the subject-matter contended for," the attorney could only recover the reasonable value of his services, no matter what kind of contract he had entered into with his client. The rule was based on the confidential relationship between attorney and client and was enforced "in order to prevent fraud and as a matter of . . . public policy." The *Stern* court went on to say that while the attorney-client relationship exists, "the attorney cannot bind his client" in any way that will increase his compensation for his services to more "than he would have the right to demand if no contract had been made during the existence of the relationship." Another factor pointed out by the court was that the burden was upon the plaintiff's attorney to show that the contract was fair and reasonable. Citing *Lee v. Pearce* as authority, the court stated that parties to a contract must stand on equal footing and that a universally recognized principle was that certain fiduciary relations such as the one between an attorney and client raise a rebuttable presumption of fraud as a matter of law.

The second North Carolina Supreme Court decision in 1921 relevant to the issue was *Casket Co. v. Wheeler*. The *Casket Co.* court stated that it was neither a violation of law nor against good morals, but rather commendable, for an attorney, who believes a client or possible client has been wronged, and is unable to hire an attorney, to bring suit upon a promise of reward contingent upon the result. The contingent fee contract must be made in good faith, without suppression or reserve of fact or apprehended difficulties, and without any kind of undue influence. The compensa-
tion bargained for must be fair and just. The court emphasized good faith, and said the entire transaction should be characterized by good faith on the part of the attorney. The court stated that the contract would not be upheld if it was shown that it was "obtained by fraud, mistake, or undue influence; or if it [was] so excessive in proportion to the services to be rendered as to be in fact oppressive or extortionate." As far as the amount or percentage of recovery, an attorney may demand a larger compensation if it is not certain or if it is to be contingent. A contingent fee "is not allowed for the rendition of merely minor services which any layman or inexperienced attorney might perform." It is only allowed to attorneys as a reward for diligence and skill exercised in the prosecution of doubtful and litigated claims.

In Randolph v. Schuyler, the North Carolina Supreme Court stated that the rule of Stern was more strict than the prevailing rule in other jurisdictions. The court decided that it did not need to determine whether the rule should be modified on that appeal. The court went on to say that the generally accepted view was that it did not matter when the contract was entered into but it must be "shown to be reasonable and to have been fairly and freely made, with full knowledge by the client of its effect and of all the material circumstances relating to the reasonableness of the fee." Contracts for contingent fees . . . are closely scrutinized by the courts where there is any question as to their reasonableness, irrespective" of when they were made. The attorney must carry the burden of proof as to the reasonableness and fairness of the contract.

Without overruling or modifying Stern, the Randolph court seemed to lay the groundwork for its decision in Rock v. Ballou. The Ballou court overruled the portion of Stern which stated that

42. Id.
43. Id.
44. Id.
45. Id.
46. Id.
47. Id.
49. Id. at 504, 201 S.E.2d at 837.
50. Id., 201 S.E.2d at 837-38.
51. Id., 201 S.E.2d at 838.
52. Id.
53. Id.
a contract between attorney and client which fixed the attorney's compensation, made while there was an existing attorney-client relationship, was void as a matter of law and the attorney could only recover on the basis of quantum meruit.\textsuperscript{55} The court stated the correct rule to be the one set out in \textit{Randolph} as prevailing in other jurisdictions.\textsuperscript{56} The new rule was made applicable whether the contract called for a contingent fee or a fixed fee.\textsuperscript{57} The \textit{Ballou} court went on to uphold the rule governing a contingent fee contract set out in \textit{Casket Co.}\textsuperscript{58}

The \textit{Ballou} court set out the two main rules that govern contingent fees in North Carolina. If the contract is entered into during the existence of the attorney-client relationship, both the \textit{Randolph} rule\textsuperscript{59} and the \textit{Casket Co.} rule\textsuperscript{60} are applicable.\textsuperscript{61} If the contract is entered into prior to the inception of the attorney-client relationship, it seems that only the \textit{Casket Co.} rule applies.

Although contingent fee contracts are often upheld, the majority view in the United States is that a fee contract contingent upon securing a divorce or contingent in amount on the amount of alimony, support, or property settlement to be obtained, is against public policy and void.\textsuperscript{62} Since the North Carolina Court of Ap-

\begin{itemize}
\item \textsuperscript{55} \textit{Id.} at 103-04, 209 S.E.2d at 478.
\item \textsuperscript{56} \textit{Id.} at 104, 209 S.E.2d at 478. In quoting \textit{Randolph}, the \textit{Ballou} court stated that the correct rule was that:
\begin{quote}
[a] contract made between an attorney and his client, during the existence of the relationship, concerning the fee to be charged for the attorney's services, will be upheld if, but only if, it is shown to be reasonable and to have been fairly and freely made, with full knowledge of the client of its effect and of all the material circumstances relating to the reasonableness of the fee. The burden of proof is on the attorney to show the reasonableness and the fairness of the contract, not upon the client to show the contrary.
\end{quote}
\textit{Id.} quoting 284 N.C. at 504, 201 S.E.2d at 837-38.
\item \textsuperscript{57} 286 N.C. at 104, 209 S.E.2d at 479.
\item \textsuperscript{58} \textit{Id.}.. The rule in \textit{Casket Co.} was that:
\begin{quote}
[A] contract for a contingent fee must be made in good faith, without suppression or reserve of fact or of apprehended difficulties, and without undue influence of any sort or degree; and the compensation bargained for must be absolutely just and fair, so that the transaction may be characterized throughout by all good faith to the client.
\end{quote}
\textit{Id.} quoting 182 N.C. at 467, 109 S.E. at 383.
\item \textsuperscript{59} \textit{See supra} note 56.
\item \textsuperscript{60} \textit{See supra} note 58.
\item \textsuperscript{61} 286 N.C. at 104, 209 S.E.2d at 479.
\item \textsuperscript{62} 7 AM. JUR. 2D \textit{Attorneys at Law} § 257 (1980).
\end{itemize}
peals considered Thompson to be a case of first impression in this jurisdiction on this issue, it is only appropriate that cases from outside jurisdictions on this point of law be examined.

The leading case on this issue is the Michigan case of Jordan v. Westerman. The defendants in Jordan were attorneys whom the plaintiff had retained to prosecute a divorce suit for her. Prior to the divorce decree, the defendant in the divorce suit paid the defendants in the present action $4,500 "in full for alimony, costs, and expenses." The suit was brought to recover that amount. The defendants claimed they were entitled to one-half of the $4,500 under an agreement which they claimed to have been made between them and the plaintiff. The contract entered into between the plaintiff and defendants stated that the defendants were to receive as reasonable compensation for their services and costs whatever amount the plaintiff's husband could be compelled to pay by the court, or otherwise, for either temporary or permanent alimony, as well as whatever the court allowed for costs and expenses, unless the amount was over $300. If the amount exceeded $300, the defendants were to receive one-half of the remainder or additional sum. The agreement was signed by the plaintiff.

The Supreme Court of Michigan held that these types of contracts were against public policy for two reasons. The first reason was based on a Michigan statute that provided that "[i]n every suit, brought either for divorce or for separation, the court may, in its discretion, require the husband to pay any sums necessary to enable the wife to carry on or defend the suit during its pendency." The court stated that this allowance of temporary ali-

63. 70 N.C. App. at 154, 319 S.E.2d at 320, rev'd, 313 N.C. 313, 328 S.E.2d 288.
64. Annot., 30 A.L.R. 188 (1924).
66. Id. at 172, 28 N.W. at 826.
67. Id.
68. Id.
69. Id.
70. Id. at 175, 28 N.W. at 827.
71. Id.
72. Id. at 176, 28 N.W. at 828.
73. Id. at 179-80, 28 N.W. at 829-30.
74. Id.
75. HOWELL'S STATUTES § 6235.
76. 62 Mich. at 178, 28 N.W. at 829 (quoting § 6235).
mony was not assignable and that it was against public policy to permit the wife to bargain it away in advance of receiving it.\textsuperscript{77} The second reason given by the court was that “\textquote{[p]ublic policy is interested in maintaining the family relation.\textquotе} The court stated that contracts like the one in question tend to prevent reconciliation which the public welfare and the good of society demand, if practicable or possible.\textsuperscript{79} If these contracts were legal they would bring about the “alienation of husband and wife by offering a strong inducement, amounting to a premium, to induce and advise the dissolution of the marriage.”\textsuperscript{80} The evil that the court was trying to prevent was illustrated in the case that was before it because every effort of reconciliation was opposed and thwarted by the attorneys because it was in their best interest under the contract not to allow reconciliation.\textsuperscript{81} The court concluded that the contract giving the defendants one-half of the alimony awarded by the court, or otherwise, was null and void.\textsuperscript{82}

The Supreme Court of Iowa was faced with a contingent fee contract in \textit{In re Sylvester's Estate}.\textsuperscript{83} The court stated that ordinarily a contingent fee contract was enforceable,\textsuperscript{84} but that the contract in the case involved more than the question of the payment of a contingent fee for legal services.\textsuperscript{85} This contract “involved an agreement to pay an attorney's fee contingent upon the procurement of a divorce and the adjustment of property rights in connection” with it.\textsuperscript{86} In general, a contract of this type is against public policy and void.\textsuperscript{87} “The sanctity of the marriage relation, the welfare of children, the good order of society, the regard for virtue, all of which the law seeks to foster and protect, are ample reasons why such [a] contract should be held to be contrary to

\textsuperscript{77} Id.
\textsuperscript{78} Id. at 180, 28 N.W. at 830.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} Id. The defendants admitted to the attorney for Mr. Jordon that it would be against their interest to have the parties reconcile and that they should not make any effort to have them do so and also that they were trying to get as large a sum as possible in looking out for their own interest. Id. at 176, 28 N.W. at 828.
\textsuperscript{82} Id. at 175, 28 N.W. at 830.
\textsuperscript{83} 195 Iowa 1329, 192 N.W. 442 (1923).
\textsuperscript{84} Id. at 1332-33, 192 N.W. at 443.
\textsuperscript{85} Id. at 1333, 192 N.W. at 443.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
public policy." Like the Supreme Court of Michigan in *Jordan*, the Supreme Court of Iowa held that a contract for an attorney's fee which is contingent upon the procurement of a divorce was against public policy and illegal and void. The court stated that public policy encourages, and the law favors, reconciliation between the parties. The court stated that a contract of this type involves the personal interests of the attorney in preventing reconciliation between the parties.

The Supreme Court of Montana, in *Keller v. Turner*, relied on *In re Sylvester's Estate* and another Montana case, *Coleman v. Sisson*, in affirming the rule that contingent fee contracts in domestic actions are void. The *Coleman* court stated that with these types of contracts, the attorney is interested in the alienation of husband and wife, not in their reconciliation. The *Keller* court also held that the rule against contingent fee contracts in domestic relations actions was applicable regardless of whether the agreement was entered into before or after the action for divorce was commenced.

In *Aucoin v. Williams*, the Court of Appeal of Louisiana, Third Circuit, held that a contingent fee contract in a divorce action was void as against public policy. The court stated that the rationale of the rule was to allow the parties to decide whether to reconcile without the pressure of an attorney because of a contingent fee predicated upon the procurement of a divorce. The *Aucoin* court relied on the case of *Succession of George E. Butler*. According to the *Butler* court, the law's attitude to the marriage relation is that "[p]ublic policy, good morals, [and] the highest interest of society require that the marriage relations should be surrounded with every safeguard and their severance allowed only

88. Id., 192 N.W. at 444.
89. Id., 192 N.W. at 443.
90. Id.
91. Id.
93. 71 Mont. 435, 230 P. 582 (1924).
94. 153 Mont. at 62, 453 P.2d at 783.
95. 71 Mont. at 444, 230 P. at 585.
96. 153 Mont. at 62, 453 P.2d at 783.
98. Id. at 874.
99. Id. at 873.
100. Id. at 871-73 (discussing Succession of Butler, 294 So. 2d 512 (La. 1974)).
for the causes specified by the law, and clearly proven."\textsuperscript{101} The Louisiana Civil Code states that "individuals cannot by their conventions derogate from the force of laws made for the preservation of the public order or good morals."\textsuperscript{102} In keeping with this policy, every attempt should be made to have the estranged couple reconcile.\textsuperscript{103}

The Thompson court found the opinion of the Appellate Court of Indiana in *Barrelli v. Levin*\textsuperscript{104} very persuasive. In reviewing the early history of the contingent fee contract, the *Barrelli* court said that the early common law considered some contingent fee contracts champertous and therefore void on the public policy ground that such contracts tended to promote litigation and multiply lawsuits.\textsuperscript{105} The Supreme Court of Indiana eventually recognized that persons who had rights but no means by which they could pursue them had to resort to contingent fee contracts in order to procure legal redress.\textsuperscript{106} This showed that the reason for holding contingent fee contracts champertous no longer carried any weight in Indiana.\textsuperscript{107} The *Barrelli* court noted that when the courts began upholding contingent fee contracts, either because they were technically not champertous or because the court found they were necessary to enable persons to enforce their rights, the courts did not extend and have not extended their blanket approval to all contingent fee contracts.\textsuperscript{108} It is only when these contracts are fairly made between the attorney and client, and made in good faith, free from fraud or imposition, that they are legal and enforceable.\textsuperscript{109} Quoting the case of *Jordon v. Kittle*,\textsuperscript{110} the *Barrelli* court stated that contracts that are intended to promote divorce are held void as against public policy.\textsuperscript{111} Later in the *Barrelli* opinion, the court stated that it was not ready to say that it was no longer the public policy of Indiana to discourage divorce and to

\textsuperscript{101} 295 So. 2d at 872 (quoting Butler, 294 So. 2d at 514).
\textsuperscript{102} 295 So. 2d at 872 (citing LA. CIVIL CODE art. 11 (West 1952)).
\textsuperscript{103} 295 So. 2d at 872.
\textsuperscript{105} Id. at 582-83, 247 N.E.2d at 850.
\textsuperscript{106} Id. (quoting Draper v. Zebec, 219 Ind. 362, 37 N.E.2d 952 (1941)).
\textsuperscript{107} 144 Ind. App. at 583, 247 N.E.2d at 850.
\textsuperscript{108} Id. at 588, 247 N.E.2d at 453.
\textsuperscript{109} Id. (quoting Whinery v. Brown, 36 Ind. App. 276, 281, 75 N.E. 605, 607 (1905)).
\textsuperscript{110} 88 Ind. App. 275, 150 N.E. 817 (1926).
\textsuperscript{111} 144 Ind. App. at 586, 247 N.E.2d at 851.
condemn contracts that provide incentives to attorneys to provide divorces for their clients and discourage reconciliation.112 The court went on to say that even if it were inclined to hold that the public policy of the state had changed and these contracts were no longer against public policy, there was no compelling reason to do so. This was so because the wife’s ability to hire an attorney was assured by statute which empowered and required the court to order the husband to pay a preliminary fee and a reasonable fee at the time the wife was granted the divorce.113 The court believed that everyone would benefit by maintaining the present public policy of not enforcing these types of contracts no matter how freely and fairly they were entered into and how reasonable the fee under them might be.114 The trial judge can be relied upon to assure every attorney an adequate fee and thereby assure every wife adequate representation.115 The chance of an occasional judicial overvaluation or under-valuation is a small price to pay for the social advantages inherent in judicial control of wives’ attorneys’ divorce fees.116 The social advantages inherent in judicial control of these fees also outweighs the occasional frustration of a wife who is unable to hire the attorney of her choice because he does not trust the evaluation of his services to judicial discretion.117 The court concluded that “all fee contracts between wives and their attorneys which measure the fee in terms of sums equal to percentages of ‘whatever may be recovered’ ” in a divorce action are void.118

The majority rule, and the rationale for it can be summarized as follows:

It is the policy of the law when differences arise between parties to a marriage that no obstacle should be placed in the way of their reconciliation. Consequently, it is not fitting that it should be for the interest of an attorney that there should be no reconciliation. If compensation for the attorney’s services is contingent on the securing of a divorce, or if the amount to be paid for his services is proportioned to the amount of alimony to be received, the attorney is in a position that his interest would be against reconciliation of the parties. A contract for the payment of a fee to an

112. Id. at 588-89, 247 N.E.2d at 853.
113. Id. at 589, 247 N.E.2d at 853.
114. Id.
115. Id.
116. Id. at 590, 247 N.E.2d at 854.
117. Id.
118. Id.
attorney, contingent upon his procuring a divorce for his client or contingent in amount upon the amount of alimony to be obtained, is void as against public policy.119

ANALYSIS

In Thompson v. Thompson,120 the North Carolina Court of Appeals held that "a contract for the payment of an attorney's fee contingent upon the procurement of a separation or divorce or contingent in amount upon the amount of alimony, support or property settlement obtained is void as against public policy."121 The court stated that it need not address each of the defendant's separate arguments122 because it based its decision on the ground that the contract was void as against public policy and therefore unenforceable.123 The court stated that the validity of a contingent fee contract in a domestic relations action had never before been decided by this jurisdiction, but the prevailing view in other jurisdictions was that this type of contract was against public policy and void.124

The court, in its analysis, seems to have overlooked the case of

121. Id. at 149, 319 S.E.2d at 317.
122. Id. at 149, 319 S.E.2d at 319. The defendant mainly challenged the trial court's judgment by assigning error to the court's order allowing the plaintiff law firm to intervene in the action. The defendant argued that the order allowing intervention was improper because:
   (a) the fee contract was void as against public policy and therefore unenforceable; (b) the contract sued upon, including the claimed fee, violates the Code of Professional Responsibility and is void; (c) no cause of action was stated in the complaint in intervention; (d) intervention was improper under Rule 24 of the Rules of Civil Procedure; and (e) no cause of action had arisen on the date of intervention, 2 April 1981, as the underlying action was not finally settled until 8 September 1981, when the defendant wife recovered from her former husband.

123. Id., 319 S.E.2d at 319-20.
CONTINGENT FEES IN DOMESTIC CASES

Pierce v. Cobb in which the Supreme Court of North Carolina stated that "If the object of a contract is to divorce man and wife, the agreement is against public policy and void." In Pierce, an action was brought by Mrs. Cobb’s attorneys to recover the amount of two notes that were payable to them. The notes had been assigned by B.P Cobb and J.H. Cobb, the defendants. The notes did not become due or collectible until Mrs. Cobb procured a divorce from her husband, B.P. Cobb. The reason for the rule that a contract to divorce man and wife is void is that the law views with repugnance all contracts which the purpose of or the direct tendency of which is to dissolve the marriage relationship. This repugnance is because of the law's regard for virtue, the good order of society, the welfare of the children, and the peculiar sanctity of the marital relation.

Pierce appears to be on point with Thompson and it seems that the rule laid out by the court is applicable. The Pierce court specifically stated that "If the object of a contract is to divorce man and wife, the agreement is against public policy and void." With this statement, it seems to make no difference whether the

125. 161 N.C. 300, 77 S.E. 350 (1913).
126. Id. at 302, 77 S.E. at 351.
127. Id. at 300, 77 S.E. at 350.
128. Id. at 301, 77 S.E. at 350.
129. Id., 77 S.E. at 350. On the back of the notes at the time they were executed was the following:

It is fully understood and agreed that this note shall not become due nor collectible in any event until Mrs. Ruth Cobb shall have obtained from her husband, the said B.P. Cobb, in a court of competent jurisdiction, a complete and absolute divorce from the bonds of matrimony, and shall present the said B.P. Cobb a duly certified copy of the decree granting same; this being the consideration for which this note is given. If the said Ruth Cobb shall fail to secure said divorce within at least six months from 10 June 1911, then this note shall be null and void. And the payees herein, in accepting this note, agree to the conditions above set out.

Id.

130. Id. at 302, 77 S.E. at 351.
131. In Pierce, the agreement was between Mr. and Mrs. Cobb. The plaintiffs in the case, Mrs. Cobb’s attorneys, received the notes for her. The facts do not say whether the notes were given to the plaintiffs to collect for Mrs. Cobb or to pay the plaintiffs for procuring the divorce for her. If the notes were given to the plaintiffs for compensation, they were contingent upon procuring a divorce for Mrs. Cobb and the court was dealing with a contingent fee contract in a domestic relations action.

132. 161 N.C. at 302, 77 S.E. at 351.
contract is between a husband and wife or between a husband or wife and their attorney. Indeed, it would seem that a fee contract contingent upon the procurement of a divorce would have as its primary objective the divorce of the husband and wife and under the rule in *Pierce*, would be void as against public policy.

The *Thompson* court found the opinion of the Appellate Court of Indiana in *Barrelli* very persuasive. The *Thompson* court stated, as the *Barrelli* court pointed out, there are two basic public policy considerations which have led the courts to invalidate contingent fee contracts in divorce actions. The first is the recognition that these contracts tend to promote divorce,\(^{133}\) and the second is the lack of need for such contracts under modern domestic relations law.\(^{134}\) The court also stated another relevant policy consideration that was identified by the *Barrelli* court. Wives contemplating divorce are often distraught and have no experience in negotiating contracts.\(^{135}\) Charges of overreaching and undue influence will be all too frequent if contingent fee contracts between wives and their attorneys become the usual fee arrangement under such conditions.\(^{136}\)

All of the public policy considerations discussed in the *Barrelli* opinion are reflective of the public policies of North Carolina.\(^{137}\) Even though the specific question as to the validity of a contingent fee contract in a domestic relations action had not been decided before *Thompson*, it was firmly established that a promise or contract contingent on the future separation of a husband and wife would not be sustained.\(^{138}\) As early as 1912, in the case of *Archbell v. Archbell*,\(^{139}\) the Supreme Court of North Carolina said it was established that articles or deeds of separation are permissible where the separation immediately follows, but agreements that look to the future separation of husband and wife will not be sus-

\(^{133}\) 70 N.C. App. at 155, 319 S.E.2d at 320.

\(^{134}\) Id.

\(^{135}\) Id. at 156, 319 S.E.2d at 321 (quoting 247 N.E.2d at 853). Note that the use of the word "wives" as opposed to "spouses" in this Note is the wording chosen by the court, and is not intended to reflect the views of the author or of the *Campbell Law Review*.

\(^{136}\) Id.

\(^{137}\) Id. at 157, 319 S.E.2d at 321.

\(^{138}\) Id. The court cited Archbell v. Archbell, 158 N.C. 409, 74 S.E. 327 (1912), and Matthews v. Matthews, 2 N.C. App. 143, 162 S.E.2d 697 (1968), as authority.

\(^{139}\) 158 N.C. 409, 74 S.E. 327 (1912).
The court in Pierce cited Archbell and held that if the object of a contract is to divorce man and wife, the agreement is void as against public policy. The North Carolina Court of Appeals, in Matthews v. Matthews, stated that "[o]ur society has been built around the home, and its perpetuation is essential to the welfare of the community." The law does not look favorably upon agreements that will bring about or encourage the destruction of the home. Because of these reasons, these types of agreements or contracts are held to be void as against public policy and are unenforceable in the courts of North Carolina.

The holding of the Thompson court is consistent with the holdings in Archbell, Pierce, and Matthews and the policy behind those decisions. The Thompson court stated that it was persuaded by the reasoning and logic of the Barrelli court that it was in the best interest of the citizens of North Carolina to adopt the rule that a contract for the payment of an attorney's fee contingent upon his procuring a divorce for his client or contingent upon the amount of alimony and/or property awarded is void as against public policy. Even though the court relied on Barrelli, the court would have probably reached the same result without doing so. The rules and policies set out in Archbell, Matthews, and especially Pierce are strong enough to support the Thompson court's holding.

In holding that the contingent fee contract between Mrs. Thompson and the law firm was unenforceable solely because it violated the public policy of North Carolina, the court said it did not need to address the question of whether the contingent fee contract was necessary in order for Mrs. Thompson to seek legal redress.

140. Id. at 414, 74 S.E. at 329. The court also stated that the agreement must be made under circumstances of such character as to "render it reasonably necessary to the health or happiness of the one or the other." In quoting from a Montana case, the court said that "[m]ere willingness to live apart is not enough. Neither will the agreement be enforced when it is the result of mutual caprice or reckless disregard of marital obligations. Neither will such an agreement be enforced when it is to be used as a means to facilitate a divorce." Id.

141. 161 N.C. at 302, 77 S.E. at 351.
142. 2 N.C. App. 143, 162 S.E.2d 697 (1968).
143. Id. at 147, 162 S.E.2d at 699.
144. Id.
146. 70 N.C. App. at 157, 319 S.E.2d at 321-22.
147. Id. at 157 n.3, 319 S.E.2d at 322 n.3.
counsel fees in actions for alimony. The statute provides:

At any time that a dependent spouse would be entitled to alimony *pendente lite* pursuant to G.S. 50-16.3, the court may, upon application of such spouse, enter an order for reasonable counsel fees for the benefit of such spouse, to be paid and secured by the supporting spouse in the same manner as alimony. The first requirement of § 50-16.4 is that the spouse asking for counsel fees must be a dependent spouse. The term "dependent spouse" is defined by § 50-16.1(3) as "a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse." The second requirement of § 50-16.4 is that the dependent spouse must be entitled to alimony *pendente lite*. Alimony *pendente lite* is defined by G.S. § 50-16.1(2) as "alimony ordered to be paid pending the final judgment of divorce in an action for divorce, whether absolute or from bed and board, or in an action for annulment, or on the merits in an action for alimony without divorce." The grounds for alimony *pendente lite* are set out in G.S. § 50-16.3.

Even though the Thompson court did not address this issue, it is apparent that the statutory scheme of North Carolina has been designed to ensure a dependent spouse the financial means to employ an attorney. Indeed, it is well established that the purpose of allowing counsel fees in North Carolina is to enable the depen-

149. Id. at § 50-16.1(3).
150. Id. at § 50-16.1(2).
151. N.C. Gen. Stat. § 50-16.3 states that:
   (a) A dependent spouse who is a party to an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce, shall be entitled to an order for alimony *pendente lite* when:
   (1) It shall appear from all the evidence presented pursuant to G.S. 50-16.8(f), that such spouse is entitled to the relief demanded by such spouse in the action in which the application for alimony *pendente lite* is made, and
   (2) It shall appear that the dependent spouse has not sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof.
   (b) The determination of the amount and the payment of alimony *pendente lite* shall be in the same manner as alimony, except that the same shall be limited to the pendency of the suit in which the application is made.
152. See 70 N.C. App. at 155-56, 319 S.E.2d at 321.
dent spouse to meet the supporting spouse, in court, on substantially the same terms by making it possible for the dependent spouse to retain adequate counsel.\footnote{153}

Another issue that the court did not fully address was the issue of whether intervention was proper under Rule 24 of the Rules of Civil Procedure. In the court of appeals' majority opinion, Judge Johnson stated that the court had some reservations as to whether the intervention was properly allowed\footnote{154} and then proceeded to handle the matter in a footnote.\footnote{155} Rule 24(b)(2) allows nonstatutory intervention by anyone "[w]hen an applicant's claim or defense and the main action have a question of law or fact in common."\footnote{156} Judge Johnson stated that under the express terms of Rule 24(b)(2) it appeared that the trial court had abused its discretion in allowing the intervention because there was no common question of law or fact between the action under the contingent fee contract and the Thompson's divorce suit.\footnote{157} The court then referred to Casket Co. v. Wheeler,\footnote{158} where, under pre-rules practice, intervention by a law firm was held to be proper in the client's underlying action to prevent the client from disposing of funds.\footnote{159}

Judge Hedrick, who agreed with the majority opinion that the contingent fee contract was void and unenforceable,\footnote{160} dissented solely on the ground that the intervention was improper.\footnote{161} Judge Hedrick stated that the majority seemed to agree with the trial court's decision allowing the law firm to intervene.\footnote{162} However, it does not seem that the majority necessarily agreed with the trial court on this issue. The majority stated that "it would appear that the trial court had abused its discretion by allowing the law firm's motion to intervene" under the express terms of Rule 24(b)(2).\footnote{163} It seems as though the court jumped at the chance to address the public policy issue in this case and have North Carolina come into conformity with the majority of the jurisdictions of the United

154. 70 N.C. App. at 153, 319 S.E.2d at 319.
155. \textit{Id.} at n.1.
156. \textit{N.C. GEN. STAT.} § 1A-1, Rule 24(b)(2).
157. 70 N.C. App. at 153 n.1, 319 S.E.2d at 319 n.1.
158. 182 N.C. 459, 109 S.E. 378 (1921).
160. \textit{Id.} at 159, 319 S.E.2d at 322.
161. \textit{Id.}, 319 S.E.2d at 323.
162. \textit{Id.}
163. \textit{Id.} at 153 n.1, 319 S.E.2d at 319 n.1.}
States. If the court had vacated the judgment of the trial court on purely procedural grounds, it would not have had the opportunity to express its much needed opinion on this area of law.

Another of Mrs. Thompson's arguments that the court did not address was that the contingent fee contract violated the Code of Professional Responsibility. Ethical Consideration 5-2 states that:

A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or the services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client.

Even though under this ethical consideration a contingent fee agreement may not be proper, Disciplinary Rule 5-103(A) provides that “[a] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of the litigation he is conducting for a client, except that he may: . . . (2) contract with a client for a reasonable contingent fee in a civil case.” The reason for allowing contingent fee arrangements in certain cases is expressed by Ethical Consideration 5-7. “Although a contingent fee arrangement gives a lawyer a financial interest in the outcome of the litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice.” It seems that the only reason a contingent fee is allowed is to enable a person without financial means to retain counsel to have the opportunity to exercise his legal rights. North Carolina has a statutory scheme which ensures that attorneys will be paid in domestic relations actions when they represent clients who do not have the means to pay them. Because of this statutory scheme, the contingent fee is not “the only means by which a layman can obtain the services of a lawyer of his choice.” The reason for the rule of allowing contingent fees as set forth in EC 5-7 is not applicable in a domestic relations action such as the one in Thompson. This reasoning leads to the conclu-

164. Id. at 153, 319 S.E.2d at 319.
168. Id.
sion that contingent fee contracts in domestic relations actions are probably a violation of the Code of Professional Responsibility in North Carolina.

An exception to the rule of not allowing contingent fee contracts in domestic relations actions should be made to cover equitable distribution actions. The pertinent part of Ethical Consideration 2-20 states that:

[c]ontingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a res out of which the fee can be paid.169

Although a pure divorce action does not produce a res out of which a fee may be paid, an equitable distribution proceeding will produce the res if the action is successful.170 Also, the equitable distribution proceeding can only be prosecuted after divorce has been granted.171 North Carolina Code of Professional Responsibility Opinion 312 (1982) states that contingent fee arrangements may be the only practical means for a person to obtain competent counsel in an equitable distribution action. This is so because there is no provision for the recovery of attorneys' fees in this type of action.172

Since an equitable distribution action does create a res and because the equitable distribution action can only be prosecuted after the divorce has been granted, a contingent fee in this situation would not seem to violate the public policy of North Carolina. Since North Carolina courts have not directly ruled on this point, North Carolina Code of Professional Responsibility Opinion 312 (1982) should be read in light of the Thompson court's holding.

One final issue to be addressed is whether the law firm was entitled to any compensation for the legal services it performed for Mrs. Thompson. After the court held that the contingent fee contract was void as against public policy, the court addressed this

The court held that the plaintiff law firm should be allowed to recover in *quantum meruit*. The court noted the case of *Baskerville v. Baskerville* where the Supreme Court of Minnesota held that an attorney who is a party to a contingent fee contract in a divorce action could not recover the reasonable value of his services. The *Baskerville* court stated that:

> [s]ince the illegality of the contingent fee contract rests on the ground that it may govern a lawyer's action in a manner which thwarts public policy, the taint of illegality permeates the entire lawyer-client relationship in a divorce action so that every objection to permitting a recovery on the express agreement applies with equal force to an attempted recovery in *quantum meruit*.

The *Thompson* court refused to adopt a rule, like the one in *Baskerville*, that would not allow an attorney in this situation to recover in *quantum meruit* with the case that was before them. The court's first reason for this decision was that because the contingent fee contract was not executed until three weeks after the establishment of the attorney-client relationship, the "taint of illegality" did not explicitly permeate this attorney-client relationship until it was half over. The court's second reason was fairness to the law firm because this was a case of first impression in this jurisdiction, and because the legal status of a contingent fee contract in a divorce action in North Carolina had not been conclusively established.

The court's decision allowing a *quantum meruit* recovery is consistent with the court's holding in *Covington v. Rhodes*. In *Covington*, the court stated the older rule, which is still the rule in some jurisdictions: where an attorney acting under a contingent fee contract is discharged without cause, he may recover the entire contingent fee. The reason for the old rule was the application of general contract law. When the client discharges his attorney without cause, the client breaches the contract. Therefore, the attorney

173. 70 N.C. App. at 157, 319 S.E.2d at 322.
174. Id. at 158, 319 S.E.2d at 322.
175. 246 Minn. 496, 75 N.W.2d 762 (1956).
176. Id. at 513, 75 N.W.2d at 773.
177. Id.
178. 70 N.C. App. at 158, 319 S.E.2d at 322.
179. Id.
180. Id.
181. 38 N.C. App. 61, 247 S.E.2d 305 (1978).
182. Id. at 64, 247 S.E.2d at 307.
can recover the entire contract price. The Covington court perceived the modern trend and the better rule to be that an attorney who is discharged, with or without cause, can only recover the reasonable value of his services as of that date. The Covington court felt that the reason for this rule was that because of the special relationship of trust and confidence that exists between an attorney and client, the client can discharge the attorney, terminating the relationship, at any time, with or without cause. Another reason for this modern trend is that before the contracting attorney could obtain an equitable interest in the recovery of his client, he had to prosecute the case to a favorable judgment or settlement. Consistent with this modern trend, the Thompson court remanded the matter for a new trial so that the reasonable value of the services provided by the discharged law firm prior to February 16, 1981, the date of discharge, could be determined.

THE SUPREME COURT'S DISPOSITION

On further appeal of this action, the Supreme Court of North Carolina held that the court of appeals erred in not vacating the order allowing intervention and dismissing the intervenors from the suit. The court's rationale was that since the contract was void, the "intervenors had no interest in the property or the transaction that was the subject of Ms. Thompson's suit." The supreme court noted, in dicta, "that it is generally held that if there can be no recovery on an express contract because of its repugnance to public policy, there can be no recovery in quantum meruit." The court ultimately reversed the opinion of the court of appeals that had remanded the case to the district court for a determination of the reasonable value of the services that the discharged attorneys had performed prior to February 16, 1981. The supreme court remanded the case "for an order vacating the order allowing intervention and for the entry of an order dismissing the action filed by the intervenors against Mrs."

183. Id., 247 S.E.2d at 307-08.
184. Id. at 65, 247 S.E.2d at 308.
185. Id.
186. Id.
187. 70 N.C. App. at 158, 319 S.E.2d at 322.
189. Id. at 314, 328 S.E.2d at 290.
190. Id. at 314-15, 328 S.E.2d at 290.
191. Id. at 315, 328 S.E.2d at 290.
Even though the supreme court reversed the court of appeals, the basic holding of the court of appeals is still valid. After stating that the court of appeals held the contingent fee contract void and unenforceable because it violated the public policy of North Carolina, the supreme court stated that review of that issue had not been sought and that the validity of that issue was not before them. In reality, the supreme court gave strength to the basic ruling of the court of appeals on the legality of a contingent fee in a divorce case by stating that "the opinion of the court of appeals on that point is the law of this case as it now stands before us." Had the court of appeals erred in its determination that the contingent fee contract was void, the supreme court could not have held the intervenors as having "no interest."

Conclusion

The Thompson court held "that a contract for the payment of a fee to an attorney contingent upon the securing of a separation or divorce or contingent in amount upon the amount of alimony, support, or property settlement obtained is void as against public policy." In doing so, the court brought North Carolina into conformity with the majority of jurisdictions in the United States. The court left some unanswered questions and based its holding solely on the grounds of public policy. The primary question left open is whether a contingent fee agreement in a domestic relations action will be a violation of the Code of Professional Responsibility if the public policy of North Carolina were to change as the attitude of the public changes towards a greater acceptance of divorce. With the current state of the Code of Professional Responsibility in North Carolina, it appears that a contingent fee in a domestic relations action would be a violation, but if the public policy of this state were to change, the Code of Professional Responsibility may change to conform with the public policy.

The court was correct in stating that the adoption of this rule

192. Id.
193. Id. at 314, 328 S.E.2d at 290.
194. Id.
195. 70 N.C. App. at 149, 319 S.E.2d at 317.
196. Id. at 154, 319 S.E.2d at 320.
197. Id. at 153, 319 S.E.2d at 319-20.
is in the best "interest of the citizens of this state." If the rule were otherwise, reconciliation of the parties to a domestic relations action would not be promoted and the current public policy of North Carolina would be undermined.

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198. *Id.* at 157, 319 S.E.2d at 321-22.