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Specific Performance of Separation Agreements - A New Remedy: Moore v. Moore

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NOTES

Specific Performance of Separation Agreements—A New Remedy: *Moore v. Moore*

In a case of first impression, the North Carolina Supreme Court unanimously approved a decree of specific performance to enforce alimony provisions of a separation agreement although the agreement had not been properly merged or incorporated into a divorce decree.[1] Prior decisions had held that breach of a separation agreement not merged into a judicial decree would not subject the breaching party to the contempt powers of the court,[2] and that the only available remedies were at law.[3] Ms. Moore's request differed. She sought a decree of specific performance—a significant intermediate step. A contempt order could then follow for failure to comply with the terms of the court's decree, rather than for failure to abide by the terms of the separation agreement.[4]

Often a casenote discusses the manner in which a court reaches a decision; others inquire whether a given decision or conclusion is justi-

1. Moore v. Moore, 297 N.C. 14, 252 S.E.2d 735 (1979).

2. Because the North Carolina Constitution prohibits imprisonment for debt except in cases of fraud, civil contempt proceedings are confined to enforcement of judicial orders. N.C. CONST. art. I, § 28. *See* Wilson v. Wilson, 261 N.C. 40, 134 S.E.2d 240 (1964); Stanley v. Stanley, 226 N.C. 129, 37 S.E.2d 118 (1946). In *Wilson*, the court held that wilful failure to comply with the court's order to pay support is contempt and can be punished by imprisonment without being an unconstitutional imprisonment for debt. 261 N.C. at 44, 134 S.E.2d at 243. In *Stanley*, the court stated that imprisonment for failure to pay a sum of money is prohibited except to enforce an appropriate judicial order that has been disobeyed. 226 N.C. at 133, 37 S.E.2d at 120.

See generally N.C. GEN. STAT. §§ 5A-21 to -25 (Supp. 1979) (Civil Contempt). Section 5A-21(a) states:

> Failure to comply with an order of a court is a continuing civil contempt as long as: (1) [t]he order remains in force; (2) [t]he purposes of the order may still be served by compliance with the order; and (3) [t]he person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable him to comply with the order.

Under § 5A-21(b), a judge may order a person in contempt imprisoned for as long as the contempt continues.

Contempt issues are beyond the scope of this article, however. This article is written from the assumption that before jumping the hurdle and approving orders of specific performance to enforce separation agreements, the court looked for quicksand on the other side. The contempt issues were adequately brought to the court's attention by both parties in their briefs. I assume, therefore, that in reaching the *Moore* decision, the court made a simultaneous decision—that there was no unconstitutional imprisonment for debt involved in ordering specific performance of separation agreement provisions.

3. *See* notes 15-17 *infra* for the North Carolina statutory remedies.

4. *See* note 2 *supra*.

fiable. "The language of judicial decision is mainly the language of logic. . . . You can give any conclusion a logical form."[5] But because "only by happenstance will an opinion accurately report the process of decision,"[6] I prefer to follow a format explicit in the often-quoted philosophy of Oliver Wendell Holmes: "The prophecies of what the courts will do in fact, and nothing more pretentious, is what I mean by the law."[7] This article will examine the "flavor"[8] of the *Moore* opinion for the purpose of predicting how the court, tomorrow, may use this decision, and will concentrate on what elements of *Moore* may be viewed as relevant and important, and how these elements may be used daily by the practitioner. *Moore* does not offer clear guidelines for determining when the trial courts should order specific performance.[9] The decision was grounded on the inadequacy of Ms. Moore's remedies at law, but "[a]dequacy is open-ended . . . [and] does not exist as a matter of rule, but as a matter of fact."[10] Because "[e]very decision becomes a basis for future predictions,"[11] however, it is hoped that each decision will embody at least methods of analysis that will serve the profession as a guide to future decisions. Unfortunately, the *Moore* court even limited its discussion of factors for determining the inadequacy of the remedies at law,[12] and only summarily accepted the rationales of certain cases in other jurisdictions.[13] The rationales of these cases, however, indicate that the North Carolina Supreme Court favors a liberal approach toward enforcing separation agreements by decrees for specific performance.

A brief study of the *Moore* facts and opinion is necessary before the availability of and the efficiency of this new remedy can be assessed. Ms. Moore obtained a judgment in 1976 against Mr. Moore for $1,500.00, representing six months arrearages in the alimony payments that had been provided for in their separation agreement.[14] Collection

5. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465-66 (1897).

6. K. LLEWELLYN, *Ore in the Published Opinion*, in THE COMMON LAW TRADITION 56-58 (1960). In an interview with Justice Potter Stewart of the United States Supreme Court, Justice Stewart confirmed that the final published opinion of a court is the result of a committee effort and includes "give and take" on the part of the Justices. Interview with Justice Potter Stewart, Sept. 19, 1980. For a detailed, but not necessarily accurate, account of this process, *see* B. WOODWARD & S. ARMSTRONG, THE BRETHREN (1979). *See also* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 350-51 (1974).

7. Holmes, *supra* note 5, at 461.

8. K. LLEWELLYN, *supra* note 6, at 56.

9. *See* notes and text accompanying notes 26-33 *infra*. If a court "attempts to answer" how cases in the future should be decided at the moment they create a new rule or apply an old remedy to a new situation, "it is not likely to answer . . . wisely." Amsterdam, *supra* note 6, at 352.

10. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 60 (1973).

11. Rundell, *The Judge as Legislator*, 29 U. KAN. CITY L. REV. 1, 10-11 (1958).

12. *See* notes and text accompanying notes 22-32 *infra*.

13. *See* note 33 *infra* for a list of the cases summarily approved in *Moore*.

14. *See* Record at 43, Moore v. Moore, 38 N.C. App. 700, 248 S.E.2d 761 (1978).

of the judgment proved unsuccessful: an execution was returned "unsatisfied,"[15] supplemental proceedings failed to uncover any assets upon which to execute,[16] and an attempt to garnish Mr. Moore's wages failed.[17] In 1977, Ms. Moore accompanied a second action for additional accrued arrearages with a request for specific performance to compel payments.[18] The trial court ruled irrelevant the testimony of her destitute state and evidence of Mr. Moore's $20,000.00 annual income, as well as evidence of his deliberate concealment of assets and assignment of property to his second wife.[19] The trial court denied Ms.

15. 297 N.C. at 14, 252 S.E.2d at 736. *See generally* N.C. GEN. STAT. §§ 1-302 to -324.7 (1969 & Supp. 1979) (Executions). Where a judgment requires a money payment, it can be enforced by execution. *Id.* § 1-302 (1969). The judgment can be enforced by sale of the judgment debtor's property, *id.* § 1-339.1(a)(3) (1969 & Supp. 1979), by following the procedures set out in §§ 1-339.41 to -339.71 (1969 & Supp. 1979) (Execution Sales). But until the periodic payments are reduced to judgment, there can be no execution. Lindsey v. Lindsey, 34 N.C. App. 201, 203, 237 S.E.2d 561, 563 (1977). Further, property held by entirety can not be subject to execution to satisfy a judgment against only one spouse. Hodge v. Hodge, 12 N.C. App. 574, 575, 183 S.E.2d 800, 801, *cert. denied*, 279 N.C. 726, 184 S.E.2d 884 (1971).

16. 297 N.C. at 15, 252 S.E.2d at 736-37. *See generally* N.C. GEN. STAT. §§ 1-352 to -368 (1969 & Supp. 1979) (Supplemental Proceedings). If no property can be found upon which to execute, the execution is returned by the sheriff as "unsatisfied." The judgment creditor may then elect to serve interrogatories on the defendant under § 1-352.1 (Supp. 1979). If the debtor does not answer, a court may order the debtor to answer or, in the alternative, to request an oral hearing to answer. Failure to comply with this order may result in contempt under § 1-368 (1969).

The creditor may also request the debtor appear and answer questions regarding his property under § 1-352 (1969 & Supp. 1979). The answers are made under oath before the court or a referee. *Id.* § 1-346 (1969).

A receiver can be appointed under § 1-363 (1969) and §§ 1-501 to -507 (1969 & Supp. 1979).

The purposes of the above proceedings are to discover and to reach any property of the debtor. The trial court in *Moore* was willing to appoint a receiver to inquire into Mr. Moore's assets, but Ms. Moore declined to pursue this remedy. *See* Brief for Appellant at 4, 5.

17. 297 N.C. at 15, 251 S.E.2d at 737. The remedies of attachment and garnishment for enforcement of an alimony decree are provided for in N.C. GEN. STAT. § 50-16.7(e) (1969), and the dependent spouse is treated as a creditor for these purposes. Under § 1-440.2 (1969), attachment of property may be had in any action for alimony or for maintenance and support if the defendant is a nonresident or a resident who, with intent to defraud creditors or to avoid service of process, has left or is about to leave or to remove property from North Carolina, conceals himself, conceals or disposes of property, or is about to conceal or dispose of property. *Id.* § 1-440.3 (1969). Procedures under §§ 1-440.1 to -440.46 (1969 & Supp. 1979) must be strictly followed.

Garnishment is a proceeding ancillary to attachment. *Id.* § 1-440.21 (1969). But under § 1-362 (1969), there is an exemption for earnings for personal services within the last 60 days if the wages are needed for a family supported in whole or in part by the debtor's labor. In *Elmwood v. Elmwood*, the North Carolina Supreme Court construed this exemption favorable to the debtor. 295 N.C. 168, 185-86, 244 S.E.2d 668, 678 (1978). *Cf.* the Editor's Note following § 1-362 (Supp. 1979). The Editor felt it would be reasonable to assume that when passed by the 1870-71 legislature, this section was intended to protect the wage-earner's family from poverty as against the claims of other creditors; it was not intended that a second family be supported at the expense of the first family. The Editor urged the legislature to amend this section and to negate the result of the *Elmwood* opinion.

18. 297 N.C. at 15, 251 S.E.2d at 737.

19. *Id.* Upon receiving his paychecks, Mr. Moore immediately endorsed them over to his second wife, who deposited them in a checking account in her name. Real property was jointly owned by Mr. Moore and his second wife. Personal property, including cars and a boat trailer, was titled only in his second wife's name.

Moore's request for a decree of specific performance and entered a second judgment for approximately $5,000.00.[20] The court of appeals affirmed, with Judge Webb dissenting.[21]

Writing the opinion for the supreme court, Justice Brock acknowledged two general rules: (1) that separation agreements are subject to the same rules of law as any other contract,[22] and (2) that the equitable remedy of enforcement of contracts by specific performance is available only if there are inadequate remedies at law.[23] More specifically, he stated that remedies at law must be as full, complete, practical, efficient, and prompt as remedies in equity.[24] Focusing then on the particular situation before the court as a prime example of inadequate remedies at law for enforcement of a separation agreement not incorporated into a judicial decree, Justice Brock described in detail the expensive, time-consuming procedures involved when a defendant refuses to abide by a separation agreement: A plaintiff must wait until arrearages accrue, file suit, obtain judgment, and seek execution—probably many times over.[25] Because the nature of an alimony contract is for basic subsistence, he pointed out the extreme financial hardships suffered by delay. Accepting factors enumerated in the *Restatement of the Law of Contracts*[26] for determining the adequacy of these remedies at law, he concluded that delayed successive awards of money damages are not the "substantial equivalent" of the periodic payments for which the parties contract, and, therefore, the "probability of multiple suits" is a sound basis for granting equitable relief.[27] He concluded that the evidence excluded by the trial court was

20. 297 N.C. at 15, 252 S.E.2d at 737.

21. Moore v. Moore, 38 N.C. App. 700, 248 S.E.2d 761 (1978). J. Webb dissented on the basis that Ms. Moore had inadequate remedies at law and equitable relief was therefore proper. *Id.* at 702-03, 248 S.E.2d at 762-63.

22. 297 N.C. at 16, 252 S.E.2d at 737. The usual remedy for breach of contract is, of course, money damages. *See* 5 A. CORBIN, CONTRACTS § 993 (1951); 2 S. WILLISTON, CONTRACTS § 1338 (1921); Farnsworth, *Legal Remedies for Breach of Contract*, 70 COL. L. REV. 1145-47 (1970); Kronan, *Specific Performance*, 45 U. CHIC. L. REV. 351, 354 (1978). *See* notes and text accompanying notes 15-17 *supra*.

23. 297 N.C. at 16, 252 S.E.2d at 737. *Accord*, E. FRY, A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS § 48 (6th ed. 1921); J. POMEROY, A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS § 4 (3d ed. with J. Mann 1926); 3 S. WILLISTON, *supra* note 22, at § 1418 (1921); Kronan, *supra* note 22, at 355.

24. *See* Summer v. Staton, 151 N.C. 194, 197, 65 S.E. 902, 904 (1909). The typical situation in which courts are prepared to order specific performance are situations in which the subject of the contract is unique. For example, contracts for the sale of land, heirlooms, and antiques are unique. *See* Kronan, *supra* note 22, at 357.

25. Ms. Moore followed these procedures and more. *See* notes and text accompanying notes 14-18 *supra*.

26. 297 N.C. at 17-18, 252 S.E.2d at 738. Subsection (c) of the RESTATEMENT OF THE LAW OF CONTRACTS § 361 at 646 (1932) focuses on the difficulty of obtaining a duplicate of the promised performance through a money award. Subsection (e) focuses on the probability of multiple actions to obtain full compensation.

27. *See* RESTATEMENT OF THE LAW OF CONTRACTS § 361(e) (1932). *See also* note 26 *supra*.

indeed relevant[28] because it indicated Ms. Moore's hardships,[29] Mr. Moore's ability to make payments,[30] and the necessity for, and futility of, multiple actions (because of Mr. Moore's deliberate pattern of avoiding execution of the judgment by assigning property to his second wife).[31] Justice Brock also found significant the absence of any evidence regarding Mr. Moore's willingness to abide by the agreement in the future.[32] Accepting the rationales and holdings of numerous jurisdictions[33] as sound support for his conclusion that Ms. Moore's remedies at law were inadequate, Justice Brock concluded that a decree for specific performance of a separation agreement neither incorporated nor merged into a judicial decree was proper, both for accrued arrearages and for future payments.[34]

Before the practical value of *Moore* can be fully appreciated, it is essential to examine the pre-*Moore* procedures necessary to insure enforcement of alimony provisions[35] of a separation agreement through the contempt powers of the court. The purpose of holding a party in contempt is to coerce compliance with the decrees of the court.[36] The contempt power is massive,[37] but because the nature of the claim for alimony is for subsistence, it has always warranted the exercise of this special power.

As previously stated, a separation agreement not properly incorporated into a judicial decree is a contract, and is not directly enforceable by the contempt powers of the court.[38] By incorporating a separation agreement into a consent order or a consent judgment, however, the agreement becomes more than a contract between the parties; it be-

28. 297 N.C. at 18, 252 S.E.2d at 738-39.

29. *See* Record for Appellant.

30. *See* text accompanying note 19 *supra*.

31. *Id.*

32. 297 N.C. at 18, 252 S.E.2d at 739.

33. Strasner v. Strasner, 232 Ark. 478, 338 S.W.2d 679 (1960); Burke v. Burke, 32 Del. Ch. 320, 86 A.2d 51 (1952); Doerfler v. Doerfler, 196 A.2d 90 (D.C. App. 1963); Hagen v. Viney, 124 Fla. 747, 169 So. 391 (1936); Fleming v. Peterson, 167 Ill. 465, 47 N.E. 755 (1897); Zouck v. Zouck, 204 Md. 285, 104 A.2d 573 (1954); Lorant v. Lorant, 366 Mass. 380, 318 N.E.2d 830 (1974); Schlemm v. Schlemm, 31 N.J. 557, 158 A.2d 508 (1960).

34. 297 N.C. at 19, 252 S.E.2d at 739.

35. Discussion in this article is limited to alimony provisions of a separation agreement and does not apply to specific performance of child support or property settlement provisions of a separation agreement.

36. *See* D. DOBBS, *supra* note 10, at 10.

37. *Id.* at 67. *See* note 2 *supra* explaining that contempt issues are beyond the scope of this article, and why.

38. *See* note 2 *supra* regarding the constitutional prohibition against imprisonment for debt.

> [W]e can find no order of the court capable of implementation by a contempt proceeding. . . . [T]he separation agreement . . . had no more sanction for its enforcement than any other civil contract; certainly not that of imprisonment through civil contempt for noncompliance. . . . The gist of the contempt is the willful disobedience to the court order.

Stanley v. Stanley, 226 N.C. 129, 132-33, 37 S.E.2d 118, 120 (1946). *See also* 2 LEE, NORTH CAROLINA FAMILY LAW § 201 at 424 (3d ed. 1963).

comes an order of the court enforceable by contempt. The requirements for boosting the status of the agreement are very technical, however, and require careful drafting.[39] The court must do more than merely acknowledge[40] or approve[41] the separation agreement in the consent order. If the order specifically states that the parties are subject to the contempt powers of the court,[42] expressly leaves the order open for modification by the court,[43] or expressly orders payments to be made,[44] the separation agreement is deemed merged or incorporated into the order and it is enforceable by contempt. Also, by merging the separation agreement into a judgment by confession,[45] the separation agreement is converted into a judgment enforceable by contempt.

Prior to *Moore*, if the above incorporation procedures were not carefully followed, only breach of contract remedies at law were available,

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39. [T]he subleties in the form of a consent judgment for support payments to the wife play a major role in determining the subsequent rights of the parties and, if the judgment is to be of practical value to the wife other than as a judicial affirmation of the contract existing between the parties, . . . it is advisable that the attorney carefully word the form of the judgment so as to preserve in the court further rights in the cause.

Bunn v. Bunn, 262 N.C. 67, 70, 136 S.E.2d 240, 243 (1964). *Bunn* is the landmark case in North Carolina dealing with whether consent judgments are contracts or consent orders. *See* Note, *Domestic Relations—Consent Judgments for Alimony—Subsequent Modification and Enforcement by Contempt*, 35 N.C.L. REV. 405, 409 (1957); Comment, *Ninth Annual Survey of North Carolina Case Law*, 40 N.C.L. REV. 482, 532 (1962).

40. *See e.g.,* Stanley v. Stanley, 226 N.C. 129, 37 S.E.2d 118 (1946); Brown v. Brown, 224 N.C. 556, 31 S.E.2d 529 (1944); Davis v. Davis, 213 N.C. 537, 196 S.E. 819 (1938). In *Stanley*, the judgment contained the following provision: "By consent, it is further ordered, adjudged and decreed that this judgment shall in no way prejudice the defendant's rights to maintenance and support under that certain agreement between the parties . . . ." 226 N.C. at 130-31, 37 S.E.2d at 119. The court held that this "hands off" provision was not sufficient to incorporate the terms of the separation agreement into an order of the court. *Id.* at 134, 37 S.E.2d at 121. In *Brown*, the judgment for absolute divorce contained the following provision: "[T]his judgment shall not affect or invalidate the deed of separation made and entered into by and between the plaintiff and defendant." 224 N.C. at 557, 31 S.E.2d at 529. The court held that this provision did not constitute a valid court order upon which the defendant could be held in contempt. *Id.* at 557, 31 S.E.2d at 530. In *Davis*, the court merely acknowledged the separation agreement and attached a copy to the divorce decree. 213 N.C. at 538, 196 S.E. at 820.

41. [When] the court merely approves or sanctions the payments which the husband has agreed to make for the wife's support and sets them out in a judgment against him[,] [s]uch a judgment constitutes nothing more than a contract between the parties made with the approval of the court . . . .

. . .

[and] is enforceable only as an ordinary contract.

Bunn v. Bunn, 262 N.C. 67, 69, 136 S.E.2d 240, 242 (1964).

42. *See, e.g.,* Edmundson v. Edmundson, 222 N.C. 181, 22 S.E.2d 576 (1942).

43. *See, e.g.,* Dyer v. Dyer, 212 N.C. 620, 194 S.E. 576 (1942).

44. *See, e.g.,* Stancil v. Stancil, 255 N.C. 507, 121 S.E.2d 882 (1972); Mitchell v. Mitchell, 270 N.C. 253, 154 S.E.2d 71 (1967).

45. *See* N.C. GEN. STAT. § 1A-1, Rule of Civil Proc. 68.1 (1969). Confession of Judgment may be entered for alimony due or to become due under Rule 68.1(a), as long as the procedures set out in Rule 68.1(b)-(d) are followed. One of these requirements is the defendant's authorization to record the judgment. Under subsection (e), judgments by confession basically have the same effect as any other judgment, and if the defendant fails to make the alimony payments, he may be held in contempt. *Id.* Rule 68.1(e).

which meant that a plaintiff was faced with the burden of successive suits to enforce his or her right to alimony. When a defendant successfully avoided execution on the money judgments awarded in breach of contract actions, the dependent spouse had no effective remedy. But "[e]quity suffers no wrong to be without a remedy,"[46] and now a court may order specific performance of the contract and enforce its own order through its contempt powers. The decree for specific performance is the crucial intermediate step.

There has never been a reason for courts not to specifically enforce separation contracts; there is no public policy ground offensive to morals or to the well-being of the parties or any future parties.[47] Courts in other jurisdictions generally have held that separation agreements are enforceable by decrees of specific performance when remedies at law are inadequate.[48] Because "prediction" is the main concern of this article, however, the important question is "How is it determined that a plaintiff's remedies at law are inadequate?" Admittedly, it is difficult to formulate a positive rule as a guide in all cases because whether the remedies at law are inadequate is a matter of fact.[49] Perhaps the best indicator of what the North Carolina Supreme Court will do in the future can be gleaned from the sister state cases summarily approved in *Moore*.[50] These cases offer varying factors for determining whether there are inadequate remedies at law, and in general take a liberal approach in evaluating the need for specific performance of separation agreements.

I. Factors for Determining Inadequacy of Remedies at Law

A. *Multiplicity of Actions*

The necessity of multiple actions to recover alimony was one factor that the *Moore* court deemed important in determining the inadequacy of Ms. Moore's remedies at law.[51] *Moore* follows the majority of jurisdictions in accepting this as a major factor;[52] however, phrasing of the standard differs from jurisdiction to jurisdiction. The *Moore* court re-

46. 71 Am. Jur. *Specific Performance* § 4, at 13 (2d ed. 1973), *citing* Manning v. Potomac Electric Power Co., 230 Md. 415, 421, 187 A.2d 468, 471 (1963).

47. *See* Burke v. Burke, 32 Del. Ch. 320, 325, 86 A.2d 51, 54 (1952); Hagen v. Viney, 124 Fla. 747, 169 So. 391 (1936); Schlemm v. Schlemm, 31 N.J. 557, 570, 158 A.2d 508, 519 (1960). All of these cases were cited with approval in *Moore*.

48. *See, e.g.*, Strasner v. Strasner, 232 Ark. 478, 338 S.W.2d 679 (1960); Peters v. Peters, 20 Del. Ch. 28, 169 A. 298 (1933); McAllister v. McAllister, 147 Fla. 647, 3 So. 2d 351 (1941); Edleson v. Edleson, 179 Ky. 300, 200 S.W. 625 (1918); Richards v. Richards, 270 Mass. 113, 169 N.E. 891 (1930); Colburn v. Colburn, 279 Pa. 249, 123 A. 775 (1924).

49. *See* D. Dobbs, *supra* note 10, at 61.

50. *See* note 33 *supra*.

51. 297 N.C. at 18, 252 S.E.2d at 738. *See* text accompanying notes 14-18 *supra*.

52. *See* note 48 *supra*.

lied on the *Restatement of the Law of Contracts* test,[53] which requires the "probability" of multiple actions as a basis for ordering specific performance. In the District of Columbia case of *Doerfler v. Doerfler*,[54] cited in *Moore*, the mere "possibility" of successive actions was sufficient to prompt the court to grant equitable relief.[55] The *Moore* court's failure to distinguish between these two formulations—the "possibility" or the "probability" of successive suits—should not prove troublesome as a practical matter, however. If a separation agreement requires future periodic payments of spousal support, and if the defendant has a history of defaults or otherwise indicates an unwillingness to pay, it seems that a probability of multiple actions exists. In *Zouck v. Zouck*,[56] cited in *Moore*, the Maryland court's main concern was the defendant's failure to make payments for five years,[57] indicating that a continued breach over a period of time is sufficient in itself for a finding of inadequate remedies at law. *Fleming v. Peterson*,[58] one of the early cases ordering specific performance of a separation agreement and approved in *Moore*, even created a presumption in favor of the remedy when the defendant offered no excuse for his arrearages,[59] indicating that the slightest hint of unwillingness to pay is a sufficient reason for a court to find that there is a probability of multiple actions and that the remedies at law are inadequate.

B. *Futility of Pursuing Remedies at Law*

Mr. Moore concealed his assets and assigned his property to his second wife,[60] thereby making it futile for Ms. Moore to continue her course of obtaining money judgments and issuing executions. Did the court intend to limit the specific performance remedy only to cases involving such egregious conduct? The court's reliance on *Hagen v. Viney*[61] indicates that such extreme circumstances are not necessary for a

53. *See* note 26 *supra*.

54. 196 A.2d 90 (D.C. App. 1963).

55. In *Doerfler*, the husband only threatened to reduce alimony payments provided for in their separation agreement. The court decided that rather than possibly forcing the wife to bring successive actions for judgments, the remedy of specific performance was more suitable. *Id.* at 91. *Cf.* Riddle v. Riddle, 32 N.C. App. 83, 230 S.E.2d 809 (1977) (a pre-*Moore* case denying specific performance when husband threatened to terminate alimony payments).

56. 204 Md. 285, 104 A.2d 573 (1954).

57. *Id.* at 290, 104 A.2d at 575. The defendant threw his copy of the separation agreement into a trash can after leaving the attorney's office where it was executed. *Id.*

58. 167 Ill. 465, 47 N.E. 755 (1897).

59. Appellant says it cannot be presumed that he would continue his refusal to pay, and thus make so many suits necessary. We must take this case as the record presents it. He has refused to pay without any reason or excuse for such refusal. . . . [W]e know of no reason why it can be presumed that he will voluntarily pay hereafter.

Id. at 469, 47 N.E. at 756 (1897).

60. *See* note and text accompanying note 19 *supra*.

61. 124 Fla. 747, 169 So. 391 (1936).

finding of inadequate remedies at law. In *Hagen*, the plaintiff merely alleged that she had no personal knowledge of any property upon which to execute if she were granted a money judgment,[62] and the court accepted her allegation rather than require actual proof.[63] The *Moore* court did not state that a plaintiff must prove both the likelihood of multiple actions *and* that the defendant is judgment-proof; the existence of either factor should be sufficient to sustain a request for specific performance.

C. *Difficulty of Service of Process*

Hagen v. Viney[64] and *Zouck v. Zouck*[65] indicate that difficulty of service of process[66] can be an important factor in determining whether remedies at law are inadequate. Although this factor was not present in *Moore*, it should not be overlooked when it does exist.

II. Burden of Proving Inadequacy of Remedies at Law

The *Moore* court's concern with the lack of evidence regarding Mr. Moore's willingness to make payments[67] and the absence of any justification for his arrearages indicates that some burden will be on the defendant to prove that the plaintiff's remedies at law are adequate. The rationales of several cases from other jurisdictions cited with approval in *Moore* indicate that this burden is initially on the defendant. In *Doerfler v. Doerfler*,[68] the court held that in the absence of any showing that it would be inequitable, the court would enforce separation agreements by specific performance decrees.[69] Recall that in *Fleming v. Peterson*[70] a presumption in favor of specific performance arose when the defendant offered no excuse for arrearages.[71] The Massachusetts Supreme Court granted specific performance in *Lorant v. Lorant*[72] because the husband failed to allege that the wife's remedies at law were

62. *Id.* at 752, 169 So. at 393.
63. *Id.* at 756-57, 169 So. at 395.
64. 124 Fla. 747, 169 So. 391 (1936).
65. 204 Md. 285, 104 A.2d 573 (1954).
66. Mr. Hagen was a successful professional golfer. His income from his profession and royalties was over $50,000.00 annually in 1936 dollars! Because he traveled around the United States and Canada secreting himself when in New Jersey, the court required him to post security for his appearance or performance of the decree. 124 Fla. at 752, 169 So. at 393. Mrs. Zouck had been unable to serve her husband with process because he traveled as an engineer in the United States and abroad. 204 Md. at 290-91, 104 A.2d at 575.
67. *See* text accompanying note 32 *supra*.
68. 196 A.2d 90 (D.C. App. 1963).
69. *Id.* at 91.
70. 167 Ill. 465, 47 N.E. 755 (1897).
71. *Id.* at 465, 47 N.E. at 756.
72. 366 Mass. 380, 318 N.E.2d 830 (1974).

inadequate.[73] Although the *Moore* court did not state that the entire burden of proving the adequacy of remedies at law would be on the defendant, it did indicate that proof of a defendant's willingness to make payments is an important factor in determining whether to issue a decree for specific performance.[74] It may prove to be the determining factor in deciding whether to order specific performance of future payments.

III. Necessity of First Pursuing Remedies at Law

Because Ms. Moore had unsuccessfully pursued every available remedy at law,[75] the court did not speak directly to this important issue. Cases from other jurisdictions cited in *Moore* indicate that North Carolina courts may follow their view in the future and not require a plaintiff to pursue remedies at law before seeking equitable relief.

Some of the cited cases do not require a showing that a plaintiff's legal remedies are in fact inadequate. In *Strasner v. Strasner*,[76] an Arkansas Supreme Court case, the remedies at law for breach of separation agreements were found "inherently" inadequate.[77] In *Lorant v. Lorant*,[78] the Massachusetts Supreme Court granted an alternative plea for specific performance without finding that the plaintiff had inadequate remedies at law.[79] However, because the *Moore* decision to grant equitable relief was grounded on a finding of inadequate remedies at law, it is improbable that the North Carolina courts will grant equitable relief as a matter of course. Instead, upon a showing of the probability or possibility of multiple suits,[80] the difficulty of service of process,[81] or the futility of pursuing remedies at law because there is no property upon which to execute,[82] the courts probably will grant a decree for specific performance without requiring that the plaintiff first pursue his or her remedies at law.

IV. Creation by Contract of the Right to Specific Performance

Can the parties create a right to specific performance by private agreement? It is not apparent whether such an agreement would be

73. *Id.* at 386, 318 N.E.2d at 834.
74. 297 N.C. at 18, 252 S.E.2d at 739.
75. *See* text accompanying notes 14-18 *supra.*
76. 232 Ark. 478, 338 S.W.2d 679 (1960).
77. *Id.* at 481-82, 338 S.W.2d at 681.
78. 366 Mass. 380, 318 N.E.2d 830 (1974).
79. *Id.* at 386, 318 N.E.2d at 834.
80. *See* text accompanying notes 51-59 *supra.*
81. *See* text accompanying notes 64-66 *supra.*
82. *See* text accompanying notes 60-63 *supra.*

binding on the court, and the argument could be made that such an agreement would be an attempt to usurp the inherent jurisdiction of the court to determine whether specific performance is appropriate.[83] Because *Moore* is grounded on the inadequacy of the remedies at law, it is doubtful that the North Carolina courts would summarily issue decrees for specific performance even though the remedy was provided for within the terms of the separation agreement. A court, however, may give some weight to such a provision even though it would not foreclose its own discretion.[84] Perhaps a provision accompanied by a description of those particular factors that made specific performance a desirable remedy for the parties would carry even more weight than a provision merely approving specific performance as a remedy.[85] Although such a provision would not bind the court, it may tend to reduce the number of breaches and, therefore, the number of time-consuming and expensive lawsuits.

V. CONCLUSION

As a matter of public policy, courts generally favor enforcement of separation agreements.[86] "[W]hen a husband and wife have determined to go their separate ways, they should be encouraged to settle their own affairs by a separation agreement . . . ."[87] Perhaps the obstacles previously encountered in enforcing separation agreements[88] have been obviated by the North Carolina Supreme Court in *Moore*, and that "regardless of how the domestic settlement is structured, the end result will be" that the parties must comply with the terms of their agreement.[89] For *Moore* to reach its full potential, however, North Carolina courts should interpret the decision as favoring specific performance as a remedy for the enforcement of separation agreements. The persistence and patience of Ms. Moore should not be required of future plaintiffs and deliberate avoidance of legal remedies should be discouraged. By granting equitable relief if the remedies at law appear doubtful or less certain than the remedies in equity,[90] North Car-

83. *See* McNeil, *Power of Contract and Agreed Remedies*, 47 CORNELL L.Q. 495, 520-23 (1962). Few cases have raised this question and there is no clear answer. D. DOBBS, *supra* note 10, at 825.

84. This would be true especially if the remedy at law was doubtful. D. DOBBS, *supra* note 10, at 825.

85. *See* Kronan, *supra* note 22, at 371.

86. *See* note 47 *supra*.

87. Doerfler v. Doerfler, 196 A.2d 90, 91 (D.C. App. 1963) (cited with approval in *Moore*).

88. *See* text accompanying notes 35-45 *supra*.

89. R. Riddle, Enforcement of Separation Agreements & Court Orders (Aug. 24, 1979) (paper prepared for the Family Law Seminar sponsored by the N.C. Academy of Trial Lawyers).

90. If the subject matter of a contract cannot be duplicated or if obtaining a substantial equivalent involves difficulty, delay, and inconvenience, the court will generally be more apt to

olina courts can prevent financial hardships like those suffered by Ms. Moore. After all, successive awards of money damages, no matter how successful the plaintiff may be in executing upon property of a breaching defendant, cannot be the duplicate or even the substantial equivalent of the periodic payments bargained for in a separation agreement.

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compel specific performance. *See* A. CORBIN, *supra* note 22, at § 1142; Kronan, *supra* note 22, at 356.