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The Honorable K. Edward Greene

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ARTICLES

A SPOUSE'S RIGHT TO CONTROL ASSETS DURING MARRIAGE: IS NORTH CAROLINA LIVING IN THE MIDDLE AGES?

THE HONORABLE K. EDWARD GREENE*

I. INTRODUCTION

Under the modern concept of marriage, a husband and wife are generally thought of as equal partners, and the wife is generally no longer thought to be under the domination of her husband.\(^1\) Ironically, this concept of treating a husband and wife as a partnership is reflected upon divorce in North Carolina’s equitable distribution laws, but is not entirely reflected during the intact marriage, especially with regard to issues of property management.

II. NORTH CAROLINA

A. History

According to William Blackstone, the principle existed at common law that upon marriage, “the husband and the wife are one person in law; that is the very being or legal existence of the

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* Judge Greene is currently serving on the North Carolina Court of Appeals.

woman is suspended during the marriage, or at least is incorpo-
rated and consolidated into that of the husband” so that a “unity
of person” was acquired.\textsuperscript{2} This principle governing marriage con-
tributed, at least in part, to the disabilities burdening the married
woman.\textsuperscript{3} For example, upon marriage, a woman’s personal prop-
ty vested absolutely in the husband,\textsuperscript{4} and any personal property
the woman acquired during the marriage likewise became her
husband’s property.\textsuperscript{5}

As for real property, the husband, upon marriage, became
seized of his wife’s estates of inheritance in land during coverture
and had the right of possession and control.\textsuperscript{6} The husband “could
appropriate all the rents and profits to his own use and could sell
and convey the land for a period not exceeding the coverture,”\textsuperscript{7}
and the wife’s personal estate as well as the husband’s interest in
her real property were subject to levy under execution to satisfy
his debts.\textsuperscript{8} While the wife retained the fee, however, she could not
convey it even with her husband’s consent, unless by a fine.\textsuperscript{9} The
common law, endorsing the fiction of the husband and wife’s
unity, also prevented a married woman from making contracts,
either with her husband or with others.\textsuperscript{10}

There were correlative duties imposed upon the husband. For
example, the husband had the duty to support his wife.\textsuperscript{11} He was

\begin{itemize}
\item \textsuperscript{2} \textsc{Blackstone, supra} note 2, at 44.
\item \textsuperscript{4} \textsc{Blackstone, supra} note 2, at 44.
\item \textsuperscript{6} \textsc{Blackstone, supra} note 2, at 44.
\item \textsuperscript{8} \textsc{Blackstone, supra} note 2, at 44.
\item \textsuperscript{10} \textsc{Blackstone, supra} note 2, at 44.
\end{itemize}
liable for his wife's prenuptial debts.\textsuperscript{12} He was liable for torts his wife committed before and during the marriage,\textsuperscript{13} and he was responsible for any crimes his wife committed in his presence.\textsuperscript{14} The wife was and is also entitled to a dower or life estate in one-third of the land held in fee by her husband at his death.\textsuperscript{15}

\textbf{B. Reform of the Common Law}

In the middle and late nineteenth century, all states enacted a series of statutes, known as \textit{Married Women's Property Acts}, to change the disabilities of a married woman at common law.\textsuperscript{16} The general purposes of the Acts were (1) to remove the common law disabilities of married women, and (2) to equalize the rights of the husband and the wife. The Acts, among other rights, gave married women the right to purchase, own and transfer property without their husbands' involvement, the right to make a will, the right to sue and be sued individually, the right to contract and keep their earnings, and the right to testify in civil and criminal trials.\textsuperscript{17}

The reform of traditional common law with the \textit{Married Women's Property Acts} can be seen in North Carolina's Constitution. First in 1868 and amended in 1964, the North Carolina Constitution provided:

\textbf{PROPERTY OF MARRIED WOMEN SECURED TO THEM}

The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed and conveyed by her . . . \textsuperscript{18}

This provision ended the traditional common law concept that the husband and wife were one with the man in charge and control. To effectuate this reform, North Carolina's legislature has, from

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\item \textit{12. 1} \textit{JAMES SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS} § 76 (6th ed. 1921).
\item \textit{13. 1} \textit{id.} at § 122.
\item \textit{14. 1} \textit{id.} at § 56.
\item \textit{15. 2} \textit{POLLOCK, supra} note 5, at 404; \textit{I AMERICAN LAW OF PROPERTY}, §§ 5.1-5.49 (James Casner ed., 1952); \textit{see 2 ROBERT E. LEE, NORTH CAROLINA FAMILY LAW} § 107 (1980).
\item \textit{16. 1} \textit{Schouler, supra} note 12, at § 287.
\item \textit{17. KATHERINE T. BARTLETT, ET AL., FAMILY LAW} 95 (2d ed. 1991).
\item \textit{18. N.C. Const. amend. X, § 4.}
\end{itemize}
\end{footnotesize}
time to time, promulgated statutes, mainly contained in Chapter 52 of the North Carolina General Statutes, entitled "Powers and Liabilities of Married Persons." Under these statutes, married women have the same rights and capacities to make contracts as if single, the earnings of a married woman are her separate property, suits are allowed between husband and wife for damages sustained, and contracts between a husband and wife are permitted, if not against public policy.

One provision governing land held by a husband and wife as tenants by the entirety, however, lingered in North Carolina until 1983. A husband and wife were, and are now permitted to own real property as tenants by the entirety, where the parties take title to the whole indivisible estate as one person. Each party has the whole estate, and neither party has a separate estate or interest; however the survivor is entitled to the entire estate or interest and the right of the survivor to the entire estate cannot be defeated by the wishes of the other party. Until 1983, during the existence of the tenancy by the entirety, the husband had absolute and exclusive control, use, possession, rents, income and profits from the property. In 1983, this anomaly passed from us as well with the enactment of N.C. GEN. STAT. § 39-13.6, which provides that a

husband and wife shall have equal right to the control, use, possession, rents, income, and profits of real property held by them in tenancy by the entirety. Neither spouse may bargain, sell, lease, mortgage, transfer, convey or in any manner encumber any property so held without the written joinder of the other spouse.

If the spouses own property as tenants in common, they each own a separate, equal, undivided interest in the land and

23. PATRICK K. HETRICK & JAMES B. McLAUGHLIN, JR., WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA § 7-4 (1994) [hereinafter WEBSTER'S] ("An estate by the entirety is a form of co-ownership held by husband and wife with the right of survivorship.").
24. 2 LEE, supra note 15, at § 115.
26. Any conveyance to a husband and wife creates a tenancy by the entirety, "unless a contrary intention is expressed in the conveyance." N.C. GEN. STAT. § 39-13.6 (1984). Thus, a husband and wife may take title as tenants in common. WEBSTER'S, supra note 23, at § 7.3.
have an equal right to possession and control. Each tenant in common has the right to convey, lease, or mortgage his interest in the common property. He has no authority, however, to bind his co-tenant unless he has authority to do so.

The reforms, however, gave the wife no control or management rights over property titled in her husband’s name, and under standard property rules, title determines the right to manage and control property. Although the reform of traditional common law helped to remove married women’s disabilities, it did not help a married woman who owned no significant property of her own because she had no access to her husband’s property. Under this system, each spouse retains individual ownership of real and personal property titled in his or her name, and has total control and management of that property, including the right to dispose of it without any obligation to share with, or consult with the non-titled spouse.

C. The Issue

The issue presented by North Carolina’s common law system is whether there are any remedies for a spouse during an intact marriage when the other spouse dissipates marital assets, and if not, whether such remedies need to be in place.

III. Remedies Available in North Carolina

A. Dissolution of the Marriage

North Carolina, along with other common law states, has moved in the direction of treating the marriage as a partnership at the time of dissolution. Principles adapted from the community property system achieve an equitable distribution of marital property, without placing the emphasis on title as is done during the

27. WEBSTER'S, supra note 23, at § 7.3.
28. Id. at § 7.6.
29. Id. ("[T]he mere relationship of tenancy in common does not create an agency relationship.").
30. Id. Traditional forms of ownership of property focus on the person or entity in which the property is titled. See Hagler v. Hagler, 319 N.C. 287, 292, 354 S.E.2d 228, 233 (1987).
31. WEBSTER'S, supra note 23, at § 7.3.
marriage. As stated by the North Carolina Supreme Court, “[e]quitable distribution reflects the idea that marriage is a partnership enterprise to which both spouses make vital contributions and which entitles the homemaker spouse to a share of the property acquired during the relationship.” The goal of equitable distribution is to allocate to divorcing spouses a fair share of the assets accumulated by the marital partnership in order to accurately reflect the theory that “both spouses contribute to the economic circumstances of a marriage, whether directly by employment or indirectly by providing homemaker services.” Therefore, although only one spouse may have title to all the marital assets during the marriage, “an equal division is made mandatory (emphasis in text) [upon divorce] ‘unless the court determines that an equal division is not equitable.’” The effect of North Carolina’s Equitable Distribution Act, therefore, is “to give the non-title spouse an equitable claim in marital property” upon divorce.


36. GOLDEN, supra note 35, at 3.

37. White, 312 N.C. at 776, 324 S.E.2d at 832(discussing N.C. GEN. STAT. 50-20(c)).

38. Hagler, 319 N.C. at 290, 354 S.E.2d at 232. The Court also notes, however, that the Act “does not displace the traditional principles of property ownership. Thus, in the absence of an equitable distribution . . . the state of the title of property owned by either spouse or by both spouses is unaffected. Nothing in the act creates a new form of ownership such as that recognized in ‘community property’ states.” Id.; see Scott Greene, Comparison of the Property Aspects of the Community Property and Common-Law Marital Property Systems and their Relative Compatibility With the Current View of the Marriage Relationship and the Rights of Women, 13 CREIGHTON L. REV. 71 (1979).

39. North Carolina’s equitable distribution scheme “has aptly been characterized as a ‘deferred community property law’ system.” Sally Sharp, Equitable Distribution in North Carolina: A Preliminary Analysis, 61 N.C.L. REV. 247, 249 (1983). “Pursuant to the ‘deferred community property’ equitable distribution scheme in North Carolina, community property principles do not apply during marriage. If, however, the marriage ends in divorce, the property is
To help insure that one spouse has not wasted marital property thereby depriving the other spouse of his or her equal share in the partnership, North Carolina's equitable distribution statute provides that a court may consider acts of either party "to waste, neglect, devalue or convert such marital property, during the period after separation of the parties and before the time of distribution" as a distributional factor. This section, however, only addresses any mismanagement of marital property occurring after separation and not during the marriage. In 1985, the North Carolina Supreme Court interpreted Section 50-20(c)(12), which allows the court to consider as a distributional factor "[any other factor which the court finds to be just and proper,]" to include "misconduct during the marriage which dissipates or reduces the value of marital assets for nonmarital purposes."

This interpretation of Section 50-20(c)(12) raises questions concerning what is meant by "misconduct during the marriage." In other words, how far before the date of separation will misconduct which dissipates marital property be considered as a distributional factor under Section 50-20(c)(12) and what actions are to be included within the meaning of "misconduct?" The Court gave as one example that such misconduct "might be, e.g., the conveyance by one spouse of marital assets in contemplation of divorce." The spouse which desires the court to consider dissipation of marital assets before separation under Section 50-20(c)(12) has the burden, at least with respect to joint accounts, to present clear and convincing evidence that the other spouse used the assets for non-marital purposes without consent. The North Carolina Court of Appeals has stated "it would be 'disastrous to distributed according to community property principles.'" Elizabeth A. Cheadle, The Development of Sharing Principles in Common Law Marital Property States, 28 U.C.L.A. L. Rev. 1269, 1282 (1981). See also UNIF. MARITAL PROP. ACT § 4, 9A U.L.A. 109 cmt. (1983)("Those family-law interests set forth in marital property definitions in equitable distribution statutes are delayed-action in nature and come to maturity only during the dissolution process."). Johnson v. Johnson, 317 N.C. 437, 443, 346 S.E.2d 430, 433-34 (1986).

43. Smith, 314 N.C. at 88, 331 S.E.2d at 687 (citing Hursey v. Hursey, 326 S.E.2d 178 (S.C. Ct. App. 1985)).
44. Id.
marital felicity' to require one spouse, after a number of years of using for family purposes the other spouse's estate which has been deposited to a spousal joint account, to account to the other spouse for the sums expended,” and that “[p]ublic policy, ever interested in the maintenance of a harmonious marriage relation, prohibits a contrary rule.” 45 Although there is some protection in an equitable distribution proceeding for a spouse when the other spouse dissipates marital assets prior to separation, the small number of cases on this issue indicate this right is limited. 46 In South Carolina, the Court of Appeals refused to consider in an equitable distribution action that the husband had given money to his mother totaling between $25,000 and $30,000 over the course of twenty years without his wife’s knowledge or consent because “there is no evidence that John gave his mother money in contemplation of divorce or with intent to deprive Barbara of her right to equitable distribution.” 47

One spouse or the other may have spent marital funds foolishly or selfishly or may have invested them unprofitably. The statute wisely prevents the other spouse from resurrecting these transactions at the end of the marriage to gain an advantage in the equitable distribution. Were it to do otherwise, human greed and vindictiveness would transform the courts into “auditing agencies for every marriage that falters.” 48 . . . In the absence of fraudulent intent, it is not unlawful for spouses to make outright gifts to others during the marriage. 49


46. The wife’s offer of evidence tending to show her husband withdrew $30,850 from joint assets from 1981, when the difficulties in the marriage started, to May 11, 1983, when the parties separated, “did not offer clear and convincing evidence that [the husband] alone withdrew the funds without defendant’s consent and used the funds for purposes other than sustaining the family” and “was insufficient to overcome the presumption that she consented to plaintiff’s withdrawals or that plaintiff dissipated the marital assets prior to separation.” Id. See also Lawrence, 100 N.C. App. at 22-23, 394 S.E.2d at 278-79 (Greene, J, concurring in the result) (“[i]n an equitable distribution proceeding, the trial judge properly considers evidence of actual dissipation of marital assets for non-marital purposes by either spouse in anticipation of separation as a distributional factor”).


48. Id. (quoting In re Marriage of Getautas, 544 N.E.2d 1284, 1288 (Ill. App. Ct. 1989)).

49. Id.; see also In re Marriage of Aud, 491 N.E.2d 894 (Ill. App. Ct. 1986) (husband’s expenditure of $70,000 to support his widowed mother did not
Therefore, North Carolina does protect one spouse from the other spouse's mismanagement of marital property titled solely in his or her name during the marriage, but only if the parties are divorcing, and only if the economic misconduct dissipates marital assets in anticipation of divorce.

B. Death of Spouse

North Carolina, like all common law states, in an effort to prevent one spouse from disinheriting the surviving spouse, has promulgated laws granting to the surviving spouse the right to dissent from the will of the decedent spouse. Under the dissent statute, as a general rule, the surviving spouse is assured of receiving at least the same share of the properties owned by the decedent spouse he would have received had the decedent spouse died intestate. These statutes, like the equitable distribution statutes, are based on the principle that the marriage is like a partnership where both spouses share, to some degree, in the ownership of the properties, however titled. Not unlike the situation that can arise at the time of the dissolution of the marriage, the surviving spouse is not protected from disinheritance by inter vivos transfers of property by the deceased spouse. Some courts, in an effort to prevent disinheritance, have set aside inter vivos transfers upon a showing that the decedent spouse had an intent

50. Under the community system, the nonacquiring spouse has a vested, present ownership interest in one-half of the community property. If the same property were similarly acquired in a common-law state, the nonacquiring spouse would have no vested, present interest in the property. At most, such a spouse would have a form of inchoate expectancy in a portion of the property in the event that the acquiring spouse predeceases or a potential right to a portion of the acquiring spouse's property on divorce.

Greene, supra note 38, at 87.


to deprive the surviving spouse of any interest in the property.\textsuperscript{54} Other courts have held that inter vivos transfers are "illusory" and have refused to recognize them in computing a surviving spouse's rights under the dissent statutes.\textsuperscript{55} These methods of avoiding inter vivos transfers, however, have been recognized as inadequate.\textsuperscript{56} As one commentator has noted, "[t]he answer to the problem seems to lie in the adoption of legislation which will protect the surviving spouse from disinheritance by means of any device which will accomplish the result that the dissent statutes were designed to prevent, namely, disinheritance by will."\textsuperscript{57} The problem of disinheritance by use of inter vivos transfers is not presented in a community property state because a decedent spouse has the right "to dispose of only his one-half share of the community property."\textsuperscript{58}

C. Other Remedies Available in North Carolina During the Intact Marriage

Spouses who are tenants in common with each other are required to account to their co-tenant for their share of any rent received from the common property and reimburse them one-half of the rents and profits.\textsuperscript{59} The co-tenant spouse is also entitled to damages if he disposed or excluded from possession by the other co-tenant.\textsuperscript{60} This is consistent with the general principle that tenants in common have a quasi-fiduciary obligation to each other and are required to "be true to each other and protect the rights of each other in the property."\textsuperscript{61} Furthermore, the tenant in com-

\textsuperscript{54} See McGee v McGee, 26 N.C. 105 (1843).
\textsuperscript{55} Newman v Dore, 9 N.E. 2d 966 (N.Y. 1937); Moore v. Jones, 44 N.C. App. 578, 583, 261 S.E.2d 289, 292 (1980); \textit{but see In re Estate of Francis, 327 N.C. 101, 109, 394 S.E.2d 150, 157 (1990)} (holding that funds in a joint account with a third party established by the decedent were not part of deceased's spouse estate for dissent purposes).
\textsuperscript{56} Philip Mechem, \textit{Why Not a Modern Wills Act?}, 33 \textit{Iowa L. Rev.} 501 (1948)(suggesting a statute enumerating the inter vivos transfers which would be inoperative as to the surviving spouse).
\textsuperscript{57} \textit{Wiggins, supra} note 53, at § 158.
\textsuperscript{58} \textit{Id.; see Model Probate Code, § 33} (1946)(any gift by married person within two years of his death "is deemed to be in fraud of the marital rights of his surviving spouse").
\textsuperscript{59} \textit{Wiggins, supra} note 53, at § 158.
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} \textit{Id.} ("The relationship between co-tenants has been described as a community of interest which gives rise to a community of duty . . . which disables each tenant from doing anything that would prejudice the others in reference to
mon spouse has a claim for waste. Although the statute does not address the issue, it would appear that spouses holding title as tenants by the entireties would have the same quasi-fiduciary obligation to each other and would have access to the same type of claims available to tenants in common. The common law remedy of constructive trust may in some instances provide relief to a spouse who claims the other spouse is "holding property under circumstances making it inequitable for him to retain it."

The North Carolina Court of Appeals recently rejected a claim that spouses in a marriage have a common law duty to exercise good faith and integrity in their dealings with each other, similar to a duty partners have to each in a business transaction.

IV. OTHER APPROACHES

A. Community Property States

1. History

Eight states can trace their law governing spousal property rights and marriage to a community property system having

the common property"); see Smith v Smith, 150 N.C. 81 (1908)("These relations of trust and confidence bind all to put forth their best exertions and to embrace every opportunity to protect and secure their common interest and forbid the assumption of a hostile attitude by either").


63. Wilson v. Crab Orchard Dev. Co., 276 N.C. 198, 211, 171 S.E.2d 873, 882 (1970); see Lamb v. Lamb, 92 N.C. App. 680, 684-86, 375 S.E.2d 685, 687-88 (1989) (defendant, in requesting equitable distribution, did not make an election of remedies barring her action for a constructive trust because there was no determination of whether the properties were marital or separate, whether funds had been exchanged for some other property, whether the funds had been dissipated or wasted, and, if so, when; trial court was therefore unable to determine from the record whether the equitable distribution would allow redress of the injury complained of in the constructive trust proceeding, and the equitable distribution action itself had not yet been prosecuted to a final judgment); but see Brown v. Boeing Co., 622 P.2d 1313 (Wash. Ct. App. 1980) (court in community property state rejects constructive trust remedy).

French or Spanish roots: Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas and Washington. The basic premise of the community property system is that marriage is a partnership with each spouse contributing in their own way. "The law does not focus on the quantity or the quality of these contributions" and each spouse is vested with a one-half ownership interest in the community property. Community property is generally defined as all property acquired by either spouse during the marriage except if by devise, gift, or inheritance. Under original systems of community property in the eight community property states, married women were at a disability during the marriage because the husband had sole management authority over all community property, and the wife's interest in the community property during marriage was described as a "mere expectancy." During the 1970s, reform occurred in the community property states to improve the wife's position with regard to community property by removing the husband as exclusive manager of all the community property during marriage.

2. Arizona: An Example of a Community Property System

Community property states have developed several approaches to the management of community property. Although one state follows the "divided management" approach, the most common approach is known as the "joint-either" or "equal management" approach. This approach "reasons that because both

66. Laughrey, supra note 32, at 122.
67. Id.
70. The gender allocation of managerial rights allowing the husband to sell or exchange community property without the wife's consent was declared unconstitutional in Kirchberg v. Feenstra, 450 U.S. 455 (1981) which dealt with former Art. 2404 of the Louisiana Civil Code.
71. TEX. FAM. CODE ANN. § 5.22 (West 1995) (each spouse is given sole management authority over all community property in the sole name of that spouse).
72. See ARIZ. REV. STAT. ANN. § 25-214 (1995); CAL. CIV. CODE § 5125 & § 5127 (West 1990); NEV. REV. STAT. § 123.230 (1995); N.M. STAT. ANN. § 40-3-13 &
spouses hold present, equal interests in all marital property, the management and control of that property should also be equal." This method grants to either spouse the right to manage and control the community property, however, there is one exception which is broadly recognized. The acquisition, disposition or encumbrance of the community real property requires the consent of both spouses. Some states require the consent of both spouses to sell or encumber community personal property necessary to the functioning of the home. Some restrict gifts of community property unless both parties consent. No community property states have adopted the rule that both spouses' consent is required for every management decision.

Arizona's statute is a good example of the approach taken by a community property state with regard to the management and control of the community property. It grants each spouse the ability to act alone and bind the community except for certain enumerated transactions, most of which require both spouses' consent.

A. Each spouse has the sole management, control and disposition rights of his or her separate property.

B. The spouses have equal management, control and disposition rights over their community property, and have equal power to bind the community.

C. Either spouse separately may acquire, manage, control or dispose of community property, or bind the community, except that joinder of both spouses is required in any of the following cases:

1. Any transaction for the acquisition, disposition or encumbrance of an interest in real property other than an unpatented mining claim or a lease of less than one year.

2. Any transaction of guaranty, indemnity or suretyship.


73. Wake, supra note 72, at 488.

74. CAL. CIV. CODE § 5127 (West 1990).

75. See e.g., CAL. CIV. CODE § 5125(c)(West 1990).


77. BARTLETT, ET AL., supra note 17, at 98.

As could be expected, some problems in the management of community property can arise when both spouses have the right to control and manage the same property. When problems occur, the first spouse to have acted usually prevails. As one commentator noted: "It might encourage a spouse to act preemptively. For example, if one spouse wants to sell an item of community property and the other does not, the spouse wishing to sell cannot be stopped, unless the other is willing and able to hide the item."

3. Mismanagement of Community Property by One Spouse

In addition to establishing principles of dual or coequal management of community property, the community property states generally provide an assortment of remedies for actions by a spouse inconsistent with the management theories.

In California, each spouse, in making management decisions, must "act in good faith," and has "the obligation to make full disclosure to the other spouse of the existence of assets in which the community has an interest and debts for which the community may be liable, upon request...." Negligent mismanagement is not considered a breach of the good faith standard. A spouse can bring an action for breach of this duty of good faith if the breach "results in substantial impairment to the claimant spouse's present undivided one-half interest in the community estate." Furthermore, California allows either spouse during the marriage to request an accounting to "determine the rights of ownership in, the beneficial enjoyment of, or access to, community property, and the classification of all property of the parties to a marriage."


80. Oldham, supra note 72, at 114; see Richard K. Effland, Arizona Community Property Law, Time for Review and Revision, 1982 Ariz. St. L.J. 1, 15("'equal' management is fine in theory but is unrealistic in practice.").

81. BARTLETT ET AL., supra note 17, at 99-100.

82. CAL. CIV. CODE § 5125(e)(West 1990).

83. Oldham, supra note 72, at 157; LA. CIV. CODE ANN. art. 2354 (West 1985)(spouse liable for loss or damage to community property only if caused by fraud or bad faith); but see Janet Mary Riley, Women's Rights in the Louisiana Matrimonial Regime, 50 Tul. L. Rev. 557, 570 (1976)(manager spouse considered as fiduciary and held to same standard as trustee).

84. CAL. CIV. CODE § 5125.1(b)(West 1990).

85. CAL. CIV. CODE § 5125.1(a)(West 1990); see Carol S. Bruch, Protecting the Rights of Spouses in Intact Marriages: The 1987 California Community Property Reform and Why It Was So Hard to Get, 1990 Wis. L. Rev. 731.
In Texas, each spouse is the sole manager of the community property that "he or she would have owned if single," giving each spouse sole control over his or her earnings. The manager of community property, however, cannot "unfairly dispose of the other spouse's one-half interest in the community." Furthermore, a husband in Louisiana successfully petitioned the court for judicial separation of property, alleging his interest in the community was threatened to be diminished by his wife's fault, neglect, or incompetence. In California and Wisconsin a spouse may petition the court to add the spouse's name to the title of the property which may facilitate the added spouse's management power over the community property. For example, if both spouse's names are on the title to an automobile, a third party purchasers will likely require both spouses to consent to its sale. The Wisconsin statute permits a court, if it determines that marital "property has been or is likely to be substantially injured by the other spouse's gross mismanagement, waste or absence," to terminate a spouse's management authority or partition the community estate into two separate estates.

In general, the community property states have attempted to employ a system to insure that the rights of spouses with regard to community property are protected not only upon dissolution of the marriage and at death, but also during the marriage by insuring that title alone does not vest in one spouse the ability to waste community property during the marriage.

86. Tex. Fam. Code Ann. § 5.22 (West 1993); See Bartlett et al., supra note 17, at 100.
88. Pan Am. Import Co., Inc. v. Buck, 452 So. 2d 1167 (La. 1984); see La. Civ. Code Ann. art. 2374 (West 1985) which provides that "when the interest of a spouse in a community property regime is threatened to be diminished by fraud, fault, neglect, or incompetence of the other spouse, or by the disorder of the affairs of the other spouse, he may obtain a judgment decreeing separation of property." This statute allows one spouse to end the community property regime without having to dissolve the marriage, thereby protecting the sanctity of the family unit. Does this remedy, however, essentially turn the marriage into one governed by principles analogous to the common law system?
B. The Uniform Marital Property Act

In 1983, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Marital Property Act (the Act) which adapts some of the principles governing a community property system to the common law. Under the Act, all the property acquired during the marriage, with certain exceptions, is treated as marital property, with each spouse having a right of joint and equal ownership in that marital property. Although ownership is shared, with each spouse having an undivided one-half interest in the marital property, the management and control of the property is title based. In other words, unlike most community property states, the management and control of the marital property is given to the spouse who has legal title. If the property is not titled, the property is to be managed by either spouse. The Act specifically provides the following:

§ 5. Management and Control of Property of Spouses
(a) A spouse acting alone may manage and control:
(1) that spouse’s property that is not marital property;
(2) except as provided in subsections (b) and (c), marital property held in that spouse’s name alone or not held in the name of either spouse;
(3) a policy of insurance if that spouse is designated as the owner on the records of the issuer of it;
(4) the rights of an employee under an arrangement for deferred employment benefits that accrue as a result of that spouse’s employment;
(5) a claim for relief vested in that spouse by other law; and
(6) marital property held in the names of both spouses in the alternative, including a manner of holding using the names of both spouses and the word “or”.
(b) Spouses may manage and control marital property held in the names of both spouses other than in the alternative only if they act together.
(c) The right to manage and control marital property transferred to a trust is determined by the terms of the trust.
(d) The right to manage and control marital property does not determine the classification of property of the spouses and does not rebut the presumption of Section 4(b).

92. Laughrey, supra note 32, at 132.
(e) The right to manage and control property permits gifts of that property only to the extent provided in Section 6.

(f) The right to manage and control any property of spouses acquired before the determination date is not affected by this [Act].

(g) A court may appoint a [conservator, guardian] to exercise a disabled spouse's right to manage and control marital property. Although the Act continues to allow one spouse to control marital property titled in his or her name, the Act does provide that "[e]ach spouse shall act in good faith with respect to the other spouse in matters involving marital property or other property of the other spouse." Although the Act does not define the parameters of the good faith requirement, the drafters of the Act state that the spouses are not to be considered as "trustees or guarantors toward each other." Instead the spouse in control of the asset "must proceed with an appropriate regard for the property interests of the other spouse and without taking unfair advantage of the other spouse." As stated by one commentator,

the title holder does not have a duty to be perfect, but neither should the title holder be allowed to take advantage of the spouse's trust and confidence. A husband and wife are expected to care for each other, and should not engage in a property transaction that benefits one at the expense of the other. This would undermine the trust that is an essential component of the marital relationship. Conduct that breaches that trust should be a violation of the good faith requirement.

Several remedies are provided for a spouse whose spouse acts inconsistent with the good faith standard.

§ 15. Interspousal Remedies.

(a) A spouse has a claim against the other spouse for breach of the duty of good faith imposed by Section 2 resulting in damage to the claimant spouse's present undivided one-half interest in marital property.

(b) A court may order an accounting of the property and obligations of the spouses and may determine rights of ownership in,
beneficial enjoyment of, or access to, marital property and the classification of all property of the spouses.
(c) A court may order that the name of a spouse be added to marital property held in the name of the other spouse alone, except

Section 15 does not permit the non-title holder to retrieve title from a third party. A bona fide purchaser for value, therefore, takes the property free of any claim the non-titled spouse has for breach of the good faith duty. The comment to section 15 suggests that the accounting remedy would not "be the classic fiduciary accounting in either style or substance." Instead, the accounting is intended to "simply establish what is marital property and what is not" in order to provide a basis for separating the title to the property if necessary to protect the ownership interest of the non-titled spouse.

Although the Act governs property rights during the marriage, it necessarily has an impact on testamentary devises. Because each spouse owns one-half of the marital estate, regardless of how it may be titled, the decedent spouse is only able to devise that one-half interest. The other one-half interest is owned by the surviving spouse as a matter of law. Whether the surviving spouse should also be given an elective share of the decedent's one-half interest of the marital property is not an issue addressed in the Act.

Only one common law state, Wisconsin, has adopted the Act to date. Statutes in Wisconsin create an action prohibiting all conduct "that breaches the duty of good faith in matters involving marital property or other property of the other spouse" before a divorce action is filed. This remedy is no longer available once a divorce action is filed.

V. WHICH SYSTEM IS BEST?

A review of the common law system and the community property system discloses two fundamentally different approaches to

101. See Laughrey, supra note 32, at 137.
103. Id.
104. WIS. STAT. ANN. §§ 766.001-.097 (West 1989).
106. Gardner, 499 N.W.2d at 268.
the control and management of property acquired by the spouses during the marriage. Under the common law system, the ownership and control of the property belongs to the spouse having title to it. In the community property system, each spouse owns a one-half interest in the property acquired during the marriage and they share the management of that property. The Uniform Marital Property Act, although based on the community property principle of equal ownership, embraces a management form similar to the common law system with the additional requirement that that managing spouse exercise good faith in the process.

Which system is best? It depends on the philosophy or system of values the society chooses to adopt. The community property system promotes the ideal of marital sharing. The common law property system promotes the ideal of individuality. The husband and wife [in a common law system] are not required to share their property with each other. They are not treated as an economic unit. Rather, their property interests are largely unrelated to their status as husband and wife. This [system] promotes the ideal of individuality. Equality between the spouses is achieved by giving each of them the right to keep whatever they can produce.\[107\]

Marriage in a community property system

is treated as an economic partnership. Each partner is expected to sacrifice their individual rights in order to promote the best interests of the partnership. The loss of individual rights is justified by the identifiable benefits that result from participation in the marital unit. Economic equality between the spouses is achieved by giving each one-half of the fruits of the marital partnership.\[108\]

The states utilizing the common law system, including North Carolina, are trying to have it both ways. They have adopted equitable distribution acts based on the partnership concept of marriage,\[109\] in an effort “to alleviate the inequities” caused by the

107. Laughrey, supra note 32, at 142.
108. Id.; see Unif. Marital Prop. Act prefatory note, 9A U.L.A. 97-102 (1987)(the partnership model represents a “system of elemental fairness and justice so that those who share in the many and diverse forms of work involved in establishing and maintaining a marriage will have a protected share in the material acquisitions of that marriage”).
common law title system at the time of divorce.\textsuperscript{110} They have also long recognized the right of a surviving spouse to share in the estate of a decedent spouse, without regard to how the property might be titled.\textsuperscript{111} Yet, the case law of these same states continues to adhere to the common law management and control principles which are based on the concept that each spouse, during the marriage, has absolutely no obligation to the other spouse. The consequence is that the spouse having title to property, even if obtained during the marriage, can act with impunity with regard to that property. The assets may be completely dissipated, leaving the non-titled spouse with no remedy during the marriage and ineffective remedies at the time of divorce or death of the titled spouse.\textsuperscript{112}

In trying to have it both ways, these states have seriously undermined their desire to apply partnership principles at the time of divorce.\textsuperscript{113} Furthermore, if partnership principles are appropriate to order the distribution of assets at the time of divorce and influence the distribution of assets at death, they are no less appropriate to govern the management and control of assets acquired during the marriage. Although this may be inconsistent with the tenet that the state should not interfere with an ongoing marriage,\textsuperscript{114} the law has an obligation to define marriage in a way that will stabilize it and thus promote the best interest of recognizing marriage as a 'partnership, a shared enterprise’’); Hinton v. Hinton, 70 N.C. App. 665, 668, 321 S.E.2d 161, 162 (1984)(“marriage relationship is to be viewed as, among other things, an economic partnership”); Sally Sharp, The Partnership Ideal: The Development of Equitable Distribution in North Carolina, 65 N.C.L. Rev. 195, 198 (1986-87).

\textsuperscript{111} See supra notes 51-52 and accompanying text.
\textsuperscript{112} See supra notes 40-50, 53-58 and accompanying text.
\textsuperscript{113} It can be argued that with the adoption of the equitable distribution statutes, the common law states established the partnership principle, not only for the distribution of assets at the time of divorce, but also the management of marital property during the marriage. To hold otherwise would establish competing systems, one based on partnership principles (at divorce) and one not (during marriage and before separation), with the later system undermining the former. This argument apparently was not raised in Smith v. Smith, 113 N.C.App 410, 413, 438 S.E.2d 457, 459 (1994) cert. denied, 336 N.C. 74, 445 S.E.2d 37 (1994), where the Court of Appeals rejected the argument that spouses have a fiduciary duty to each other similar to the duty partners own to each other.
\textsuperscript{114} Parkinson, supra note 93, at 695-96.
Applying partnership principles throughout the marriage will provide stability to the marriage because it will provide a recognized standard for management decisions and a method for resolving property disputes, short of divorce. Furthermore, to the extent that the parties to the marriage wish to reject the partnership principles of management and control, they may elect to do so.\textsuperscript{116}

The decision to adopt the partnership principles of property management, however, does not fully answer the question of how the property acquired during the marriage should be managed. Which is better: the equal or joint management concept of the community property states or the view adopted in the Uniform Marital Property Act which places full management and control in the titled spouse subject to a good faith requirement? As noted, equal or joint management can create problems with each spouse competing for the right to manage an item of community property.\textsuperscript{117} On the other hand, under the Act the non-titled spouse has no right to interfere in the actual management of the property and is limited to actions against the titled spouse for breach of good faith. This balance between partnership principles and spousal autonomy, however, is a good one and eliminates the problems of equal control. The non-titled spouse is vested with a one-half interest in the marital property and given remedies for management abuses that occur during the marriage. These remedies include the right to seek a court order to add her name to the title or to divide the property between the parties, establishing separate property in each spouse.\textsuperscript{118}

VI. Conclusion

There are differing views on whether there should be judicial interference in disputes that arise between spouses in an intact marriage.\textsuperscript{119}
marriage concerning management of property. Some posit that a couple needing judicial intervention in disagreements over the management of marital property are inevitably heading for divorce.\textsuperscript{119} Realistically, the vast majority of management disputes that arise during the intact marriage will either be solved privately by the parties, or the parties will divorce, in which case, any mismanagement may, in some circumstances, be considered when distributing marital property equitably. Nevertheless, having statutes or allowing lawsuits to rectify any mismanagement by one spouse during the intact marriage may facilitate the parties' willingness to come to an agreement or discourage the parties from mismanaging or otherwise wasting marital property. In the absence of an agreement and where the parties are not discouraged from mismanagement, the courts need to be available to prevent abuses. Furthermore, such statutes would preserve the marital assets for distribution at the time of divorce or death.

The Uniform Martial Property Act provides a solid framework on which to pattern a statute that would extend partnership principles to a marriage, not only at the time of divorce and death but during the marriage. The Act will need to be modified some to adjust the definitions of marital and separate property to conform to those already established in the Equitable Distribution Act.\textsuperscript{120} It will also be necessary for the legislature to address whether the surviving spouse should continue to possess a statutory right to dissent. If the dissent statutes are left as they presently exist, one-half of the marital property will pass at death to the surviving spouse and the surviving spouse will also have a right to inherit an intestate share of the decedent's remaining one-half interest. This large percentage of the marital estate passing to the surviving spouse may not represent sound public policy.

\textsuperscript{119} Oldham, \textit{supra} note 72, at 116; \textit{but see} Marjorie M. Shultz, \textit{Contractual Ordering of Marriage: A New Model for State Policy}, 70 CAL. L. REV. 204, 325-28 (1982), for a differing view.

\textsuperscript{120} Compare N.C. GEN. STAT. § 50-20(b)(1) and (2)(defining marital and separate property) with \textit{Uniform Martial Prop. ACT} § 4, 9A U.L.A. 109 (1987).