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Property Law-Mims v. Mims: North Carolina Eliminates Presumption of Purchase Money Resulting Trust for Wives

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Property Law—*Mims v. Mims*: North Carolina Eliminates Presumption of Purchase Money Resulting Trust for Wives

It is a well settled rule of common law that the payment of purchase money for property held by or jointly with another raises a presumption of a resulting trust in favor of the payor.[1] An exception to that rule, equally well settled, presumes that those who furnish payment for property held by one who is the natural object of the donor's bounty[2] intend to make a gift.[3] Until recently in North Carolina, a husband furnishing payment for property held by his wife was, under this exception, presumed to be making a gift to her, whereas a wife furnishing payment for property held by her husband was presumed to be setting up a resulting trust.[4] In *Mims v. Mims*,[5] a 1982 decision intended to keep the North Carolina courts "in step" with the legislature by helping to "place men and women generally and husbands and wives particularly on an equal legal footing,"[6] the North Carolina Supreme Court on its own initiative[7] rejected this discriminatory treatment of husbands and wives.[8] Expressly overruling "all cases holding to the contrary,"[9] the court held that in

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1. *See, e.g.,* Tarkington v. Tarkington, 301 N.C. 502, 506, 272 S.E.2d 99, 101 (1980); Waddell v. Carson, 245 N.C. 669, 674, 97 S.E.2d 222, 226 (1957); Kelly Springfield Tire Co. v. Lester, 190 N.C. 411, 416, 130 S.E. 45, 48 (1925); Harris v. Harris, 178 N.C. 7, 11, 100 S.E. 125, 129-30 (1919); *see also* 5 A. SCOTT, THE LAW OF TRUSTS § 440 n.7 (3d ed. 1967 & Supp. 1982) (citing supporting cases from 28 states); *id.* at § 440.3 (discussing statutes in California, Georgia, Montana, North Dakota, Oklahoma, and South Dakota that expressly permit purchase-money resulting trusts). *But cf. id.* at § 440.2 (discussing states that have statutorily abolished (Kentucky, Michigan, Minnesota, New York, and Wisconsin) or modified (Indiana and Kansas) purchase-money resulting trusts).

2. *See* 5 A. SCOTT, *supra* note 1, § 442, at 3340.

3. *See, e.g., Tarkington*, 301 N.C. at 506, 272 S.E.2d at 101; Thurber v. LaRoque, 105 N.C. 301, 306-07, 11 S.E. 460, 462 (1890).

4. *See, e.g., Tarkington*, 301 N.C. at 505, 272 S.E.2d at 101-02; Bowling v. Bowling, 252 N.C. 527, 531, 114 S.E.2d 228, 231 (1960); *Kelly Springfield Tire Co.*, 190 N.C. at 416, 130 S.E. at 48; Deese v. Deese, 176 N.C. 527, 528, 97 S.E. 475, 475 (1918).

5. 305 N.C. 41, 286 S.E.2d 779 (1982).

6. *Id.* at 56, 286 S.E.2d at 789. The court here alluded to the Equitable Distribution Act, N.C. GEN. STAT. § 50-20 (Cum. Supp. 1981). In discussing the Act the court noted the legislature's mandate "that one rule, the same for husbands as for wives, would govern property division between them upon dissolution of the marriage." 305 N.C. at 51, 286 S.E.2d at 786-87. To this end the Equitable Distribution Act distinguishes "[m]arital property" from "[s]eparate property" and orders an equal property division between husband and wife based upon the net value of *marital* property. N.C. GEN. STAT. § 50-20 (b)(1)-(2), (c) (Cum. Supp. 1981). If the court finds an equal division of property to be inequitable, the marital property is divided equitably. *Id.* § 50-20(c). *See generally* Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C.L. REV. 247 (1983) (discussing Equitable Distribution Act).

7. The court was asked only to rule whether "the evidentiary showing . . . entitle[d] defendant to summary judgment." 305 N.C. at 43, 286 S.E.2d at 781-82. The court, however, used *Mims* as a vehicle to effect a sweeping change in the law of resulting trusts.

8. *See id.* at 56, 286 S.E.2d at 789 (noting the "unmistakable legislative policy that there be no difference in treatment of husbands and wives in our courts based solely on gender"). *See infra* notes 44-51 and accompanying text.

9. *Id.* at 53, 286 S.E.2d at 787. *Mims* expressly overruled Tarkington v. Tarkington, 301 N.C. 502, 272 S.E.2d 99 (1980). *Mims*, 305 N.C. at 53 n.9, 286 S.E.2d at 787 n.9. In *Tarkington* the court had concluded that "[t]he facts of the case before us offer no compelling reason to

all cases to which the Equitable Distribution Act[10] does not apply the rule will be "where a spouse furnishing the consideration causes property to be conveyed to the other spouse, a presumption of gift arises, which is rebuttable by clear, cogent and convincing evidence."[11]

Nineteen months after being married Allen Mims (plaintiff) bought a house in which he and his wife (defendant) took up residence.[12] He paid the entire purchase price with funds he had received from his father and grandfather.[13] At the signing of the contract of sale Mims' realtor told him that in North Carolina homes had to be titled in the names of both husband and wife.[14] Believing he had no alternative,[15] Mims had the home titled to both himself and his wife.[16] Shortly after the parties separated, plaintiff filed an action seeking reformation of the deed to his house on the ground of mutual mistake and a declaratory judgment that he was sole owner of the property.[17]

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change this long-standing presumptive rule" that a woman who furnishes consideration for property taken in her husband's name intends that he hold it in trust for her. 301 N.C. at 506, 272 S.E.2d at 102. At the time of the *Tarkington* decision, however, the legislature had not passed the Equitable Distribution Act and the court, therefore, may not have felt pressure to change the law, as it did in *Mims*. *See* 305 N.C. at 51, 56, 286 S.E.2d at 786, 789 (expressing the court's desire to follow the legislature's lead). See *supra* note 6 for an explanation of the Equitable Distribution Act.

10. N.C. GEN. STAT. § 50-20 (Cum. Supp. 1981). See *supra* note 6 for a brief explanation of the Equitable Distribution Act.

11. 305 N.C. at 53, 286 S.E.2d at 787.

12. *Id.* at 43, 286 S.E.2d at 782. Because plaintiff bought the house *after* he and defendant married, in the absence of plaintiff's clear expression of intention *not* to make a gift of one-half the house, defendant would have become owner of one-half. *See supra* notes 2-4 and accompanying text. *But see infra* notes 13, 16-18.

13. *Id.* at 44, 286 S.E.2d at 782. Because the money was given to plaintiff alone, it was his separate property. The property in question, therefore, was purchased with plaintiff's separate property and put in the name of another (by the entirety). Under the common law this is a purchase-money trust, a type of resulting trust (unless excepted due to husband-wife relationship). G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 454, at 624-27 (rev. 2d ed. 1977).

14. 305 N.C. at 44, 286 S.E.2d at 782. In most residential purchases the husband and wife need to borrow money. Most lending institutions require both spouses to sign the note and deed of trust, hence both names usually appear on the title. Due to the prevalence of this situation, many North Carolina realtors may believe the names of both husband and wife must appear on the title. Legally, this is a false assumption.

15. Mims claimed in his affidavit that "[p]rior to [the] closing, at the closing, and at all times since the closing, [he had] told the defendant . . . [and she had agreed] that since [he] was paying for [the] real estate . . . it was [his] and [his] alone." *Id.* at 44, 286 S.E.2d at 783. As a resulting trust arises "by implication . . . of law to carry out the presumed intention of the parties," Waddell v. Carson, 245 N.C. 669, 674, 97 S.E.2d 222, 226 (1957), in the absence of an exception for husbands, plaintiff appears to have set up a resulting trust. *But see infra* notes 16-17.

16. 305 N.C. at 43, 286 S.E.2d at 782. In putting his wife's name on the deed plaintiff was, under North Carolina common law, presumed to be making a gift to her of an entirety interest in the property. To rebut this presumption and to establish a resulting trust he must have "clear, strong, and convincing" evidence that his intentions were otherwise. 2 R. LEE, NORTH CAROLINA FAMILY LAW § 113, at 44 (4th ed. 1980). Plaintiff's claim that he told defendant the property was to be his alone is a clear statement of his intent that must be considered because it was made both before and at the time of the passing of the title. 305 N.C. at 45, 286 S.E.2d at 783. *See* G. BOGERT, *supra* note 13, § 459, at 718.

17. 305 N.C. at 43, 286 S.E 2d 779, 782. Reformation of a deed may be obtained if the deed fails to conform to the parties' intentions, if the party praying for reformation was mistaken as to the deed's factual contents and the other party knew of the mistake and kept silent, or if the party praying for reformation was mistaken as to the deed's factual contents because of "fraudulent affirmative behavior" by the other party. 6A R. POWELL & P. ROHAN, POWELL ON REAL PROPERTY § 894 (1949 & Supp. 1982).

The superior court held that plaintiff would not be able to make out a claim for mutual mistake[18] at trial and granted defendant summary judgment. Plaintiff appealed and the court of appeals affirmed.[19]

In reversing the court of appeals the supreme court agreed that Mims would not be able to succeed at trial in his claim for mutual mistake.[20] The court held, however, that Mims' failure to seek recovery on the alternative theory of resulting trust should not have prevented the appeals court from considering that theory.[21] The court then held "[b]oth the pleadings and the evidentiary showing on the motion for summary judgment indicate plaintiff may be able to obtain the relief he seeks at trial by proving the facts necessary to give rise to a resulting trust in his favor."[22] In so holding the court seized the opportunity to reconsider and modernize North Carolina's resulting trust law.

In its reformulation of the law the court considered four "compelling" reasons that it felt made modification necessary. The court first pointed out

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18. *See* 305 N.C. at 45, 286 S.E.2d at 783. The supreme court pointed out that there could be no recovery on this theory because both parties understood that the deed would be made out in both names, and the misunderstanding of North Carolina law did not constitute mistake. *See id.* at 61, 286 S.E.2d at 792; Wright v. McMullan, 249 N.C. 591, 107 S.E.2d 98 (1959).

19. Mims v. Mims, 48 N.C. App. 216, 268 S.E.2d 544 (1980).

20. 305 N.C. at 45, 286 S.E.2d at 783. Mims also argued that the differing common-law rules "unconstitionally discriminate on the basis of sex," but the court refused to consider whether a constitutional analysis of the unequal treatment of husbands and wives under North Carolina resulting trust law would offer Mims relief. *Id.* at 47-48, 286 S.E.2d at 784. The court explained that "neither the United States Constitution nor the North Carolina Constitution require [sic] courts to employ presumptions of gift or trust in settling property disputes"; the court further noted that "[t]hese presumptions are not constitutional concepts, rather they are equitable tools . . . ." *Id.* at 48, 286 S.E.2d at 784.

In so explaining its refusal to consider the constitutional implications of these presumptions the court avoided the real issue. While it is true that neither constitution requires the use of a presumptive trust or presumptive gift rule, the fourteenth amendment of the United States Constitution does require that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The United States Supreme Court in *Craig v. Boren* emphasized that "[t]o withstand [an equal protection clause] . . . challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." 429 U.S. 190, 197 (1976). In Kirchberg v. Feenstra, 450 U.S. 455 (1981), the Supreme Court upheld a *Craig v. Boren* analysis of a Louisiana law, holding once again that "gender-based discrimination [is] . . . unconstitutional absent a showing that the classification is tailored to further an important governmental interest." 450 U.S. at 460.

Had the North Carolina Supreme Court so analyzed *Mims* the outcome would likely have been the same as that in *Craig v. Boren* and *Kirchberg v. Feenstra*. The presumption of gift for a husband and of trust for a wife in a resulting trust situation is just the sort of gender-based discrimination condemned by the fourteenth amendment. At one time there was an important governmental interest protected by this discrimination—the protection of wives from their husbands in a world dominated by men. But as the *Mims* court points out, such protection is no longer needed. *See* 305 N.C. at 48-51, 286 S.E.2d at 785-86.

21. *See* 305 N.C. at 61, 286 S.E.2d at 792. The court noted that the nature of an action is not determined solely by what a party calls it, *id.* (citing Dickens v. Puryear, 302 N.C. 437, 454, 276 S.E. 2d 325, 336 (1981)), and that a defendant is entitled to summary judgment only if "the forecast of evidence available for trial (when viewed most favorably to plaintiff) . . . demonstrates that plaintiff will not at trial be able to make out at least a *prima facie* case . . . ." *Id.* at 56, 286 S.E.2d at 789. The court concluded that plaintiff "presented a sufficient evidentiary showing to allow him at trial to prove that defendant holds on resulting trust for him." *Id.* at 61, 286 S.E.2d at 792.

22. *Id.* at 46, 286 S.E.2d at 783; *see also supra* note 21.

that the old, discriminatory presumption[23] was originally developed " 'out of a desire to protect [wives] in [their] subordinate and inferior position against the importunities and influence of [their] husband[s].' "[24] Noting that our laws no longer reflect these notions of marital relations,[25] the court dismissed such conceptions as antiquated.[26] Next the court considered the opinions of other courts and noted that many have abandoned such discriminatory treatment of married couples in favor of a presumptive gift rule for both husbands and wives.[27] The court then considered the writings of commentators who support the presumptive gift rule.[28] Finally, observing that the North Carolina Legislature had recently "indicated its view that the same rules should apply to both spouses"[29] by enacting the Equitable Distribution Act, the court expressed its belief that its modification of resulting trust law was in keeping with legislative

23. The presumption in question is that a husband intends to make a gift whereas a wife intends to set up a trust.

24. 305 N.C. at 49, 286 S.E.2d at 785 (quoting G. BOGERT, *supra* note 13, § 460, at 728). See *infra* note 25 for examples of how this "subordinate and inferior" position was manifested in North Carolina and how North Carolina has updated its laws.

25. 305 N.C. at 49, 286 S.E.2d at 785. The North Carolina Legislature and Supreme Court recently have done much to alleviate the discriminatory treatment of wives. Probably the most visible of these corrective measures is the Equitable Distribution Act, N.C. GEN. STAT. §50-20 (Cum. Supp. 1981). See *supra* note 6 for a brief explanation of the Act. Other equally important measures have been taken. In 1980 the supreme court recognized for the first time a wife's right to a cause of action for loss of consortium, a right husbands enjoy at common law. *See* Nicholson v. Chatham Memorial Hosp., 300 N.C. 295, 266 S.E.2d 818 (1980). In 1977 the legislature repealed N.C. GEN STAT. § 52-6 (1976), which required a wife who wished to contract with her husband for the disposition of her own real estate to submit to an examination before a certifying officer to ensure that the contract was reasonable and not injurious to the wife. Husbands, of course, were under no such requirement. Act of May 13, 1977, ch. 375, § 1, 1977 Sess. Laws 375. N.C. GEN STAT. § 50-13.4(b) (Cum. Supp. 1981), enacted in 1977, provides that mothers and fathers of equal means are equally responsible for the support of their minor children. *See also infra* note 80 (discussing the impact of An Act to Equalize Between Married Persons the Right to Income, Possession, and Control in Property Owned Concurrently in Tenancy by the Entirety, ch. 1245, 1981 N.C. Sess. Laws (Regular Sess., 1982) (to be codified at N.C. GEN. STAT. §39-13.6 (1982 Interim Supp.).

26. *See* 305 N.C. at 49, 286 S.E.2d at 785.

27. *See id.* at 49-50, 286 S.E.2d at 785-86. *See, e.g.*, Butler v. Butler, 464 Pa. 522, 528, 347 A.2d. 477, 480 (1975) (favoring the presumptive gift rule as consistent with a marriage in which the husband is no longer the "sole provider" and in which "both parties . . . provide for each other"). The *Butler* court was influenced by the Pennsylvania Equal Rights Amendment which "keeps the law from imposing 'different benefits or different burdens upon members of a society based on the fact that they may be man or woman.'" 305 N.C. 41, 50 n.8, 286 S.E.2d at 786 n.8 (quoting *Butler*, 464 Pa. at 527, 347 A.2d. at 480). *See also* White v. Amenta, 110 Conn. 314, 317, 148 A. 345, 346 (1930); Printup v. Patton, 91 Ga. 422, 434, 18 S.E. 311, 312 (1893); Hogan v. Hogan, 286 Mass. 524, 526, 190 N.E. 715, 716 (1934); Emery v. Emery, 122 Mont. 201, 222-23, 200 P.2d 251, 264 (1948); Peterson v. Massey, 155 Neb. 829, 835, 53 N.W.2d 912, 916 (1952); Denny v. Schwabacher, 54 Wash. 689, 692, 104 P. 137, 138 (1909).

28. 305 N.C. at 50-51, 286 S.E.2d at 786 (quoting 2 R. LEE, *supra* note 16, § 113 at 45 ("since a husband is no longer necessarily the 'sole provider,' there should be a presumption that *either* spouse has made a gift to the other") (emphasis added); 1 H. TIFFANY, THE LAW OF REAL PROPERTY § 272, at 461 (B. Jones 3d ed. 1939) ("reason would seem to support the view in favor of the presumption that a gift was intended"); G. BOGERT, *supra* note 13, § 460, at 727 ("it may with some reason be urged that a wife is under a moral duty to aid her husband financially . . . . Furthermore . . . affection running from wife to husband is . . . as strong as . . . from husband to wife . . . . In addition . . . wives very generally make gifts [in anticipation of death] to their husbands").

29. 305 N.C. at 51, 286 S.E.2d at 786.

policy.[30]

To understand the import of the court's holding one must appreciate the longevity and constancy of the law that the *Mims* decision alters. The concept of the resulting trust has its roots in fifteenth century English law.[31] From these roots the resulting trust has emerged in twentieth-century North Carolina law virtually unchanged. The "classic example of a resulting trust"[32] is the purchase-money resulting trust, in which one party pays the purchase money but another party takes the title.[33] Such a trust is "a creature of equity and arises by . . . operation of law to carry out the presumed intention of the part[ies]."[34] In such a transaction, the payor is presumed to have purchased

30. *Id.* at 56, 286 S.E.2d at 789.

31. G. BOGERT, *supra* note 13, § 453; P. HASKELL, PREFACE TO THE LAW OF TRUSTS 143 (1975); 5 A. SCOTT, *supra* note 1, § 405, at 3216. *See generally* W. HOLDSWORTH, AN HISTORICAL INTRODUCTION TO THE LAND LAW 140-75 (1927) (discussing the rise of the use, the Statute of Uses, and the effects of the Statute of Uses).

Because medieval land law was a "rigid and narrow. . . system of law . . . [and therefore] did not meet the needs of landowners," the feoffment to use was developed to circumvent the law. W. HOLDSWORTH, *supra*, at 137-38. In a feoffment to use the *cestui-que use* (equitable owner or trust beneficiary) transferred legal ownership of his property to a feoffee to uses (legal owner or trustee) who was then compelled in equity by the King's Chancellor to use his powers as legal owner for the benefit of the beneficial owner. *Id.* at 147-49. In so doing the beneficial owner acquired a great deal of control over the property that, as legal owner, the common law denied him. *See* T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS § 105 (1966) (enumerating those powers over property a *cestui-que use* gained by transferring legal ownership and retaining equitable ownership). Because not all such feoffments to uses were declared clearly, the Chancellor often had to decide what relief to give in a transfer in which no use was declared or in which the transferor did not retain the entire equitable interest. 5 A. SCOTT, *supra* note 1, § 404, at 3211. Because the practice of splitting equitable and legal interests was so common, the transferor was presumed to have retained the equitable interest in both situations. *Id.* at 3212. Accordingly, the courts presumed that a transferee who gave no consideration "held upon a resulting use for the transferor." *Id.* § 405, at 3216. Although the Statute of Uses, 27 Hen. 8, ch. 10 (1535), enacted in 1535 and effective in 1536, converted the transferor's interest to a legal interest, effectively nullifying the transfer, the courts continued to presume that the transferor's intention in such a trust was to preserve a use for himself. 5 A. SCOTT, *supra* note 1, § 405, at 3217. (Professor Scott suggests that the reason for the court's continued presumption that the transferor intended to retain a use might be that "although these presumptions were originally founded upon a desire to carry out the real intention of the parties, they had become crystallized in definite rules of law before the Statute of Uses was passed . . . ." *Id.*) The enactment of the Statute of Frauds, 29 Car. 2, ch. 3 (1676), which provided that "declarations or creations of uses or trusts in land must be manifested and proved by a signed memorandum . . . ," 5 A. SCOTT, *supra* note 1, §405, at 3217, eventually resulted in the courts' refusal to find a resulting trust where a gratuitous transfer was in evidence. *Id.* at 3218. In fact, "[t]here are no modern cases in which it has been held that where a gratuitous conveyance is made without a declaration of trust a resulting trust arises in favor of the transferor." *Id.* Resulting trusts, however, were well settled, "law-inferred" trusts that were excepted expressly from the Statute of Frauds, G. BOGERT, *supra* note 13, §452, at 615, and, as evidenced by a plethora of twentieth-century cases, are still very much in evidence in North Carolina today. *See, e.g.*, Cline v. Cline, 297 N.C. 336, 344, 255 S.E.2d 399, 404-05 (1979); Vinson v. Smith, 259 N.C. 95, 98, 130 S.E.2d 45, 47-48 (1963); Carlisle v. Carlisle, 225 N.C. 462, 465, 35 S.E.2d 418, 420 (1945); Wilson v. Williams, 215 N.C. 407, 411, 2 S.E.2d 19, 21-22 (1939); Teachey v. Gurley, 214 N.C. 288, 292, 199 S.E. 83, 86-87 (1938); Miller v. Miller, 200 N.C. 458, 461, 157 S.E. 604, 605 (1931); McWhirter v. McWhirter, 155 N.C. 145, 147, 71 S.E. 59, 60 (1911); Hendren v. Hendren, 153 N.C. 505, 506, 69 S.E. 506, 506 (1910).

32. J. WEBSTER, WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA § 507 at 630-31 (P. Hedrick ed. 1981).

33. *See, e.g.*, Kelly Springfield Tire Co. v. Lester, 190 N.C. 411, 416, 130 S.E. 45, 48 (1925); Avery v. Stewart, 136 N.C. 426, 435-36, 48 S.E. 775, 778 (1904).

34. Waddell v. Carson, 245 N.C. 669, 674, 97 S.E.2d 222, 226 (1957).

the property to be held by another for his benefit.[35]

The presumption of gift when a husband purchases property that is titled in the name of his wife is a long standing exception to the common law resulting trust rule. Under a "legal, or . . . [perhaps even] a moral obligation to maintain [his wife]," the husband was thus presumed to be making a quite natural gift to his wife when he titled property in her name.[36] There was, prior to *Mims*, no such presumption running from wife to husband.[37] This apparent inequality was well founded in North Carolina's common law: "In no court in this country was the common law conception of the marital relation, with all of its incidents, more clearly and tenaciously retained than in [North Carolina]."[38] Upon marriage, the personal property of a woman vested absolutely in her husband.[39] Real property also came under the husband's possession and control,[40] and was considered his to convey, at least in a limited sense.[41] It was thus entirely natural in this male-dominated scheme that the wife would be unable to convey property without the consent of her husband.[42] The wife was presumed to be so deeply under the husband's dominance and control that the legislature required that a probate officer examine her, in private, before any conveyance in which she joined with her husband was deemed to be voluntary.[43]

Reform did not come until the late nineteenth century, with the North Carolina Constitution of 1868. Article X, section 6 provided that all property acquired by the wife, either before or after marriage, "shall be and remain the sole and separate estate and property of such female."[44] The provision was of limited effect, however, since

> the concept that a married woman was incapable of engaging in business transactions with her husband by reason of his dominant influ-

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35. *Id.*

36. Thurber v. LaRoque, 105 N.C. 301, 306-07, 11 S.E. 460, 462 (1890).

37. Tarkington v. Tarkington, 301 N.C. 502, 506, 272 S.E.2d 99, 101 (1980); Deese v. Deese, 176 N.C. 527, 528, 97 S.E. 475, 475 (1918).

38. Ball & Sheppard v. Paquin, 140 N.C. 83, 87, 52 S.E. 410, 411-12 (1905).

39. *See* O'Connor v. Harris, 81 N.C. 279 (1879); Arrington v. Yarbrough, 54 N.C. 72 (1853).

40. *See* Richardson v. Richardson, 150 N.C. 549, 64 S.E. 510 (1909); Taylor v. Taylor, 112 N.C. 134, 16 S.E. 1019 (1893).

41. Upon marriage, the husband was empowered to sell and convey the land for a period not exceeding coverture. Given the rarity of divorce at common law, this essentially meant the shorter of his or his wife's lives. This estate became substantially enlarged, however, upon the birth of issue to the marriage. At that point, the husband became seized of his wife's lands for the period of his natural life. *See* Perry v. Stancil, 237 N.C. 442, 445, 75 S.E.2d 512, 515 (1953).

42. *Id.*

43. For a thorough discussion of the privy exam statute, N.C. Gen. Stat. § 52-6 (repealed 1977), see Spencer v. Spencer, 37 N.C. App. 481, 246 S.E.2d 805 (1978).

44. The heart of this provision is currently embodied in article X, § 4 of the State constitution, which states:

> 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, subject to such regulations and limitations as the General Assembly may prescribe.

N.C. CONST., art. X, § 4.

> ence over her and that any deed she might execute conveying property to him was executed under his coercion and therefore void still prevailed and was enforced as a part of the law of the land.[45]

The historical justification for the exclusion of wife-to-husband gifts from the resulting trust exception began to crumble in the 1960s. The legislature began to recognize that the wife was not necessarily dependent on the husband and could indeed be the gift giver of the family. In 1965, the statutory requirement that a husband join in his wife's conveyance was stricken by the legislature.[46] Two years later, the statutory definition of a "dependent spouse" for purposes of alimony was made sex neutral.[47] The privy exam statute also fell, in 1977, to the wave of legislative reform.[48] Two additional developments came in 1981—the passage of the Equitable Distribution Act,[49] which the *Mims* court found to evidence a legislative determination that the sexes be treated equally,[50] and removal of the statutory presumption that the husband was the supporting spouse.[51]

The court's decision to apply the presumptive gift rule in all cases not governed by the Equitable Distribution Act modernizes the law[52] but strays from the apparent intention of the North Caroina Legislature. In the Equitable Distribution Act the legislature specifies for the courts what property is "marital" and what remains "separate" in a property division at divorce.[53]

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45. Perry v. Stancil, 237 N.C. at 446-47, 75 S.E.2d at 516.

46. Act of June 9, 1965, ch. 878, 1965 N.C. Sess. Laws 1175.

47. Act of July 6, 1967, ch. 1152, 1967 N.C. Sess. Laws 1766. "Dependent spouse" is now defined 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." N.C. GEN. STAT. § 50-16.1 (1976).

48. Act of May 13, 1977, ch. 375, § 1, 1977 N.C. Sess. Laws 375 (effective Jan. 1, 1978). The statute had occasionally been advanced as support for the wife's exception from the resulting trust presumption, since it was based upon the presumed dominant position of the husband vis-à-vis his wife. *See, e.g.,* Sims v. Ray, 96 N.C. 87, 2 S.E. 443 (1887).

49. Act of July 3, 1981, ch. 815, 1981 N.C. Sess. Laws, 1st Sess. 1184 (codified at N.C. GEN. STAT. § 50-20 (Cum. Supp. 1981)). *See supra* note 6.

50. 305 N.C. at 51, 286 S.E.2d at 786.

51. Act of April 27, 1981, ch. 274, 1981 N.C. Sess. Laws, 1st Sess. 239 (codified at N.C. GEN. STAT. § 50-16.1(4) (Cum. Supp. 1981)).

52. Unwarranted protection of wives still lingers in many jurisdictions. *See generally* 5 A. SCOTT, *supra* note 1, § 442, at 3337 n.9 (3d ed. 1967 & Supp. 1982) (citing cases from sixteen states that presume a resulting trust rather than a gift when a wife purchased property in the name of her husband).

53. The Act provides in part:

> (b) For purposes of this section:
>
> (1) "Marital property" means all real and personal property acquired by either spouse during the course of the marriage and presently owned, except property determined to be separate property in accordance with subdivision (2) of this section.
>
> (2) "Separate property" means all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage. However, property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance. Property acquired in exchange for separate property shall be considered separate property regardless of whether the title is in the name of the husband or wife or both. The increase in value of separate property and the income derived from separate

The Act addresses the resulting trust situation, providing that "[p]roperty acquired in exchange for separate property shall be considered separate property regardless of whether the title is in the name of the husband or wife or both."[54] The presumptive gift rule clearly is abolished in favor of the presumptive trust rule in the divorce context. The *Mims* court explained its divergence from the legislative intent, stating that it did not feel "compelled to apply the presumptive trust . . . simply because the legislature seems to have shown a preference for a variant of the trust rule"[55] and that applying the presumptive gift rule to both husband and wife is "the better rule because it recognizes that such transfers are normally motivated by love and affection and the desire to make a gift."[56] The court further explained that while the primary focus of the Act is on "*equitably distributing* 'marital' as opposed to 'separate' property *upon dissolution of* [a] *marriage*," the rule announced in *Mims* is intended to apply in all pertinent disputes of husband-wife property ownership.[57] In addition to this difference of purpose, the court pointed out that the Equitable Distribution Act is based upon the "relative positions of the parties at the time of divorce," while the modified common law rule operates from the basis of "what was intended at the time the property was acquired."[58]

Although the court's position in not following the legislative lead is logically and historically sound,[59] the reasoning employed in justifying that departure may be criticized on two counts. First, in deciding to apply the presumptive gift rule to transfers between husbands and wives, the court rejected the alternative of no presumption at all.[60] Although the court heeded Professor Scott's advice that "we should not maintain a rule of law premised on the belief 'that husbands have a greater affection for their wives than wives have for their husbands,' "[61] it did not adopt Scott's ultimate conclusion that the best approach is to ascertain intention "as shown by all the circumstances" surrounding the transfer rather than to rely on any presumption.[62] Even

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property shall be considered separate property. All professional licenses and business licenses which would terminate on transfer shall be considered separate property. Vested pension or retirement rights and the expectation of nonvested pension or retirement rights shall be considered separate property.

N.C. GEN. STAT. § 50-20(b)(1)-(2) (Cum. Supp. 1981). For an analysis of the distinction between separate and marital property, see Sharp, *supra* note 6.

54. N.C. GEN. STAT. § 50-20(b)(2) (Cum. Supp. 1981).

55. 305 N.C. at 53-4, 286 S.E.2d at 788.

56. *Id.* at 53, 286 S.E.2d at 788.

57. *Id.* at 54, 286 S.E.2d at 788 (emphasis in original).

58. *Id.*

59. See 5 A. SCOTT, *supra* note 1, § 442, at 3339-43 for a discussion of the principle to be applied by courts in presuming trust or gift. The fact that wives today often fulfill the same functions as husbands suggests that they should be treated the same under the law.

60. 305 N.C. at 53, 286 S.E.2d at 788.

61. *Id.* (quoting 5 A. SCOTT, *supra note 1,* § 442, at 3339). Professor Scott explains that neither closeness of relationship nor extent of natural affection necessarily indicates a relationship in which one party can be presumed to be making a gift to another party. As an example, he notes, "Some . . . would contend that it is more likely that a man should intend to make a gift to his mistress than to his wife." A mistress, of course, would not be presumed to have received a gift. 5 A. SCOTT, *supra* note 1, § 442, at 3341. *See also infra* text accompanying notes 76-79.

62. 5 A. SCOTT, *supra* note 1, § 442, at 3340.

though presumptions may be rebutted by further evidence, Scott correctly points out that in many cases the presumption is given conclusive weight:[63] "Such a rule clearly gives too great a weight to the relationship between the parties. The question is really one of intention . . . . The notion that intention can be determined by the application of hard and fast rules of law is common in primitive systems of law . . . ."[64] The court's retention of a rule of presumptive intent in transfers between spouses, while commendable for its even-handed approach, was not as progressive a modification of the law as it might have been.

As an alternative to rejecting presumptions entirely, the court might have lowered the threshhold of evidence necessary to rebut the presumption. The presumption of gift arising when one spouse furnishes the consideration for property received by the other is "rebuttable by clear, cogent, and convincing evidence."[65] This moderately heavy burden of proof, always on the party contending there was no gift, is part of the "undue weight" accorded presumptions that Professor Scott criticizes.[66] Since the critical inquiry is the intention of the parties, a presumption of gift should be rebuttable by the preponderance of the evidence: "The better view is that it is necessary to produce such evidence as is required to establish any other fact."[67] Even if the court were unwilling to forgo entirely the convenience of a presumption, it might have more closely approached the central issue of determining intent from all the circumstances by easing the burden on the party seeking to rebut the presumption.

The second problem with the court's reasoning is its insistence that there is a difference in the principles underlying the Equitable Distribution Act and the common law resulting trust.[68] The court held that the provisions of the Act should not be applied by analogy because the Act "is designed . . . to divide property equitably, based upon the relative positions of the parties at the time of the divorce," whereas the case at issue required the court to devise a rule to ascertain what the parties intended "when the property was acquired."[69] The distinction, however, may have been too hastily drawn. Although the primary purpose of the Act is to provide rules for a fair distribution of marital assets at the time of divorce, the court erred in declaring that the intention of the donor is irrelevant in the determination of what property should be distributed to each spouse under the Act. When property is acquired by gift from the other spouse during the course of the marriage, a presumption arises that the property is "marital" property of the donee unless a contrary intention is stated in the conveyance.[70] Thus, at least in the context

63. *Id. See also* Shue v. Shue, 241 N.C. 65, 84 S.E.2d 302 (1954).
64. 5 A. SCOTT, *supra* note 1, § 442, at 3340.
65. 305 N.C. at 53, 286 S.E.2d at 788.
66. 5 A. SCOTT, *supra* note 1, § 442 at 3340.
67. *Id.* § 443, at 3347.
68. *See supra* note 55 and accompanying text.
69. 305 N.C. at 54, 286 S.E.2d at 788.
70. N.C. GEN. STAT. § 50-20(b)(2) (Cum. Supp. 1981).

of direct interspousal gifts, the Act does not preclude an inquiry into the intent of the donor at the time of the transfer.

Furthermore, the court's failure to follow the approach taken in the Equitable Distribution Act may lead to inconsistent results that depend entirely upon whether or not the issue is raised in a divorce proceeding. *Wright v. Wright*,[71] a post-*Mims* case, illustrates the divergence between the *Mims* rule and the Equitable Distribution Act. Plaintiff, a carpenter, spent $17,270 of his separate money making improvements on his wife's house, which was her separate property. In return for these improvements, plaintiff claimed that defendant had promised to "convey the property to the parties [plaintiff and defendant] as tenants by the entirety." When defendant refused to so convey the property plaintiff brought an action, in the unusual posture of a husband suing his wife as creditor, for a money judgment and an equitable lien in the amount of his expenditures on defendant's property.[72] In holding that plaintiff was not entitled to relief, the court, noting *Mims*, stated that "the same presumption of gift should apply whichever spouse furnishes improvements on the other spouse's land"[73] and charged plaintiff with the responsibility of rebutting that presumption with "clear, cogent and convincing evidence."[74] Had this been a divorce action the Equitable Distribution Act could well have dictated a different result. Because plaintiff improved defendant's property with his "separate property," under section (b)(2) of the Equitable Distribution Act there would be no presumption of a gift to defendant[75] and the court might well have found defendant to be unjustly enriched and plaintiff deserving of relief. It seems inconsistent that the outcome of plaintiff's action should hinge on the timing of his suit before a divorce action.

Whatever the reasons for not following the legislative lead, the court's decision is well founded in the law of the resulting trust, which posits that the presumption of an intention to make a gift depends on whether the transferee is the "natural object of the bounty of the payor."[76] This elusive phrase generally means that the transferee shares the kind of relationship with the payor that would make it natural for the payor to be interested in him and "make provision for his advancement."[77] The past exclusion of the husband as a natural object of the wife's bounty was an aberration from the law born out of the wife's presumed inferior position to her husband, a position that generally viewed the wife as unlikely if not unable to make a gift at all.[78] In changing this anachronistic presumption the court recognized the wife's right to own property and the likelihood that she might give property to her husband.[79]

71. 305 N.C. 345, 289 S.E.2d 347 (1982).
72. *Id.* at 346, 289 S.E.2d at 348.
73. *Id.* at 355, 289 S.E.2d at 354.
74. *Id.* at 354-55, 289 S.E.2d at 353.
75. N.C. GEN. STAT. § 50-20(b)(2) (Cum. Supp. 1981).
76. 5 A. SCOTT, *supra* note 1, § 442, at 3340.
77. *Id.*
78. *Id.*
79. It should be pointed out, however, that until An Act to Equalize Between Married Persons the Right to Income, Possession and Control in Property Owned Concurrently in Tenancy by

Although the *Mims* decision changes longstanding North Carolina common law and therefore was given careful consideration by the court,[80] its result has been long overdue. Lawmakers have become increasingly aware of the need to treat men and women equally under the law.[81] The court's decision to employ the presumptive gift rule rather than the presumptive trust rule does not lessen the decision's impact in that context, because both spouses are treated equally. Nevertheless, in choosing to employ the presumptive gift rule the court has created an inconsistency between legislated law and court-made law that renders the basis of the common-law resulting trust uncertain.[82] A body of law that dictates one result in a divorce action and another in, for example, an action by a deceased's children to gain ownership of property willed to them by the deceased, appears arbitrary. Moreover, if the purpose of the resulting trust is to accomplish the presumed intentions of the parties, the retention of any rule of presumption is likely to lead to inaccurate conclusions in many cases. In the wake of *Mims v. Mims*, husbands and wives now enjoy equal treatment, but in granting that equality the supreme court has altered the foundation on which the common-law trust was built.

R. BENJAMIN WRIGHT

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the Entirety, N.C. GEN. STAT. § 39-13.6 (1982 Interim Supp.), which became effective 11 months *after* the *Mims* decision, a wife's position was not equal to her husband's with respect to property owned as tenants by the entirety. Under the old law a husband had exclusive rights to use and control entirety property. In addition, a husband did not have to account to his wife for rents and profits received from the property. Also, because a husband had the exclusive right to control and use entireties property, he could lease the property to a third party and thereby exclude his wife from it. *See e.g.*, Moore v. Shore, 208 N.C. 446, 181 S.E. 275 (1935); Dorsey v. Kirkland, 177 N.C. 520, 99 S.E. 407 (1919); 2 R. LEE, *supra* note 16, § 115, at 50; Comment, *Real Property—Tenancy by the Entirety in North Carolina: An Idea Whose Time Has Gone?*, 58 N.C.L. REV. 997, 999 (1980). The *Mims* decision, by requiring the gift presumption when a wife pays her own money for property put in her and her husband's names as tenants by the entirety, ensured that a husband would enjoy the rights he had been denied under the presumptive trust rule, which kept beneficial ownership of the property in the wife's hands. N.C. GEN. STAT. § 39-13.6, however, equalizes control, use, possession, rents, income, and profits of real property held as tenants by the entirety. In short, the legislature has tidied up the job started by the *Mims* court.

80. *See* 305 N.C. at 54-6, 286 S.E.2d at 788-89. The court emphasized that, although its normal policy " 'in matters involving title to property . . . [is] to leave changes in the law to the legislature,' " *id.* at 54, 286 S.E.2d at 788 (quoting Rabon v. Rowan Memorial Hosp., 269 N.C. 1, 20, 152 S.E.2d 485, 498 (1967)), it was "convinced that changes in . . . society . . . demanded a change in the law." *Id.* at 55, 286 S.E.2d at 788 (citing cases illustrating the court's willingness to adjust to changed circumstances).

81. Increased attention to equalization of divorce settlements, such as North Carolina's Equitable Distribution Act and the ratification of the Equal Rights Amendment by 35 states, are examples of this awareness. *See also supra* note 25.

82. The inconsistency is a difference in the interpretation of the transferor's intention in the resulting trust situation.