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# Hinton v. Hinton: Equitable Distribution without Consideration of Marital Fault

Leslie Calkins O'Toole

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## ***Hinton v. Hinton*: Equitable Distribution Without Consideration Of Marital Fault**

In 1981 North Carolina modernized its laws on the distribution of property upon divorce.<sup>1</sup> The adoption of North Carolina General Statutes section 50-20 changed North Carolina law from the common-law approach, in which property division focused primarily on legal title,<sup>2</sup> to an equitable distribution system, in which marriage is viewed as an economic partnership.<sup>3</sup> This change brought North Carolina in line with most other jurisdictions<sup>4</sup> and generally has been seen as desirable,<sup>5</sup> but it also left unanswered questions. For example, if a husband beats his wife, or if a wife abandons her husband, should a court consider such conduct in distributing the couple's property on divorce?

In *Hinton v. Hinton*<sup>6</sup> the North Carolina Court of Appeals addressed for the first time whether marital fault should be a consideration in equitable distribution. The court concluded that marital fault is irrelevant in making an equitable distribution of property.<sup>7</sup> This Note examines the implications of the court's decision and concludes that, although marital fault generally should not be a consideration, other types of fault may be relevant in equitable distribution. If confronted with this issue, the North Carolina Supreme Court should reach the same holding as the *Hinton* court, but also should recognize those situations in which fault may be relevant.

The parties in *Hinton* filed for equitable distribution of their property under section 50-20.<sup>8</sup> The trial court awarded a greater share of the property to the wife, partly because the husband had physically abused the wife throughout their marriage.<sup>9</sup> Among other incidents of abuse,<sup>10</sup> the husband had struck his wife, causing a detached retina and scarring the tissue of her eye.<sup>11</sup> At the time

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1. Act of July 3, 1981, ch. 815, 1981 N.C. SESS. LAWS 1184 (codified at N.C. GEN. STAT. § 50-20 (1984)).

2. Marschall, *Proposed Reforms in North Carolina Divorce Law*, 8 N.C. CENT. L.J. 35, 45 (1976); see *infra* notes 40-41 and accompanying text.

3. Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C.L. REV. 247, 247 (1983); see *infra* notes 42-45 and accompanying text.

4. There are at least forty-one states with equitable distribution systems. Freed & Foster, *Family Law in the Fifty States: An Overview*, 17 FAM. L.Q. 365, 379 (1984).

5. See, e.g., Sharp, *supra* note 3; *Survey of Developments in North Carolina Law, 1981—Family Law*, 60 N.C.L. REV. 1379, 1396 (1982) [hereinafter cited as *Survey*].

6. 70 N.C. App. 665, 321 S.E.2d 161 (1984).

7. *Id.*

8. *Id.* at 666, 321 S.E.2d at 161-62.

9. *Id.* at 666, 321 S.E.2d at 162.

10. The evidence showed that the husband was argumentative, threatened his wife, repeatedly physically abused her, chased her around the house with a loaded shotgun and told her he was going to blow her head off, held a loaded shotgun to his wife's head for 30 minutes and told her to "say your prayers because it will be the last time you see daylight," beat her with his shoe, ripped the phone out of the wall and chased her with a butcher knife, beat one of their daughters, spanked his wife over his knee, and contracted venereal disease and gave it to his wife. *Id.* at 670-71, 321 S.E.2d at 164.

11. *Id.*

of trial, these injuries still impaired her ability to work.<sup>12</sup> The trial court found that an equal distribution of property would not be equitable,<sup>13</sup> citing as one reason that "injuries from the beatings . . . have affected her employability."<sup>14</sup> On appeal, the court interpreted this finding to mean that "because it is the husband's fault that his wife's future earning ability is limited, his share of the marital property should be reduced."<sup>15</sup> Although it is questionable whether the trial court's distribution actually reflected fault considerations,<sup>16</sup> the court of appeals used *Hinton* as a vehicle to consider the relevance of fault under North Carolina's equitable distribution statute.

In rejecting fault as a consideration, the court of appeals examined the approach taken in other states, particularly New York,<sup>17</sup> and focused on the policies and legislative intent behind North Carolina's statute. Other jurisdictions take varying approaches to the issue of fault in equitable distribution. Some states expressly include fault as a relevant consideration in their statutes; others reject it.<sup>18</sup> In states with statutes that do not expressly mention fault, courts have reached different conclusions on whether to consider fault in the distribution of property.<sup>19</sup>

In *Hinton* the court began its discussion by stating that the North Carolina equitable distribution statute was enacted to recognize marriage as an economic partnership.<sup>20</sup> The purpose of equitable distribution is to effect "a return to each party of that which he or she contributed to the marriage."<sup>21</sup> The court discussed the difficulty in determining fault<sup>22</sup> and expressed its view that considera-

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12. *Id.*

13. See *infra* notes 33-34 and accompanying text.

14. *Hinton*, 70 N.C. App. at 671, 321 S.E.2d at 164. The court also based its conclusion that an equal distribution would not be equitable on the disparity in the parties' incomes, the duration of the marriage, the disparity between their retirement rights, and the wife's indirect contribution to the husband's career potential. *Id.*

15. *Id.* at 672, 321 S.E.2d at 165.

16. Judge Becton, in his dissent, contended that the trial court's decision was not based on fault. See *infra* note 75 and accompanying text.

17. The court's reliance on New York's approach was appropriate because North Carolina's equitable distribution statute closely resembles and was modeled after the New York statute. See *Survey*, *supra* note 5, at 1399; *infra* notes 48-50 and accompanying text (discussion of similarities between the two statutes). The court paid particular attention to a recent New York decision, *Blickstein v. Blickstein*, 99 A.D.2d 287, 472 N.Y.S.2d 110 (1984). See *infra* notes 51-56 and accompanying text.

18. See *Hinton*, 70 N.C. App. at 667, 321 S.E.2d at 162. The court lists the following state statutes as among those that expressly include fault: CONN. GEN. STAT. ANN. § 46b-81(c) (West 1984); MASS. GEN. LAWS ANN. ch. 208, § 34 (West 1984); MO. ANN. STAT. § 452.330.1(4) (Vernon 1984). The following statutes expressly exclude fault from consideration: DEL. CODE ANN. tit. 13, § 1513(a) (1981); ILL. ANN. STAT. ch.40, § 503(d) (Smith-Hurd 1984); MINN. STAT. ANN. § 518.58 (West 1984). *Hinton*, 70 N.C. App. at 667, 321 S.E.2d at 162. Fault is a factor to be considered at the trial court's discretion in at least two states: ALA. CODE § 30-2-52 (1983); VT. STAT. ANN. tit. 15, §751 (Equity 1984). See also *infra* notes 57-64 and accompanying text (discussion of different states' approaches to consideration of fault).

19. *Hinton*, 70 N.C. App. at 667, 321 S.E.2d at 162; see also *infra* note 59 (list of representative state decisions); *infra* notes 57-64 and accompanying text (discussion of different states' approaches to consideration of fault).

20. *Hinton*, 70 N.C. App. at 668, 321 S.E.2d at 163.

21. *Id.* at 669, 321 S.E.2d at 163.

22. *Id.*

tion of fault serves only one purpose—punishment of the “guilty” spouse by the courts.<sup>23</sup> The court asserted that the general assembly did not intend the statute to fulfill this purpose.<sup>24</sup> Last, the court considered the relationship between the equitable distribution statute and other North Carolina divorce statutes. The general assembly has instituted “no fault” divorce.<sup>25</sup> Fault, however, is a relevant consideration in awarding alimony.<sup>26</sup> These facts led the court to conclude that the general assembly intended fault to be considered in making alimony awards, but not in equitable distribution.<sup>27</sup>

The policies underlying North Carolina’s equitable distribution statute and the cases cited in *Hinton* support the conclusion that marital fault<sup>28</sup> is not an appropriate consideration under the statute. Although equitable distribution should not be based on marital fault, other types of fault should be considered.<sup>29</sup> An examination of the North Carolina statute and the approach taken in other jurisdictions will illuminate this distinction.

The North Carolina equitable distribution statute<sup>30</sup> provides that on divorce, the court shall make an equitable distribution<sup>31</sup> of a couple’s marital property.<sup>32</sup> The court must make an equal division<sup>33</sup> of marital property unless it determines that an equal distribution would not be equitable.<sup>34</sup> The court

23. *Id.*

24. *Id.*

25. N.C. GEN. STAT. § 50-6 (1984) (provides for divorce based on one-year separation without showing that plaintiff is injured party).

26. See *infra* note 31.

27. *Hinton*, 70 N.C. App. at 670, 321 S.E.2d at 164.

28. The term “fault” is used here to refer to conduct leading to the dissolution of the marriage. Economic fault, usually consisting of dissipating joint assets, involves different considerations and is discussed *infra* in notes 73-74 and accompanying text.

29. See *infra* notes 73-79 and accompanying text.

30. N.C. GEN. STAT. § 50-20 (1984).

31. The distribution of property on divorce differs from the awarding of alimony. Property distribution is a one-time division of marital assets between husband and wife; alimony involves ongoing payments from one spouse to the other. In North Carolina, alimony is paid to a dependent spouse by a supporting spouse, N.C. GEN. STAT. § 50-16.1 (1984), and is awarded only if the supporting spouse has committed one of the wrongs listed in N.C. GEN. STAT. § 50-16.2 (1984). Two of the grounds for alimony are particularly relevant to the *Hinton* case: “The supporting spouse by cruel or barbarous treatment endangers the life of the dependent spouse [and] [t]he supporting spouse offers such indignities to the person of the dependent spouse as to render his or her condition intolerable and life burdensome.” *Id.* § 50-16.2 (6), (7).

Misconduct by the dependent spouse prevents him or her from receiving alimony. N.C. GEN. STAT. § 50-16.5 (1984). Thus, in North Carolina alimony awards clearly are fault-based. See *Williams v. Williams*, 299 N.C. 174, 188, 261 S.E.2d 849, 858 (1980) (general assembly intended that fault be a factor in alimony awards).

32. Only marital property is subject to distribution—separate property is excluded. N.C. GEN. STAT. § 50-20 (1984). The definition of marital property in North Carolina is relatively narrow; thus, the reach of the statute is less extensive than that of other states’ statutes. See *Sharp, supra* note 3, at 253. For an example of the effect of this provision, see *Crumbley v. Crumbley*, 70 N.C. App. 143, 318 S.E.2d 525 (1984) (lot held to be husband’s separate property even though deeded to husband and wife, because it was received by husband from his mother in exchange for a separately owned lot conveyed earlier to his mother).

33. See *Alexander v. Alexander*, 68 N.C. App. 548, 552, 315 S.E.2d 772, 775 (1985) (statute creates presumption of equal division “in the absence of some reason(s) compelling a contrary result”); *White v. White*, 64 N.C. App. 432, 435, 308 S.E.2d 68, 71 (1983) (statute creates presumption of equal division), *aff’d as modified*, 312 N.C. 770, 324 S.E.2d 829 (1985).

34. N.C. GEN. STAT. § 50-20(c) (1984).

must consider specific factors in determining what division is equitable.<sup>35</sup> The final listed factor is a "catch-all" provision,<sup>36</sup> which permits consideration of "[a]ny other factor which the court finds to be just and proper."<sup>37</sup> It is under this factor that fault could be considered.<sup>38</sup>

The significance of the court of appeals' decision not to consider fault is apparent only when the decision is contrasted with the fault-ridden backdrop of earlier divorce law.<sup>39</sup> Before the adoption of section 50-20, North Carolina courts distributed property on divorce under the common-law system. Under this system, property followed legal title on divorce, unless a constructive trust or gift could be established.<sup>40</sup> This approach produced inequitable results when one spouse had performed housekeeping and child-rearing services, but property was held in the name of the other spouse.<sup>41</sup> To remedy this inequity<sup>42</sup> and to

35. N.C. GEN. STAT. § 50-20(c) (1984) lists the following factors:

- (1) The income, property, and liabilities of each party at the time the division of property is to become effective;
- (2) Any obligation for support arising out of a prior marriage;
- (3) The duration of the marriage and the age and physical and mental health of both parties;
- (4) The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects;
- (5) Vested pension or retirement rights and the expectation of nonvested pension or retirement rights, which are separate property;
- (6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker;
- (7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse;
- (8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage;
- (9) The liquid or nonliquid character of all marital property;
- (10) The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party;
- (11) The tax consequences to each party; and
- (12) Any other factor which the court finds to be just and proper.

36. See *Survey*, *supra* note 5, at 1399.

37. N.C. GEN. STAT. § 50-20(c)(12) (1984).

38. See *Survey*, *supra* note 5, at 1403-07 (pre-*Hinton* discussion of whether North Carolina courts would be likely to consider fault under catch-all factor).

39. For a discussion of the role of fault in North Carolina family law, see Marschall, *supra* note 2, at 38-39; Sharp, *Divorce and the Third Party: Spousal Support, Private Agreements, and the State*, 59 N.C.L. REV. 819, 822-25 (1981) [hereinafter cited as *Divorce*]. *But cf.* Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1454-55 (1984) (suggesting that the role of fault in alimony awards and property distribution may have been overestimated).

40. Marschall, *supra* note 2, at 45; *Survey*, *supra* note 5, at 1396 (property follows title on divorce).

41. See Marschall, *supra* note 2, at 45; Sharp, *supra* note 3, at 247; *Survey*, *supra* note 5, at 1396; see also Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 23 UCLA L. REV. 1181, 1241-53 (1980-81) (demonstrating empirically that men are financially better-off than women after divorce).

42. The North Carolina Court of Appeals stated in *White v. White*, 64 N.C. App. 432, 433, 308 S.E.2d 68, 69 (1983) that "[e]quitable distribution . . . gives recognition to the essential supportive

recognize marriage as an economic partnership,<sup>43</sup> the general assembly enacted section 50-20.<sup>44</sup> Under this statute, marital property is distributed equitably upon divorce based on factors enumerated in the statute,<sup>45</sup> which do not include marital fault. In contrast, fault is crucial in determining *alimony* awards; a dependent spouse is entitled to alimony only if the supporting spouse is "guilty" and the dependent spouse is "innocent."<sup>46</sup>

The North Carolina General Assembly borrowed heavily from New York's equitable distribution statute,<sup>47</sup> therefore, an examination of that state's statute is helpful.<sup>48</sup> The New York statute was enacted in 1980 to reflect the "modern view of marriage as a partnership of equals and of divorce as the dissolution of such a partnership."<sup>49</sup> The New York equitable distribution statute contains a catch-all provision almost identical to North Carolina's, which allows consideration of "any other factor which the court shall expressly find to be just and proper."<sup>50</sup> In *Blickstein v. Blickstein*<sup>51</sup>, a recent New York case relied on by the

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role played by the wife in the home, acknowledging that as homemaker, wife and mother she should clearly be entitled to a share of the assets accumulated during the marriage."

Furthermore, the North Carolina Supreme Court has described § 50-20 as part of "the ongoing march of the law to place men and women generally and husbands and wives particularly on an equal legal footing." *Mims v. Mims*, 305 N.C. 41, 56, 286 S.E.2d 779, 789 (1982). *But cf.* Prager, *Sharing Principles and the Future of Marital Property Law*, 25 UCLA L. REV. 1, 2 (1977-78) (suggesting that "the marital property policy debate has become distorted by the focus on equality" and emphasizing the importance of "sharing behavior" in marriage).

43. *Hinton*, 70 N.C. App. at 668, 321 S.E.2d at 163; *White v. White*, 64 N.C. App. 432, 432, 308 S.E.2d 68, 69 (1983).

44. Since § 50-20 was enacted, the North Carolina courts have resolved many controversies in connection with the statute in addition to the fault issue. The statute has survived a charge of unconstitutional vagueness. *Ellis v. Ellis*, 68 N.C. App. 634, 315 S.E.2d 526 (1984). Also, the courts have determined that the statute does not affect the validity of separation agreements, *McArthur v. McArthur*, 68 N.C. App. 484, 315 S.E.2d 344 (1984), although it does permit parties to execute a property settlement without a separation. *Buffington v. Buffington*, 69 N.C. App. 483, 317 S.E.2d 97 (1984). Furthermore, a valid property settlement precludes the parties from requesting equitable distribution of their property. *Id.* In addition, the court of appeals has determined that equitable distribution must occur *before* alimony and child support are awarded. *Capps v. Capps*, 69 N.C. App. 755, 318 S.E.2d 346 (1984).

It is clear that only marital property is subject to equitable distribution. The court must determine what the marital property is, ascertain its net value, and *then* proceed with the distribution. *Turner v. Turner*, 64 N.C. App. 342, 307 S.E.2d 407 (1983). If the trial court concludes that an equal distribution is not equitable, it is required to enter findings of fact to support its conclusion. The trial court's order will not be disturbed on appeal unless it has resulted in "an obvious miscarriage of justice." *Alexander v. Alexander*, 68 N.C. App. 548, 552, 315 S.E.2d 772, 776 (1984).

45. *See supra* note 35.

46. *See supra* note 31.

47. North Carolina was relatively late in enacting its equitable distribution statute. *See* Marshall, *supra* note 2, at 45 (at the time of enactment, only fourteen United States jurisdictions, including North Carolina, still adhered to common-law marital property systems). *See also* Freed & Foster, *supra* note 4, at 379 (at least forty-one states have equitable distribution systems).

48. *See supra* note 17.

49. *Recent Developments—Equitable Distribution in New York*, 45 ALB. L. REV. 483, 488 (1980-81) [hereinafter cited as *Recent Developments*]; *see also* Forcucci v. Forcucci, 83 A.D.2d 169, 171, 443 N.Y.S.2d 1013, 1015 (1981) (statute enacted as a result of realization that marriage is an economic partnership).

50. N.Y. DOM. REL. LAW § 236(B)(5)(d)(10) (McKinney Supp. 1985). This provision was controversial. Opponents of the statute thought the catch-all factor gave the courts too much latitude. *Recent Developments, supra* note 49, at 504. The factor apparently was included, both in the New York and North Carolina statutes, as a compromise between those who wanted fault to be considered and those who did not. *Survey, supra* note 5, at 1403 n.191. *See Recent Developments,*

court in *Hinton*, the New York Supreme Court determined that marital fault generally is not a relevant factor under the statute.<sup>52</sup> The court's holding was based on its view of marriage as an economic partnership and on the idea that upon dissolution of the partnership, property should be distributed according to economic need.<sup>53</sup> In addition, the court reasoned that fault may be difficult to evaluate and that both parties actually may be responsible for the breakup of a marriage.<sup>54</sup> The court did note, however, that fault may be relevant in extraordinary situations—those in which marital misconduct “shocks the conscience.”<sup>55</sup> The court also stated that economic fault—in most cases dissipation of assets—is a relevant consideration.<sup>56</sup>

Legislative and judicial resolutions of the fault issue in other jurisdictions further illustrate the policy considerations in this area. The Uniform Marriage and Divorce Act expressly precludes consideration of fault in distribution of property.<sup>57</sup> Some states have enacted statutes providing that fault may not be considered, whereas others have statutes listing fault as a factor that must be considered.<sup>58</sup> Still other states' statutes do not mention fault; in these states the

*supra* note 49, at 506 n.116, for a discussion of the omission of fault from the New York statute (commentary was written prior to any New York court decisions on the fault issue).

51. 99 A.D.2d 287, 472 N.Y.S.2d 110 (1984).

52. *Id.* Before *Blickstein*, lower courts in New York had reached varying conclusions on whether fault was a proper consideration in equitable distribution of marital property. In *Giannola v. Giannola*, 109 Misc. 2d 985, 441 N.Y.S.2d 341 (Sup. Ct. 1981), the court held that marital fault, consisting of alleged adultery, constructive abandonment, and cruel and inhuman treatment by the husband, was relevant to equitable distribution. The court held, however, that marital fault would not preclude an award of equitable distribution. *Id.* at 987, 441 N.Y.S.2d at 341.

This approach was developed further in *Kobylack v. Kobylack*, 110 Misc. 2d 402, 442 N.Y.S.2d 392 (Sup. Ct. 1981), *modified on other grounds*, 96 A.D.2d 831, 465 N.Y.S.2d 581 (1983) (mem.), *rev'd per curiam on other grounds*, 62 N.Y.2d 399, 477 N.Y.S.2d 109 (1984). The *Kobylack* court agreed with the *Giannola* court that fault is a proper consideration, but found it not relevant in the case before it because the assets could be equitably distributed without economic harm to either party. *Kobylack*, 110 Misc. 2d at 408, 442 N.Y.S.2d at 395. The *Kobylack* court set forth the general rule that “fault should not be used as a punishment but only as a consideration to tilt the balance where there are insufficient assets to make the parties economically ‘whole.’” *Id.*

In a later decision, *M.V.R. v. T.M.R.*, 115 Misc. 2d 674, 454 N.Y.S.2d 779 (Sup. Ct. 1982), another trial court concluded that fault (in this case the husband's alleged homosexuality) should not be considered in equitable distribution of marital assets. The court based its holding on an analogy to dissolution of a commercial partnership, in which fault is irrelevant, *id.* at 678, 454 N.Y.S.2d at 782, on the difficulty in determining marital fault, *id.* at 679, 454 N.Y.S.2d at 782, and on the potential for discrimination by the courts (against homosexuals in this case and against women in other cases). *Id.* at 680, 454 N.Y.S.2d at 783.

53. *Blickstein*, 99 A.D.2d at 291, 472 N.Y.S.2d at 113.

54. *Id.* at 292, 472 N.Y.S.2d at 113.

55. *Id.* at 292, 472 N.Y.S.2d at 113-14; *see infra* text accompanying notes 77-79.

56. *Id.* at 293, 472 N.Y.S.2d at 114; *see supra* note 28; *infra* notes 73-74 and accompanying text.

57. UNIFORM MARRIAGE AND DIVORCE ACT, 201 FAM. L. REP. (BNA) § 307 (1974). This section contains two alternatives. Alternative A provides that “the court, without regard to marital misconduct, shall . . . equitably apportion between the parties the property and assets belonging to either or both . . .” Alternative B states that the court “shall divide community property, without regard to marital misconduct, in just proportions . . .” Both alternatives list factors for the court to consider in making the distribution. *Id.*

The New York statute was modeled on Alternative A. *Recent Developments, supra* note 49, at 492. The language regarding marital misconduct, however, was omitted. *See supra* note 50 and accompanying text.

58. *See supra* note 18 and accompanying text.

courts have decided whether fault should be considered.<sup>59</sup> New Jersey's equitable distribution statute, for example, does not address the question of fault.<sup>60</sup> In the landmark case of *Chalmers v. Chalmers*<sup>61</sup> the New Jersey Supreme Court held that marital fault could not be considered in equitable distribution.<sup>62</sup> The court based its decision on the difficulty of assessing fault, noting that "fault may be merely a manifestation of a sick marriage."<sup>63</sup> In addition, the court found the concept of fault irrelevant in equitable distribution "since all that is being effected is the allocation to each party of what really belongs to him or her."<sup>64</sup>

The *Hinton* court's holding appears to reflect properly the policies underlying equitable distribution. If the purpose of equitable distribution is to effect the dissolution of an economic partnership, marital fault is irrelevant. Misconduct that leads to divorce may not be related to the economic contributions of the parties or to their financial needs after divorce.<sup>65</sup>

If the court does consider marital fault, it faces the difficult task of determining which spouse's conduct precipitated the collapse of the marriage.<sup>66</sup> Some courts have taken the position that fault is relevant, but when both spouses are equally at fault, the parties' misconduct will be disregarded.<sup>67</sup> This position affords a partial solution to the problem of assessing fault. On the other hand, courts may not wish to inquire into marital fault at all to avoid the

melancholy history of feigned grounds, strident name-calling and finger-pointing and mutually destructive charges of crime and misconduct which have turned our courts all too often into battle grounds in which reputations are destroyed along with marriages, and children are made spectators to mutual character-assassination by their parents.<sup>68</sup>

Refusal to consider fault on dissolution, however, may have drawbacks. The court in *Hinton* pointed out that the trial court might reach the same result

59. Representative state decisions include: *Cooper v. Cooper*, 382 So. 2d 569 (Ala. Civ. App. 1980) (fault relevant despite availability of no-fault divorce); *Peters v. Peters*, 248 Ga. 490, 283 S.E.2d 454 (1981) (adultery relevant but will not preclude equitable distribution); *In re Marriage of Williams*, 199 N.W.2d 339 (Iowa 1972) (fault irrelevant under catch-all provision); *LaRue v. LaRue*, 216 Kan. 242, 531 P.2d 84 (1975) (fault relevant); *Davey v. Davey*, 106 Mich. App. 579, 308 N.W.2d 468 (1981) (fault relevant despite availability of no-fault divorce); *Simmons v. Simmons*, 275 S.C. 41, 267 S.E.2d 427 (1980) (adultery relevant but will not preclude equitable distribution); *Thorpe v. Thorpe*, 108 Wis. 2d 189, 321 N.W.2d 237 (1982) (fault not proper consideration under catch-all factor of equitable distribution statute).

60. See N.J. STAT. ANN. § 2A:34-23 (West Supp. 1985).

61. 65 N.J. 186, 320 A.2d 478 (1974).

62. *Id.* at 193, 320 A.2d at 482.

63. *Id.*

64. *Id.* at 194, 320 A.2d at 483.

65. Sharp, *Divorce*, *supra* note 39, at 825 n.30.

66. See *supra* notes 22, 54 & 63 and accompanying text.

67. See *Nolen v. Nolen*, 398 So. 2d 712, 717 (Ala. Civ. App. 1981); *Hultberg v. Hultberg*, 259 N.W.2d 41, 45 (N.D.), *appeal after remand*, 281 N.W.2d 569 (N.D. 1977).

68. *Hultberg v. Hultberg*, 259 N.W.2d 41, 46-47 (N.D.), *appeal after remand*, 281 N.W.2d 569 (N.D. 1977) (Vogel, J., dissenting). Justice Vogel pointed out that the purpose of no-fault divorce was to end this "melancholy history," but that the purpose is not achieved if fault enters as a consideration in property division. *Id.* at 47 (Vogel, J., dissenting).

on remand, but must support it with nonfault-related findings.<sup>69</sup> Given that their orders will not be easily disturbed on appeal,<sup>70</sup> trial courts may continue to be influenced by fault without expressing it as a factor in their findings. This risk probably will be short lived, however, because over time courts are likely to move away from a fault-oriented approach. Courts historically have considered fault in all aspects of divorce,<sup>71</sup> although recently the trend has been away from fault considerations.<sup>72</sup> As courts confront more cases under the new laws and become accustomed to making decisions without reference to fault, fault surely will cease to be even an unconscious consideration. In addition, when alimony is not an issue, fault-related evidence will be irrelevant and thus can be excluded entirely.

A general rule against consideration of fault is consistent with the policies behind equitable distribution. Such a rule allows courts to focus on the economic situations of the parties rather than on the marital dispute itself. There are circumstances, however, under which it would be inequitable not to consider certain types of fault. In particular, fault may be relevant when one spouse has dissipated joint assets, when one spouse has engaged in misconduct that decreases the earning capacity of the other spouse, and when marital fault is especially egregious.

Although marital fault usually does not involve the economic contributions of the parties, sometimes the fault of one spouse consists of dissipation of marital assets.<sup>73</sup> Even if fault generally is not a relevant factor, economic fault should be considered in equitable distribution. For example, in *In re Marriage of Clark*,<sup>74</sup> the Washington Court of Appeals held that the husband's dissipation of much of his earnings through drinking could be taken into account in distributing the couple's property.

Misconduct by one spouse that affects the earning capacity of the other spouse should be entitled to similar treatment. In *Hinton* the majority refused to consider that the husband's abuse of his wife affected her ability to work, but Judge Becton, in his dissent, found this fact relevant.<sup>75</sup> There clearly is a distinction between misconduct that leads to the dissolution of a marriage and mis-

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69. *Hinton*, 70 N.C. App. at 672, 321 S.E.2d at 165.

70. *Alexander v. Alexander*, 68 N.C. App. 548, 315 S.E.2d 772 (1984).

71. *See supra* notes 39-46 and accompanying text.

72. *See supra* notes 1-5, 39-46 and accompanying text.

73. The *Blickstein* court stated that such economic fault is a relevant consideration. *Blickstein*, 99 A.D.2d at 293, 472 N.Y.S.2d at 114.

74. 13 Wash. App. 805, 538 P.2d 145 (1975). *See also* *Harrigan v. Harrigan*, 135 Vt. 249, 251, 373 A.2d 550, 552 (1977) (relevant that husband dissipated wife's inheritance).

75. Fault may not have been the appropriate issue on which to resolve *Hinton*. The court of appeals probably was anxious to resolve the issue of fault in the equitable distribution context and thus saw fault as an issue in *Hinton* when it really was not. Mrs. Hinton suffered from a detached retina and scarring of the tissue in her left eye, which affected her ability to work. *Hinton*, 70 N.C. App. at 670-71, 321 S.E.2d at 164. Thus, Judge Becton in his dissent interpreted the trial court's determination as based on the wife's impaired employability and not on fault. *Id.* at 673, 321 S.E.2d at 166 (Becton, J., dissenting). Judge Becton agreed with the majority that fault should not be considered in equitable distribution, but stated that the fact that one spouse has diminished the career potential of the other is a relevant consideration. *Id.* He pointed out that the statute specifically directs courts to consider the parties' relative economic positions, their physical and mental

conduct that leaves a spouse disabled and unemployable. For instance, in an Oregon case, the court found the fact that the husband had fractured his wife's ankle relevant to the issue of her employability, but found that she was able to work.<sup>76</sup> Misconduct causing a physical disability that affects one spouse's ability to work should be a proper consideration in equitable distribution and should be distinguished from misconduct causing only the deterioration of the marriage.

Finally, in some cases the fault of one spouse may be so egregious that to ignore it would be inequitable. For example, in *D'Arc v. D'Arc*<sup>77</sup> a husband had offered someone \$50,000 to kill his wife, a wealthy heiress. In this case the court relaxed the New Jersey rule against consideration of fault in equitable distribution<sup>78</sup> to permit consideration of the husband's fault. The court noted that this was not the usual type of fault, but an attempt to commit a heinous crime and stated, "[W]here a spouse has committed an act that is so evil and outrageous that it must shock the conscience of everyone, it is inconceivable that this court should not consider his conduct when distributing the marital assets equitably."<sup>79</sup>

The adoption of equitable distribution represented a significant change in North Carolina family law. To implement the policies of the equitable distribution statute fully, marital fault clearly cannot be considered in dividing a couple's property on divorce. Equitable distribution is based on a view of marriage as an economic partnership. The parties are entitled to recover what they contributed to the marriage. In addition, the economic future of each spouse is relevant. Fault, however, is not relevant to the dissolution of an economic partnership or to predicting the future needs of the parties. The decision of the North Carolina Court of Appeals in *Hinton* not to consider fault under North Carolina's equitable distribution statute thus is both appropriate and consistent with the purpose of the statute.

If the North Carolina Supreme Court is confronted with this issue, it should reach the same result as the court of appeals, but should provide excep-

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health, and any effort by one spouse to develop the career potential of the other spouse. *Id.* at 673, 321 S.E.2d at 165 (Becton, J., dissenting).

Any controversy over whether *Hinton* was the appropriate forum for deciding the role of fault in equitable distribution has since been rendered moot. The court of appeals recently reaffirmed its *Hinton* decision in a case presenting the issue more clearly. In *Smith v. Smith*, 71 N.C. App. 242, 322 S.E.2d 393 (1984), the wife had engaged in various forms of misconduct, including abandoning her husband and children and drinking alcohol excessively. *Id.* at 245-46, 322 S.E.2d at 396. The court reiterated its holding in *Hinton*: fault is not an appropriate consideration in determining an equitable distribution of property. *Id.* at 249, 322 S.E.2d at 395; see also *Dusenberry v. Dusenberry*, 73 N.C. App. 177, 326 S.E.2d 65 (inappropriate to consider fault consisting of wife's adultery), *disc. rev. granted*, 313 N.C. 598, 330 S.E.2d 608 (1985); *Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260 (evidence of misconduct properly excluded), *disc. rev. denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).

76. *In re Marriage of Koch*, 58 Or. App. 252, 255, 648 P.2d 406, 408 (1982). *But cf.* *Myers v. Myers*, 586 S.W.2d 797, 798 (Mo. Ct. App. 1979) (fault is relevant, but husband's misconduct in striking wife was too minor to affect property distribution).

77. 164 N.J. Super. 226, 395 A.2d 1270 (1978), *modified on other grounds*, 175 N.J. Super. 598, 421 A.2d 602 (1980), *cert. denied*, 451 U.S. 971 (1981).

78. *Id.* at 241, 395 A.2d at 1278; see *supra* text accompanying notes 61-64.

79. *D'Arc*, 164 N.J. Super. at 241, 395 A.2d at 1278. The court in *Blickstein* used similar language in stating that certain types of misconduct might be relevant. See *supra* text accompanying note 55.

tions to the general rule against consideration of fault in equitable distribution. A spouse's misconduct that depletes the parties' joint assets should be considered. It would be inequitable to allow one spouse to waste the couple's assets and then to share equally in the property on divorce. In addition, courts should consider any physical disability affecting a spouse's earning capacity, regardless of whether the disability was caused by the misconduct of the other spouse. Finally, some types of misconduct are so egregious that a court would find it difficult to ignore them, even if it were so inclined. Egregious fault thus should be considered by courts making equitable distributions of marital property.

Although the court of appeals did not address these specific issues, the broad policy expressed in *Hinton* is sound. The North Carolina Court of Appeals helped fulfill the purpose of equitable distribution in holding that fault should not enter into the court's division of marital property under section 50-20. The courts now will be free to implement the true purposes of the statute—equitable distribution of marital property based on the parties' contributions and needs.

LESLIE CALKINS O'TOOLE