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Death and the Partnership Principle: Interpreting Recent Abatement Amendments to North Carolina's Equitable Distribution Act

North Carolina equitable distribution laws reflect public policy that strongly favors the partnership principle of marriage.¹ Consistent with this important principle, the North Carolina General Assembly has sought to encourage couples seeking divorce to play active roles in reaching equitable property settlements outside the courtroom.² The North Carolina General Assembly, through numerous revisions of the Equitable Distribution Act ("Act"),³ has tried to preserve the

1. The partnership principle presumes that both spouses contribute equally to the marital unit and are thus entitled to an equal share of marital property upon dissolution of the marriage. Sally Burnett Sharp, *The Partnership Ideal: The Development of Equitable Distribution in North Carolina*, 65 N.C. L. REV. 195, 198-99 (1987). For further discussion of this concept, see generally Susan Westerberg Prager, *Sharing Principles and the Future of Marital Property Law*, 25 UCLA L. REV. 1 (1977) (claiming that sharing principles function in marriages and marriage-like relationships, and therefore states should recognize these common expectations of sharing at the dissolution of the marriage). See, e.g., Act of Aug. 10, 2001, ch. 364, § 1, 2001 N.C. Sess. Laws 146, 146 (to be codified at N.C. GEN. STAT. § 50-20(c)) (making an equal division of property upon the dissolution of marriage mandatory unless "an equal division is not equitable," and then requiring an equitable distribution); *White v. White*, 312 N.C. 770, 775, 324 S.E.2d 829, 832 (1985) (asserting that the process of equitable distribution "reflects the idea that marriage is a partnership enterprise to which both spouses make vital contributions"); *Khajanchi v. Khajanchi*, 140 N.C. App. 552, 556, 537 S.E.2d 845, 848 (2000) (noting that the enactment of North Carolina's equitable distribution laws was "grounded in the notion that marriage is a partnership enterprise"); *Friend-Novorska v. Novorska*, 131 N.C. App. 508, 510, 507 S.E.2d 900, 902 (1998) (citing the language in *White*, 312 N.C. at 775, 324 S.E.2d at 832); see also Sally Burnett Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C. L. REV. 247, 247 (1983) (noting that equitable distribution affords special recognition to "the invaluable role played by a homemaker spouse").

2. Section 50-20(d) permits a couple, during or after marriage, to contract for an equitable distribution of property. N.C. GEN. STAT. § 50-20(d) (1999). North Carolina favors these private property settlements because they are assumed to be a satisfactory arrangement reached by parties on equal footing. See *Hagler v. Hagler*, 319 N.C. 287, 290, 354 S.E.2d 228, 232 (1987); *Hill v. Hill*, 94 N.C. App. 474, 480-81, 380 S.E.2d 540, 545 (1989); *Knight v. Knight*, 76 N.C. App. 395, 398, 333 S.E.2d 331, 333 (1985). But see Sally Burnett Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1406 (1984) (arguing that spouses may not have equal bargaining power in these kinds of contracts because they are negotiated under highly stressful conditions and the context of the "dissolution of marriage . . . deviates substantially from the competitive, arm's length bargaining between strangers in which standard bargaining principles were designed to operate").

3. See Act of July 3, 1981, ch. 815, 1981 N.C. Sess. Laws 1184 (current version at ch. 364, §§ 1, 2, 2001 N.C. Sess. Laws 146, 146) (to be codified at N.C. GEN. STAT. §§ 50-20 to -21). Sections 50-20 and 50-21 deal with property distribution upon divorce and are

integrity of the partnership theory. In further support of the principle that marriage is an economic partnership, the General Assembly enacted “An Act to Clarify That an Action for Equitable Distribution Does Not Abate Upon the Death of a Party”⁴ on August 10, 2001. These statutory amendments specify that when a married couple separates and files an action for equitable distribution of marital and divisible property, and then one spouse dies prior to the entry of an equitable distribution order, the decedent’s death does not abate the pending equitable distribution action.⁵ But the amendments do not specify whether a surviving spouse or decedent spouse’s estate may *initiate* an equitable distribution action subsequent to the parties’ separation and the decedent’s death.⁶

Because a party’s death does not presumptively dismiss a cause of action,⁷ the General Assembly’s failure to comment on such posthumous equitable distribution actions could promote decisions that run counter to the partnership principle and discourage parties from attempting to settle property disputes through private agreement. Although a strict textual reading of the amendments suggests that equitable distribution claims must be filed prior to a party’s death to survive, such an interpretation ignores the important public policy underlying the partnership principle of marriage. This Recent Development argues that courts should interpret the new abatement amendments to recognize that the death of a spouse following separation, but before the filing of an equitable distribution claim, does not destroy the right of either the surviving spouse or the decedent spouse’s estate to seek an equitable distribution of property. Statutory language, precedent, and sound public policy support such an interpretation.

commonly referred to as the “Equitable Distribution Act.” See Sally Burnett Sharp, *Step by Step: The Development of the Distributive Consequences of Divorce in North Carolina*, 76 N.C. L. REV. 2017, 2019 n.2 (1998) [hereinafter Sharp, *Distributive Consequences*].

4. Act of Aug. 10, 2001, ch. 364, 2001 N.C. Sess. Laws 146, 146–49 (to be codified at N.C. GEN. STAT. §§ 50-20, -21, 30-3.2, -3.3, 29-14). Sections 30-3.2 and 30-3.3 deal with a surviving spouse’s right to claim an elective share, and section 29-14 governs intestate succession.

5. Act of Aug. 10, 2001, ch. 364, § 2, 2001 N.C. Sess. Laws 146, 146 (to be codified at N.C. GEN. STAT. § 50-20).

6. See *id.*

7. See N.C. GEN. STAT. § 1A-1, Rule 25(a) (1999) (“No action abates by reason of the death of a party if the cause of action survives.”); § 28A-18-1(b)(3) (1999) (stating that a cause of action in favor of a decedent does not survive “where the relief sought could not be enjoyed, or granting it would be nugatory after death”).

The General Assembly passed the Equitable Distribution Act⁸ in 1981 to combat the inequities present in the “common-law title” system of property division.⁹ Since its enactment, the Act has been subject to critical amendments that more clearly reflect these fairness principles.¹⁰ Originally, the Act provided that a judgment for equitable distribution could not be entered before the entry of a divorce decree.¹¹ Between 1981 and 1992, the General Assembly amended the Act three times to add exceptions to this rule.¹² It amended another provision in 1987 to change the time when equitable distribution rights vest from the time of filing for divorce to the time of separation.¹³ This amendment supports the inference that the General Assembly intended to allow equitable distribution actions to proceed independent of the outcome of divorce actions.¹⁴ Yet some courts continued to hold that an equitable distribution judgment must follow a divorce decree.¹⁵ Then in 1995, the General

8. §§ 50-20, -21.

9. 2 SUZANNE REYNOLDS & KENNETH M. CRAIG, NORTH CAROLINA FAMILY LAW § 169.3, at 4 (4th ed. Special Supp. on Equitable Distribution 2000). *See generally id.* § 169.3, at 1–8 (explaining the common law system and citing several cases acknowledged as driving forces in the development of the Equitable Distribution Act); Sharp, *supra* note 1, at 195–201 (discussing how the introduction of no-fault divorce also helped pressure the legislature into passing the Equitable Distribution Act and expounding on the partnership ideal behind the Act). When a party seeks an equitable distribution of marital property, the Act requires the court to determine a distribution that reflects each party’s contribution to the family, which can take the form of earned income or homemaking services. Hagler v. Hagler, 319 N.C. 287, 289, 354 S.E.2d 228, 232 (1987). For a description of what constitutes marital property, see N.C. GEN. STAT. § 50-20(b) (1999).

10. Sharp, *Distributive Consequences*, *supra* note 3, at 2024. This Recent Development focuses on the amendments that affect the procedure for filing an equitable distribution action and the termination of that right.

11. N.C. GEN. STAT. § 50-21(a) (1981) (current version at ch. 364, § 1, 2001 N.C. Sess. Laws 146, 146) (to be codified at § 50-21(a)) [hereinafter Equitable Distribution Procedures Provision]; *see, e.g.*, Brown v. Brown, 136 N.C. App. 331, 332–33, 524 S.E.2d 89, 91 (2000), *rev’d*, 353 N.C. 220, 539 S.E.2d 621 (2000).

12. For a comparison of the original and amended Equitable Distribution Procedures Provision, see sections 50-21 (1989), 50-21 (1991), 50-21 (1992), and 50-21 (1995); *see also Brown*, 136 N.C. App. at 333, 524 S.E.2d at 91 (comparing the various versions of the provision).

13. N.C. GEN. STAT. § 50-20(k) (1987) (current version at § 50-20(k) (1999)); *see Brown*, 136 N.C. App. at 333, 524 S.E.2d at 91 (discussing the amendment to § 50-20(k)); 2 REYNOLDS & CRAIG, *supra* note 9, § 169.6, at 25.

14. *See Brown*, 136 N.C. App. at 333, 524 S.E.2d at 91.

15. *See, e.g.*, Trogdon v. Trogdon, 97 N.C. App. 330, 330, 388 S.E.2d 212, 212 (1990) (holding that an equitable distribution order cannot be obtained when death abates a divorce action); Caldwell v. Caldwell, 93 N.C. App. 740, 742, 379 S.E.2d 271, 272 (1989) (explaining that the action for divorce and equitable distribution abated when the plaintiff died).

Assembly deleted entirely the text that referred to the “equitable distribution after divorce” rule and its exceptions.¹⁶

Despite these amendments, some courts remained uncertain as to whether the General Assembly intended to allow an equitable distribution action to ensue independent of any divorce proceeding.¹⁷ Because a party’s death clearly abates a divorce action,¹⁸ this confusion became especially significant in cases where a party died after separation but prior to the entry of an equitable distribution judgment or a divorce decree. Confronted with this ambiguity, the North Carolina Supreme Court decided *Brown v. Brown*.¹⁹

In *Brown*, the administrator of a wife’s estate asked to proceed as the plaintiff in the wife’s equitable distribution action.²⁰ Reversing the court of appeals, the court held that “when death ends all chance for divorce, any equitable distribution action then pending must abate.”²¹ That is, an equitable distribution action could only proceed

16. N.C. GEN. STAT. § 50-21(a) (1995), *repealed by* Act of June 14, 1995, ch. 245, 1995 N.C. Sess. Laws 510 (current version at ch. 364, § 1, 2001 N.C. Sess. Laws 146, 146) (to be codified at N.C. GEN. STAT. § 50-21(a)). In 1992, section 50-21(a) authorized a court to enter an equitable distribution judgment prior to the entry of a divorce decree only through a consent judgment, when an incompetent spouse was involved, or when the parties had been separated for six months and agreed in writing to an equitable distribution of property as determined by the court. § 50-21(a) (1992), *amended by* Act of Oct. 1, 1993, ch. 209, 1993 Sess. Laws 389 (current version at ch. 364, § 1, 2001 N.C. Sess. Laws 146, 146) (to be codified at N.C. GEN. STAT. § 50-21(a)). After the 1995 amendment, the section read: “At any time after a husband and wife begin to live separate and apart from each other, a claim for equitable distribution may be filed, either as a separate civil action, or together with any other action brought pursuant to Chapter 50” § 50-21 (1995), *amended by* Act of Aug. 10, 2001, ch. 364, § 1, 2001 N.C. Sess. Laws 146, 146 (to be codified at N.C. GEN. STAT. § 50-21(a)); *see also Brown*, 136 N.C. App. at 333, 524 S.E.2d at 91 (discussing the legislative history of the Equitable Distribution Procedures Provision).

17. *Compare Brown*, 136 N.C. App. at 334, 524 S.E.2d at 92 (determining that the parties’ right to equitable distribution at separation cannot be divested, whether or not the parties divorce) *with Brown v. Brown*, 353 N.C. 220, 227, 539 S.E.2d 621, 625 (2000) (concluding that an equitable distribution right is linked to divorce proceedings despite amendments to the Equitable Distribution Procedures Provision).

18. *See, e.g., Elmore v. Elmore*, 67 N.C. App. 661, 664, 313 S.E.2d 904, 906–07 (1984) (noting that because an action for divorce is based on the status of the marriage, a court cannot enter a divorce decree where the marriage is dissolved by death).

19. 353 N.C. 220, 539 S.E.2d 621 (2000).

20. *Id.* at 222, 539 S.E.2d at 622. The wife had died shortly after filing her complaint but before the court had entered an equitable distribution judgment or divorce decree. *Id.*

21. *Id.* at 224, 539 S.E.2d at 624. The court examined the title of the 1995 amendment to the Equitable Distribution Procedures Provision: “An Act to Allow Claims for Equitable Distribution to Be Resolved Either Before or After an Absolute Divorce Is Granted” Act of June 14, 1995, ch. 245, 1995 N.C. Sess. Laws 510. The court then concluded that the amendment did not remove the link between equitable distribution and divorce, but merely authorized an equitable distribution action to occur prior to the entry

if the possibility of obtaining a divorce decree existed.²² This conclusion leads to a striking inconsistency. A couple that separates but decides not to divorce can still receive an equitable property distribution because the “possibility” of divorce continues to exist. But if death removes a couple’s ability to obtain a divorce, both the decedent’s heirs and the survivor lose their rights to equitable distribution regardless of whether both parties intended to divorce.

Thus, under the *Brown* holding, a surviving spouse would be eligible to inherit a deceased spouse’s property only because the parties technically remained married. In such situations, the surviving spouse could take property under one of four methods: testate succession,²³ intestate succession,²⁴ elective share,²⁵ or life interest election.²⁶ Providing for property distribution through any one of

of a divorce decree. *Brown*, 353 N.C. at 223, 225, 539 S.E.2d at 623, 625. The court did not address prior cases that held that the death of a party did not abate an action for the adjudication of property rights. See, e.g., *Elmore*, 67 N.C. App. at 667, 313 S.E.2d at 908 (holding that a divorce action must abate upon the plaintiff’s death because he “did not seek an adjudication of property rights”); see also 1 ROBERT E. LEE, NORTH CAROLINA FAMILY LAW § 48, at 253 (4th ed. 1979) (noting that a party’s death only terminates an action for divorce but does not necessarily prevent that portion of the action that seeks an adjudication of property rights). The *Brown* court cited *Elmore*, but only referred to its general holding that the death of a party abates a divorce action. *Brown*, 353 N.C. at 222, 539 S.E.2d at 622–23.

22. *Brown*, 353 N.C. at 223, 539 S.E.2d at 623.

23. Under this method, the surviving spouse inherits according to the terms of the decedent’s will. See generally N.C. GEN. STAT. ch. 31 (1999 & Supp. 2000) (detailing the requirements for a valid will).

24. See Act of Aug. 10, 2001, ch. 364, § 6, 2001 N.C. Sess. Laws 146, 149 (to be codified at N.C. GEN. STAT. § 29-14) (discussing the distribution of property upon intestacy). The surviving spouse’s share in the property of an intestate spouse depends on the value of the property and whether lineal descendants or a parent also survived the decedent. *Id.*

25. See N.C. GEN. STAT. §§ 30-3.1, -3.4 (1999); ch. 364, §§ 4, 5, 2001 N.C. Sess. Laws 146, 146–48 (to be codified at §§ 30-3.2, -3.3) (defining formulas and procedures for determining an elective share). As in intestate succession, the surviving spouse’s share depends in part on the number of the decedent’s lineal descendants and is based on a percentage of the decedent spouse’s net estate (probate assets). *Id.* Elective share is a surviving spouse’s right to dissent from a deceased spouse’s will and instead take a statutorily determined percentage of the assets of the estate. Tracy Dawn Cobb, Comment, *North Carolina’s New Elective Share Statute: Much Ado About Nothing?*, 36 WAKE FOREST L. REV. 795, 798 (2001). Elective share is intended to protect a surviving spouse against disinheritance. *Id.* at 798–99. For further discussion of North Carolina’s elective share statutes, see generally Cobb, *supra*.

26. See N.C. GEN. STAT. § 29-30 (1999) (providing that a surviving spouse may elect to take a life estate in certain real and personal property of the decedent spouse in lieu of an elective share or intestate share). This right is also known as statutory dower because it closely resembles common law dower.

these methods when the parties have already separated may yield results that run contrary to the partnership model of marriage.²⁷

On one hand, the surviving spouse may be undercompensated when he or she takes under one of the above-mentioned methods. For example, even if the decedent spouse died testate, the decedent may have removed the surviving spouse from the will in contemplation of divorce.²⁸ The only means then left for the surviving spouse to receive property are the statutory rights to take an elective share or to take a life interest election. Neither of these systems effectively treats the surviving spouse as an equal partner.²⁹ For example, these statutes fail to consider the mismanagement of marital assets during marriage or a period of separation.³⁰ The Equitable Distribution Act, however, does allow a court to consider any party's waste, neglect, or conversion of marital property during separation,³¹ as well as "other factor[s]"³² the court considers to be proper, which may include the mismanagement of marital property during the marriage.³³

27. See K. Edward Greene, *A Spouse's Right to Control Assets During Marriage: Is North Carolina Living in the Middle Ages?*, 18 CAMPBELL L. REV. 203, 211-12 (1996) (explaining that a surviving spouse may receive an inequitable property distribution if the decedent spouse transferred substantial property through inter vivos conveyances). Note that the testate and intestate statutes embody the partnership principle in so far as they seek to prevent a spouse from disinheriting the surviving spouse. *Id.* at 211. For more support of the assertion that North Carolina's equitable distribution laws embody the partnership principle, see *supra* note 1.

28. See, e.g., *Evans v. Evans*, 514 S.E.2d 74, 75 (Ga. Ct. App. 1999) (noting that a decedent spouse had filed for divorce and excluded surviving spouse from his will); *In re Estate of Zimmerman*, 561 N.W.2d 642, 643 (N.D. 1997) (quoting decedent spouse's will as stating, "I am presently married and separated, contemplating divorce. I hereby leave my wife the legal minimum required by law," and holding that the surviving spouse's elective share must be considered to determine what she may receive under the will).

29. See § 29-30; §§ 30-3.1, -3.4; ch. 364, §§ 4, 5, 2001 N.C. Sess. Laws 146, 147-49 (to be codified at §§ 30-3.2, -3.3). Though these systems were enacted with the intention of furthering the partnership principle, their end results may fail to effectuate that policy. Cobb, *supra* note 25, at 799-800. For instance, a surviving spouse may be disinherited by the non-probate lifetime transfers loophole, or may take a windfall. *Id.* at 801, 805. For example, a surviving wife might receive few assets if her decedent husband chose another individual as the beneficiary of his life insurance policy, a non-probate asset. Also, if a surviving spouse is a successive spouse, it is possible that he or she may only take one-half of what he or she would have taken if the decedent had died intestate. *Id.* at 806-07.

30. Greene, *supra* note 27, at 211.

31. Act of Aug. 10, 2001, ch. 364, § 3, 2001 N.C. Sess. Laws 146, 146-47 (to be codified at N.C. GEN. STAT. § 50-20(c)(11a)).

32. N.C. GEN. STAT. § 50-20(c)(12) (1999).

33. See, e.g., *DiOrio v. DiOrio*, 751 A.2d 747, 750 (R.I. 2000) (finding it reasonable for the trial judge to consider the husband's refusal to rent out a vacation home with the potential for high rental income in determining equitable distribution). The surviving spouse also may be barred from acquiring any rights to a distribution of property if the

On the other hand, the surviving spouse may receive a windfall, either through inheritance by a will that devises all property to the surviving spouse, by succeeding to property held as tenants by the entirety,³⁴ or through a life interest election when the decedent's estate contains a large amount of real property.³⁵ In all likelihood, under the *Brown* holding, either the surviving spouse or the decedent spouse's heirs or devisees would receive a distribution of property that does not reflect North Carolina's partnership-based theory of marriage.³⁶ Faced with this inconsistency, the General Assembly took action.

The Act of August 10, 2001,³⁷ revised five different statutes with six amendments. An amendment to section 50-21(a)³⁸ severs equitable distribution claims from divorce proceedings and permits an equitable distribution claim to "be filed *and adjudicated*" following a separation.³⁹ The most important amendment adds a new statutory section that states, "[a] pending action for equitable distribution shall

spouse engaged in certain acts. See N.C. GEN. STAT. § 31A-1 (Supp. 2000). Under this statute, a surviving spouse loses the rights of intestate succession, elective share, and life interest election (among others) if the spouse commits adultery or abandons the decedent spouse. *Id.*

34. When divorce destroys a tenancy by the entirety, the former spouses become tenants in common. See, e.g., *Sawyer v. Sawyer*, 54 N.C. App. 141, 143, 282 S.E.2d 527, 528 (1981) (describing how death and divorce affect tenancies by the entirety). But if death destroys the tenancy instead, the surviving spouse continues to own the property in full. See, e.g., *id.*

35. A surviving spouse probably would not take a life interest election unless the decedent spouse was "seised" of a large amount of real estate because the statute generally provides for a life estate "in one third in value of all the [decedent's] real estate." N.C. GEN. STAT. § 29-30(a) (1999).

36. See, e.g., *Evans v. Evans*, 514 S.E.2d 74, 75 (Ga. Ct. App. 1999) (excluding the surviving spouse from the decedent spouse's will following separation); *Fazekas v. Fazekas*, 737 A.2d 1262, 1265 (Pa. Super. Ct. 1999) (holding that a wife was entitled to all the funds held in an escrow account as a tenant by the entirety, when her husband died following separation but before the entry of a divorce). But note that property settlements are binding and survive a party's death. See, e.g., *Riley v. Riley*, 86 N.C. App. 636, 638, 359 S.E.2d 252, 253 (1987) (holding that a husband's death before his divorce was finalized did not nullify a property agreement he made with his wife). "[P]roperty acquired by the single enterprise of the marital unit, to which both spouses often are presumed to contribute equally, should be equally shared when the unit is dissolved . . ." Sharp, *supra* note 1, at 199; see also *Smith v. Smith*, 314 N.C. 80, 86, 331 S.E.2d 682, 686 (1985) (explaining that the "heart of the theory" of the partnership principle is the idea that both spouses equally contribute to "the economic circumstances of a marriage") (citations omitted).

37. Act of Aug. 10, 2001, ch. 364, 2001 N.C. Sess. Laws 146, 146-49 (to be codified at N.C. GEN. STAT. §§ 50-20 to -21, 30-3.2 to -3.3, 29-14).

38. § 50-21(a), amended by Act of Aug. 10, 2001, ch. 364, § 1, 2001 N.C. Sess. Laws 146, 146 (to be codified at § 50-21(a)).

39. Act of Aug. 10, 2001, ch. 364, § 1, 2001 N.C. Sess. Laws 146, 146 (emphasis added).

not abate upon the death of a party."⁴⁰ These amendments are intended to limit the risk of undercompensating either party.

The remaining amendments seek to prevent the possibility of overcompensation when a surviving spouse acquires both an equitable distribution of property and a share of the decedent's estate through operation of intestate or testate succession.⁴¹ The General Assembly eliminated the possibility of such a predicament by amending the Equitable Distribution Act and several of the provisions governing intestate succession and elective share rights. First, by adding a factor under section 50-20(c),⁴² the General Assembly now requires courts to consider any property passing to the surviving spouse through a will, intestacy, a tenancy by the entirety, a beneficiary designation, or an elective share in determining how to distribute property equitably.⁴³ Second, the General Assembly included property passing to a surviving spouse through the new equitable distribution laws in the formulas for determining a surviving spouse's elective share or intestate succession share.⁴⁴ Thus, the

40. An Act to Clarify That an Action for Equitable Distribution Does Not Abate Upon the Death of a Party, ch. 364, § 2, 2001 N.C. Sess. Laws 146, 146 (to be codified at N.C. GEN. STAT. § 50-20(l)). This amendment (and the source of the title of the Act) was presumably designed to clarify emphatically the confusion resulting from *Brown*. See *id.*

41. *Brown v. Brown*, 136 N.C. App. 331, 339, 524 S.E.2d 89, 94-95 (2000) (Lewis, J., dissenting) (describing this situation as a "practical dilemma"), *rev'd*, 353 N.C. 220, 539 S.E.2d 621 (2000).

42. Act of Aug. 10, 2001, ch. 364, § 3, 2001 N.C. Sess. Laws 146, 146-47 (to be codified at § 50-20(c)(11b)). Section 50-20(c) previously listed thirteen factors for courts to consider in determining an equitable distribution of property. Sharp, *supra* note 1, at 245. The amendment added that courts should consider the following:

- a. Property passing to the surviving spouse by will or through intestacy due to the death of a spouse.
- b. Property held as tenants by the entirety or as joint tenants with rights of survivorship passing to the surviving spouse due to the death of a spouse.
- c. Property passing to the surviving spouse from life insurance, individual retirement accounts, pension or profit-sharing plans, any private or governmental retirement plan or annuity of which the decedent controlled the designation of beneficiary (excluding any benefits under the federal social security system), or any other retirement accounts or contracts, due to the death of a spouse.
- d. The surviving spouse's right to claim an "elective share" pursuant to G.S. 30-3.1 through G.S. 30-33, unless otherwise waived.

Act of Aug. 10, 2001, ch. 364, § 3, 2001 N.C. Sess. Laws 146, 146 (to be codified at § 50-20(c)(11b)).

43. See Act of Aug. 10, 2001, ch. 364, § 3, 2001 N.C. Sess. Laws 146, 146-47 (to be codified at § 50-20(c)(11b)).

44. See Act of Aug. 10, 2001, ch. 364, §§ 4-6, 2001 N.C. Sess. Laws 146, 147-49 (to be codified at N.C. GEN. STAT. §§ 30-3.2(d), 30-3.3(a), 29-14(c)). The amendments to sections 30-3.2(d) and 30-3.3(a) instruct that the value of the marital estate that passes to the surviving spouse through equitable distribution shall be included under "Property Passing to Surviving Spouse," and that the property that will pass must be included under

amendments to the Equitable Distribution Act and to the intestacy and surviving spouse statutes aim to preclude the overcompensation of a surviving spouse entitled to a division of property both through equitable distribution and through inheritance laws.

These legislative enactments evince an intent to promote the partnership principle by allowing an equitable distribution action to proceed when a party dies prior to the entry of an equitable distribution order. The courts should interpret the amendments to preserve the right of a surviving spouse or decedent spouse's estate to *initiate* an equitable distribution action when the death occurred between separation and the filing of an equitable distribution action. Reviewing North Carolina's general abatement statutes together with the language of the amendments in light of public policy favoring the partnership principle demonstrates that such an interpretation is consistent with the General Assembly's intent.

A party's death only abates an action when the death removes the cause of action.⁴⁵ If the cause of action survives, then the court may substitute the decedent's personal representative for the decedent and allow the action to continue.⁴⁶ Therefore, with the amendment to section 50-20,⁴⁷ the General Assembly arguably asserted that a cause of action survives when a party dies before a pending equitable distribution action can be resolved. Although the Act states that it intends to "clarify" that death does not abate a previously initiated equitable distribution action, it is silent with

the decedent's "Total Net Assets" for elective share purposes. *Id.* §§ 4-5. The amendment to section 29-14(c) instructs that the share of the surviving spouse determined under intestate succession laws "shall be first determined as though no property had been awarded to the surviving spouse pursuant to [the Equitable Distribution Procedures Provision] subsequent to the death of the decedent, and then reduced by the net value of the marital estate awarded to the surviving spouse." *Id.* at § 6. Prior to these amendments, no provision covered this situation.

45. N.C. GEN. STAT. § 1A-1, Rule 25 (1999). Note that an "action" is a judicial proceeding and is synonymous with the term "suit." BLACK'S LAW DICTIONARY 28-29 (7th ed. 1999). A "cause of action" consists of the facts that give rise to a basis for filing a suit. *Id.* at 214.

46. *See* § 1A-1, Rule 25. Note that some earlier cases held that an action did not abate when even incidental property rights were involved. *See, e.g.,* Patrick v. Patrick, 245 N.C. 195, 199, 95 S.E.2d 585, 588 (1956) (noting that a husband had a right to proceed with an action to vacate a divorce decree in order to establish property rights notwithstanding the fact that his wife had died); Poole v. Poole, 210 N.C. 536, 539, 187 S.E. 777, 779 (1936) (determining that a wife's action to vacate a divorce decree did not abate upon her husband's death because property rights were involved).

47. "A pending action for equitable distribution shall not abate upon the death of a party." Act of Aug. 10, 2001, ch. 364, § 2, 2001 N.C. Sess. Laws 146, 146 (to be codified at § 50-20(1)).

respect to whether an equitable distribution cause of action expires unless filed prior to a party's death.⁴⁸ Because the equitable distribution cause of action survives for both the surviving spouse and the decedent's estate, both parties should have an opportunity to take advantage of it.⁴⁹ This outcome would likely follow the intent of the decedent spouse who had initiated an equitable distribution action prior to her death. Similarly, even if the decedent spouse had not yet filed an equitable distribution action, his separation provides strong evidence that the decedent would prefer his other heirs or devisees to take his equitable portion of the marital property, rather than his surviving spouse. After all, if the parties in the latter situation are not permitted to file an equitable distribution action, they face the possibility of an inequitable division of property—the exact policy problem that the amendments were designed to cure.⁵⁰

In addition to examining the effect of abatement, determining the correct method for interpreting the amendments also requires a contextual evaluation of their passage.⁵¹ To be sure, the title of the Act of August 10, 2001 only refers to equitable distribution actions.⁵² But amended section 50-21(a) permits the filing of an equitable distribution action and the actual property distribution order at any time after the parties' separation.⁵³ The fact that the amendment

48. An Act to Clarify That an Action for Equitable Distribution Does Not Abate Upon the Death of a Party. Act of Aug. 10, 2001, ch. 364, 2001 N.C. Sess. Laws 146, 146.

49. The statutory scheme provides an exception to the general rule that all rights of action in favor of a decedent survive for situations when a cause of action would be nugatory after death, such as a cause of action for divorce. See N.C. GEN. STAT. § 28A-18-1(b)(3) (1999); *Elmore v. Elmore*, 67 N.C. App. 661, 664, 313 S.E.2d 904, 906 (1984) (explaining that a claim for divorce does not survive the death of a party).

50. See N.C. GEN. STAT. §§ 29-30, 30-3.1, -3.4 (1999); Act of Aug. 10, 2001, ch. 364, 2001 N.C. Sess. Laws 146, 146-49 (to be codified at N.C. GEN. STAT. §§ 29-14, 30-3.2 to -3.3); see also *supra* notes 22-35 and accompanying text (discussing inequities under the common law system).

51. See, e.g., *Brown v. Brown*, 353 N.C. 220, 223, 539 S.E.2d 621, 623 (2000) ("Courts may refer to the context of an act to infer legislative intent when the meaning of a statute is in doubt.").

52. An Act to Clarify That an Action for Equitable Distribution Does Not Abate Upon the Death of a Party. Act of Aug. 10, 2001, ch. 364, §§ 1-6, 2001 N.C. Sess. Laws 146, 146-49 (to be codified at N.C. GEN. STAT. §§ 50-20, -21, 30-3.2, -3.3, 29-14). But note that courts have concluded that the title of an act "will not be permitted to control when the meaning of the text is clear." *In re Appeal of Forsyth County*, 285 N.C. 64, 71, 203 S.E.2d 51, 55 (1974) (quoting *Dunn v. Dunn*, 199 N.C. 535, 536, 155 S.E. 165, 166 (1930)); see also *Allen v. Allen*, 76 N.C. App. 504, 506, 333 S.E.2d 530, 532 (1985) (asserting that while a statute's title may be considered, the statute's language controls when legislative intent is clearly expressed in the language).

53. Act of Aug. 10, 2001, § 1, 2001 N.C. Sess. Laws 146, 146 (to be codified at N.C. GEN. STAT. § 50-21(a)).

specifically allows for the entry of an equitable distribution judgment after separation, without any mention of the necessity for a corresponding divorce action,⁵⁴ indicates that a party's death should not prevent the filing of an equitable distribution complaint, so long as the parties separated prior to the decedent's death. This interpretation comports with the language of section 50-20(k), which emphasizes that the parties' equitable distribution rights vest at the time of the parties' *separation*.⁵⁵ But commentators have often noted that the Equitable Distribution Act created only an optional remedy for separated spouses and not "a new form of property ownership."⁵⁶ As Judge Lewis argued in dissent in *Brown*, section 50-20(k) "does not create any vested rights in particular property, but merely creates a right to equitable distribution of the property."⁵⁷ Thus, perhaps if the spouses fail to file for an equitable distribution of property in time (for example, before the death of a party), they simply lose their rights to enjoy that system of property division.

If parties lose their equitable distribution rights by not asserting them quickly enough, then the Equitable Distribution Act would seem to favor parties who immediately file equitable distribution actions over those who wait and attempt to settle property disputes through private agreements.⁵⁸ This interpretation of the Act would

54. "At any time after a husband and wife begin to live separate and apart from each other, a claim for equitable distribution may be filed and adjudicated . . ." *Id.*

55. N.C. GEN. STAT. § 50-20(k) (1999); see also 2 REYNOLDS & CRAIG, *supra* note 9, § 169.13, at 225. The authors of this supplement contend that the language of section 50-20(k) supports an argument that "the death of a spouse after separation but before the assertion of a right to an equitable distribution of property should not divest the surviving spouse's right to an equitable distribution of marital and divisible property." *Id.* The word "parties" should be substituted for the term "surviving spouse's" here as the decedent spouse's estate has the same right to equitable distribution as the surviving spouse.

56. 2 REYNOLDS & CRAIG, *supra* note 9, § 169.3, at 4. Without an equitable distribution of property, "a spouse does not, by virtue of marriage, acquire an interest in property titled in the name of the other spouse." 2 *id.*; see also *Hagler v. Hagler*, 319 N.C. 287, 290, 354 S.E.2d 228, 232 (1987) (noting that "in the absence of an equitable distribution under [section] 50-20, the state of the title of property owned by either spouse or by both spouses is unaffected").

57. *Brown v. Brown*, 136 N.C. App. 331, 338-89, 524 S.E.2d 89, 94 (2000) (Lewis, J., dissenting), *rev'd*, 353 N.C. 220, 553 S.E.2d 621 (2000).

58. A property settlement is "an agreement that adjusts the rights of the couple in real and personal property." Sally Burnett Sharp, *Divorce and the Third Party: Spousal Support, Private Agreements, and the State*, 59 N.C. L. REV. 819, 826 (1981); see also *Anderson v. Anderson*, 145 N.C. App. 453, 457, 550 S.E.2d 266, 269 (2001) (discussing how separation agreements allow a couple to determine a division of property for themselves in lieu of a court ordered equitable distribution).

A separation agreement "is a contract between spouses providing for marital support rights." Katherine Martin Allen, *Property Settlement or Separation Agreement:*

certainly encourage parties with illnesses to file an equitable distribution complaint immediately. But it runs counter to the accepted public policy notion that property settlements, a type of private agreement, "are favored in this state, as they serve the salutary purpose of enabling marital partners to come to a mutually acceptable settlement of their financial affairs."⁵⁹ In fact, the Equitable Distribution Act specifically authorizes a married couple, through a valid writing, to reach a binding property agreement deemed to be equitable by both parties.⁶⁰ So long as the parties consider the settlement to be fair, the property settlement bars the use of the Equitable Distribution Act.⁶¹ If the parties achieve a settlement, the Act is no longer necessary to ensure that either party acquires an adequate distribution of property.⁶² Instead, a property settlement allows spouses to determine a property division together,⁶³ thus upholding the principle that marriage is a partnership. Although

Perpetuating the Confusion—Buffington v. Buffington, 63 N.C. L. REV. 1166, 1169 (1984). Although a legal distinction exists between property settlements and separation agreements, many parties enter into an agreement that covers both property division and support payments and (along with the courts) refer to the entire document as a separation agreement. *Id.* at 1170. For a discussion of the problems associated with interchanging these terms, see generally Stegall v. Stegall, 100 N.C. App. 398, 402–04, 397 S.E.2d 306, 309–10 (1990) (analyzing the "construction and effect" of a separation agreement); Allen, *supra* at 1170.

59. *Hagler*, 319 N.C. at 290, 354 S.E.2d at 232; see also *Hill v. Hill*, 94 N.C. App. 474, 480–81, 380 S.E.2d 540, 545 (1989) (discussing why North Carolina courts favor property settlements); Allen, *supra* note 58, at 1173 (discussing the various principles, with which North Carolina courts comply, that reflect a policy in favor of private property settlements).

60. N.C. GEN. STAT. § 50-20(d) (1999).

61. See *id.* (stating that a valid separation agreement determined by the parties to be equitable is binding on the parties); *Blount v. Blount*, 72 N.C. App. 193, 195, 323 S.E.2d 738, 740 (1984) (asserting that an action seeking an equitable distribution of property must be dismissed when the parties' settlement agreement fully disposed of property rights); see, e.g., *Hagler*, 319 N.C. at 292, 354 S.E.2d at 233 (stating that equitable distribution is an alternative to creating a property settlement); Peter M. Jennings, Note, *Contractual Agreements As a Means of Avoiding Equitable Distribution*—Buffington v. Buffington, 21 WAKE FOREST L. REV. 213, 213 (1985) ("Parties may avoid equitable distribution with a well-drafted contract.").

62. See *Hagler*, 319 N.C. at 293, 354 S.E.2d at 233 (noting that the existence of a property settlement demonstrates that the parties intended to determine the appropriate property division for themselves).

63. Allen, *supra* note 58, at 1173. Allen argues, however, that barring equitable distribution by the court when the parties have entered into a property settlement "ignores the potential for overreaching and unfairness in marital contracts negotiated wholly outside the courtroom" and that "[a]t some point, North Carolina courts must consider whether contract remedies alone provide sufficient protection." *Id.* at 1175. But as Professor Sharp notes, the parties may prefer the freedom to prepare a property settlement that allows them to "divide property in a fashion that a court would be without power to order." Sharp, *Private Agreements*, *supra* note 58, at 826 n.38.

North Carolina courts have not yet articulated exactly when a property settlement deemed equitable by the parties is too objectively unfair to be upheld,⁶⁴ they will grant relief “if the settlement is manifestly unfair to a spouse because of the other’s overreaching.”⁶⁵

If courts interpret the recent amendments to the Equitable Distribution Act as preventing a surviving spouse or decedent spouse’s estate from initiating an equitable distribution action when the decedent spouse died, they might discourage separated couples from first attempting to resolve property disputes privately and by mutual agreement.⁶⁶ Although a party could file an equitable distribution action and then pursue a private property settlement while the action is pending, this option would waste both the parties’ and the courts’ time and money. A better solution is to interpret the recent amendments in a manner that encourages the parties to first seek a property settlement, while assuring them that an equitable distribution action will remain available as a viable alternative.⁶⁷

The General Assembly’s recent enactment to clarify that an equitable distribution action does not abate upon the death of a party is yet another attempt to eliminate inequities and promote the partnership marriage principle. But the Act’s passage leaves open the question of whether the abatement amendments also preserve the right to *initiate* an equitable distribution action following separation and the death of a party. Reasonable statutory interpretation and sound public policy dictate that courts should resolve this issue in favor of posthumous equitable distribution initiations. Such an interpretation upholds the partnership principle while still encouraging parties to seek property settlements through private agreements.⁶⁸

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64. LLOYD T. KELSO, NORTH CAROLINA DIVORCE, ALIMONY AND CHILD CUSTODY § 4-5, at 51 (4th ed. 2001).

65. *Stegall v. Stegall*, 100 N.C. App. 398, 401, 397 S.E.2d 306, 307 (1990) (quoting *Johnson v. Johnson*, 67 N.C. App. 250, 255, 313 S.E.2d 162, 165 (1984)).

66. A couple may prepare a property settlement at any time during the marriage. See N.C. GEN. STAT. § 50-20(d) (1999). But “it is a common practice for the parties to enter into an agreement determining the rights of the parties to their marital and separate property” following their breakup. Jennings, *supra* note 61, at 217.

67. This is true at least until a divorce decree is entered. If the parties have not filed for equitable distribution before a court enters a divorce decree, the parties may no longer assert that right. See N.C. GEN. STAT. § 50-11(e) (1999).

68. “[T]he greater the uncertainty in the law, the more likely it is that disputes will be litigated instead of settled.” Sharp, *Distributive Consequences*, *supra* note 3, at 2025.

