HUSBAND AND WIFE TRANSACTIONS:

TITLE, OTHER INTERESTS AND LIENS

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I. GENERAL COMMENTS

The North Carolina General Statutes, case law and Federal statutes have created certain rules governing vesting of title, conveyance of title, granting or obtaining of interests in title and attachment of liens. At times, these rules are clear. At times, they are ambiguous. When clear, we will set the rules out, occasionally illustrated by example. When ambiguous, we will set forth our best interpretation, again using examples.

II. VESTING OF TITLE

A. Tenancy by the entireties.

Spouse A and ***Spouse B*** are married to each other. ***C*** conveys the title to land to ***Spouse A*** and ***Spouse B***. A tenancy by the entirety is created unless the deed says different, such as specifically stating that a tenancy in common is created. The deed need not identify ***Spouse A*** and ***Spouse B*** as husband and wife or recite that they are married. (G.S. 39-13.6 (b). See the exception for partition deeds noted in **C.** below.)

B. Conveyances between husband and wife.

Spouse A conveys title to ***Spouse B***. Title is vested in ***Spouse B***. **Spouse *B*** need not join as a grantor. (G.S. 39-13.3(a); G.S. 39-13.3(e); G.S. 39-7(c).)

Spouse A conveys title to ***Spouse A*** and ***Spouse B*** and ***Spouse A*** did not hold title as a tenant in common with anyone. ***Spouse A*** and ***Spouse B*** hold title as tenants by the entirety. The deed could specify an estate other than a tenancy by the entirety. (G.S. 39-13.3(b); G.S.39-13.6 (b).) **Spouse *B*** need not join as a grantor. (G.S. 39-13.3(d); G.S. 39-13.3(e); G.S. 39-7(c). G.S. 39-13.3(e) says any conveyance under G.S. 39-13.3 is subject to G.S. 52-10 or G.S. 52-10.1, except that acknowledgment by the spouse of the grantor is not necessary. G.S. 52-10(a) says that contracts between husband and wife not inconsistent with public policy are valid, and any persons of full age about to be married and married persons may, with or without valuable consideration, release and quitclaim such rights which they might respectively acquire or may have acquired by marriage in the property of each other… No contract or release between husband and wife made during their coverture shall be valid to affect or change any part of the real estate of either spouse, or the accruing income thereof for a longer time than three years next ensuing the making of such contract or release, unless it is in writing and is acknowledged by both parties before a certifying officer. So, apparently G.S. 39-13.3(e) makes G.S. 52-10 applicable for all except the joinder and acknowledgment requirements in G.S. 52-10. G.S. 52-10.1 applies to separation agreements.)

Spouse A and ***Spouse B*** hold title as tenants by the entirety. ***Spouse A*** conveys title to ***Spouse B***. The tenancy by the entirety is dissolved. Complete title is vested in ***Spouse B***. (G.S. 39-13.3(c).) ***Spouse B*** need not join as a grantor. (G.S. 39-13.3(d); G.S. 39-13.3(e); G.S. 39-7(c).)

In the first and third of the above three examples, if ***Spouse B*** thereafter wants to convey or mortgage the title and ***Spouse A*** and ***Spouse B*** do not have a satisfactory separation agreement as noted in **III. E.** below, or if the deed does not contain a waiver provision as discussed in the next paragraph, ***Spouse A*** will have to join in the instrument because of G.S. 29-30's provisions. G.S. 29-30 is discussed in **II. F.** below.

In any of the deeds in the first and third of the above three examples, the deed can contain a clause similar to the following: "***Spouse A*** also waives and releases any marital rights which ***Spouse A*** now has or may hereafter acquire under [option 1: G.S. 29-30] [option 2: G.S. 29-30, G.S. 30-3.1, et. seq., G.S. 50-20 or any other applicable law]." Such a clause will eliminate the need for ***Spouse A's*** joinder in any mortgage or deed given by ***Spouse B*** in the future. G.S. 39-13.3(e) says that acknowledgment (and, presumably signature) of ***Spouse B*** is not necessary for "any *conveyance* authorized *by this section*." However, an additional *release* by ***Spouse A*** of marital rights is not a "conveyance authorized by this section." Therefore, some attorneys feel that, *for purposes of the release by* ***Spouse A***, G.S. 52-10

requires ***Spouse A*** and ***Spouse B*** to execute and acknowledge the deed. (See above for a discussion of G.S. 52-10.) However, it seems that an excellent argument can be made that since only ***Spouse A*** is executing a release, G.S. 52-10 does not apply and ***Spouse B*** need not join. (The first sentence of G.S. 52-10(a) seems to refer to a mutual release. While less certain, the second sentence also seems to refer to a mutual release. We suggest that G.S. 39-13.3(f) should be added to G.S. 39-13.3: "Any conveyance authorized by this section containing a waiver or release by only the spouse who is not the grantee of any interest or interests that the waiving or releasing spouse may now have or may hereafter have in the real property by virtue of the marriage is valid and is not subject to the provisions of G.S. 52-10 or G.S. 52-10.1.") If the deed from ***Spouse A*** to ***Spouse B*** also contains ***Spouse B's*** release of any rights ***Spouse B*** might have in ***Spouse A's*** other property, then ***Spouse B*** would have to join in the execution of the deed containing ***Spouse B's*** release and G.S. 52-10 would apply.

C. Partition of real property and creation of a tenancy by the entireties.

Spouse A and ***C*** own 20 acres of real property as tenants in common. ***Spouse A*** is not married to ***C.*** ***Spouse A*** and ***C*** want to physically partition the real property by cross-deeds. ***Spouse A*** and ***C*** convey the east 10 acres by metes and bounds description to ***Spouse A*** and ***Spouse B*** who are married to each other. ***Spouse A*** and ***C*** convey the west 10 acres by metes and bounds description to ***C***. The deed to ***Spouse A*** and ***Spouse B*** says nothing about how ***Spouse A*** and ***Spouse B*** are to hold title. The deed says nothing about a tenancy by the entirety. ***Spouse A*** and ***Spouse B*** do not hold title as tenants by the entirety. (G.S. 39-13.5(1).) This is an exception to the general rule in G.S. 39-13.6(b). (*Brown v. Brown*, 59 N.C. App. 719, 297 S.E.2d 619 (1982); cert. den., 307 N.C. 696, 301 S.E.2d 388 (1983).) The deed can create a tenancy by the entirety if it clearly says so in the granting clause. (G.S. 39-13.5(1).) Also, under *Brown v. Brown* cited above, apparently, ***Spouse B*** takes nothing by the deed if the deed to ***Spouse A*** and ***Spouse B*** does not specify that a tenancy by the entirety is created.

Instead of using cross-deeds, ***Spouse A*** and ***C*** may have to resort to a partition proceeding under Chapter 46. ***Spouse A*** and ***Spouse B*** have a right to become parties to the proceeding and state that their intent is to hold the east 10 acres as tenants by the entirety and the order shall so state. (G.S. 39-13.5(2).)

D. Tenancy in common between spouses and with others.

As noted in ***A.*** above, if a deed names ***Spouse A*** and ***Spouse B*** as tenants in common, they hold title that way and not as tenants by the entireties. (However, see partitions and *Brown v. Brown* discussed in **C**. above.)

If the deed names ***Spouse A*** and ***Spouse B*** and ***C*** as grantees, without more, ***Spouse A*** and ***Spouse B*** hold title to a one-half undivided interest as tenants by the entireties and ***C*** owns the other one-half undivided interest. ***Spouse A*** and ***Spouse B***, as to their one-half undivided interest, are tenants in common with ***C*** as to ***C's*** one-half undivided interest.

In the above example, it can be expressly provided in the deed that if ***C*** dies first, ***Spouse A*** and ***Spouse B*** have survivorship rights in ***C's*** undivided interest and if ***Spouse A*** and ***Spouse B*** die before ***C***, ***C*** has survivorship rights in ***Spouse A's*** and ***Spouse B's*** one-half undivided interest. (G.S. 41-2.)

E. Intestate succession – transfer of ownership when decedent dies on or after March 5, 1981.

1. Decedent leaves spouse plus children or lineal descendants of deceased children.

Spouse plus one child or lineal descendants of one deceased child: When an intestate is survived by a spouse and also by one child or by one or more lineal descendants of one deceased child, the spouse receives a one-half undivided interest in the real property in the estate. The child or lineal descendants of a deceased child receives the other one-half undivided interest in the real estate. (G.S. 29-14(a)(1).)

Spouse plus two or more children or lineal descendants of two or more deceased children: When an intestate is survived by a spouse and also by two or more children or the lineal descendants of two or more deceased children or a combination of one or more children and lineal descendants of a deceased child or children, then the spouse receives a one-third undivided interest in the real property. The children and/or lineal descendants of deceased children receive the other two-thirds undivided interest in the real property in the estate. (G.S. 29-14(a)(2).)

2. Decedent leaves spouse but no children or lineal descendants of deceased children.

Spouse and one or both parents: When an intestate is survived by a spouse and one or both parents, and no lineal descendants, the spouse receives an undivided one-half interest in the real estate. The parent or parents receive the other one-half undivided interest in the real estate, each parent sharing equally in the one-half undivided interest when both parents survive. (G.S. 29-14(a)(3).)

Spouse and no parents: When an intestate is survived by a spouse and no children or other lineal descendants and no parents, the spouse receives the entire net estate. (G.S. 29-14(a)(4).)

3. Decedent leaves no spouse but leaves children or lineal descendants of deceased children.

When an intestate dies leaving no spouse but leaving one or more children or one or more lineal descendants of one or more deceased children, the one or more children and/or lineal descendants of one or more deceased children receive the entire net estate. (G.S. 29-15(1),(2).) The members of each class of descendants share equally, as discussed in subsection (7) below. Parents of an intestate are entirely cut off from inheritance when any lineal descendants survive.

4. Decedent leaves no spouse or lineal descendants but leaves one or both parents.

The surviving parent or parents of a deceased inherit the entire net estate if the deceased is survived by no spouse or lineal descendants. When both parents survive, they share equally in the estate (G.S. 29-15(3).)

5. Decedent leaves no spouse, lineal descendants or parents but leaves brothers and sisters.

Brothers and/or sisters of an intestate and any lineal descendants of deceased brothers or sisters share the entire net estate if the intestate is not survived by a spouse, parents or any lineal descendants. (G.S. 29-15(4).) The members of each class of kinship share equally as discussed in **7** below. Lineal descendants of brothers or sisters not within the fifth degree of kinship to the deceased, however, do not inherit, unless no collateral relatives within the fifth degree of kinship survive. (G.S. 29-16(6); G.S. 29-7.)

6. Decedent dies leaving no spouse, children, lineal descendants, parents, brothers, sisters, or lineal descendants of brothers or sisters.

When an intestate leaves no spouse, lineal descendants, parents, brothers, or sisters or lineal descendants of deceased brothers or sisters, within the fifth degree of kinship, the maternal grandparents or, if neither survive, then their lineal descendants, receive one-half of the net estate, and the paternal grandparents, or if neither survive, then their lineal descendants, take the other one-half of the net estate. If no maternal grandparents or their lineal descendants survive, then the paternal grandparents or their lineal descendants receive the entire estate. Similarly, if no paternal grandparents or their lineal descendants survive, then the maternal grandparents or their lineal descendants take the entire net estate. (G.S. 29-15(5).)

7. Distribution among classes.

North Carolina basically follows a per capita distribution scheme under present law. In other words, when two or more persons of the same class of kinship to the intestate are to share an inheritance, they share equally. If there are members of the same class and deceased members of the same class leaving lineal

descendants, each surviving member and each deceased member leaving lineal descendants are allotted equal shares, but the share of the deceased members are distributed to the lineal descendants of all of the deceased members without regard to what share a particular deceased member would have received had he survived, as illustrated by the example in the next paragraph.

Intestate is survived by ***Child A***, ***Grandchild 1*** and ***Grandchild 2*** by deceased ***Child B*** and ***Grandchild 3*** by deceased ***Child C***. ***Child A*** would receive one-third of the net estate and the other two-thirds that would have gone to ***Child B and Child C*** had they survived, would be distributed equally among the ***Grandchild 1, Grandchild 2 and Grandchild 3.*** Any grandchildren of ***Intestate*** by ***Child A*** would be cut off from inheritance by his surviving parent, and would not be entitled to share at all. This per capita distribution scheme applies not only to lineal heirs of the intestate, but also to the brothers and sisters and the lineal descendants of deceased brothers and sisters of the intestate who are entitled to inherit. (G.S. 29-16.)

8. Adopted children.

Adopted children inherit through their adoptive parents and their adoptive parents inherit through them just as if they were the natural children of the adoptive parents. Adopted children do not inherit through their natural parents and their natural parents do not inherit through them, unless a natural parent had previously married, is married to, or shall marry an adoptive parent. (G.S. 29-17.)

9. Illegitimate children

Illegitimate children inherit through their mothers and their mothers inherit through them as if they were legitimate. As to inheritance through and by illegitimate children with respect to their fathers, the law has changed several times in recent years. Article 6 of Chapter 29 of the General Statutes should be consulted for rules of inheritance as to illegitimate children and their fathers.

10. Conceived but unborn children.

Children of an intestate born within ten lunar months of the intestate's death inherit just as if they had been born before the death. (G.S. 29-9.) Conceived but unborn children are often referred to in the law as being "in esse" or "en ventre sa mere."

11. Half-bloods.

Half-brothers and half-sisters inherit the same way that full brothers and sisters inherit. (G.S. 29-3(3).)

12. Lineal succession unlimited.

There is no limitation on the right of succession by lineal descendants of an intestate (G.S. 29-6.) "Lineal descendants" of a person means all children of such person and successive generations of children of such children. (G.S. 29-2(4).)

13. Collateral succession limited.

Collateral kin more than five degrees of kinship removed from an intestate cannot take by intestate succession unless it is necessary to prevent any property from escheating. (G.S. 29-7.) Degrees of kinship are computed in accordance with G.S. 104A-1. (G.S. 29-5.)

14. Aliens.

The fact that a person is an alien makes no difference. (G.S. 29-11.)

15. Escheat.

If there is no person entitled to take under intestate succession rules, the net estate escheats. (G.S. 29-12; Chapter G.S. 116B.)

F. Elective life estate and G.S. 29-30.

G.S. 29-30(a) provides in part:

> In lieu of the intestate share provided in G.S. 29-14 or G.S. 29-21, or of the elective share provided in G.S. 30-3.1, the surviving spouse of an intestate or the surviving spouse who has petitioned for an elective share shall be entitled to take as his or her estate share or elective share a life estate in one third in value of *all the real estate of which the deceased spouse was seised and possessed of an estate of inheritance at any time during coverture* . . . (Emphasis added.)

G.S. 29-30(a) applies to property the title to which becomes vested in the deceased spouse during marriage (or coverture). However, the emphasized language could also be applied to real property which the deceased spouse acquired title to *before* marriage. This is based upon the words "at any time *during* coverture," since if the decedent spouse acquires title to real property before marriage, he could be deemed to be seized and possessed of an estate *during* marriage. If the intent of G.S. 29-30(a) is different, the applicable portion of G.S. 29-30(a) should state "all of the real estate of which the deceased spouse *became* seised and possessed of an estate of inheritance at any time during coverture . . ."

Of course, G.S. 29-30(a) goes on to create exceptions for waivers, releases and quitclaims of such rights, which would include valid separation agreements discussed in ***III. E.*** below and pre-nuptial agreements discussed in ***III. I.*** below. It is the right that necessitates the joinder of a non-owner spouse in a conveyance by an owner spouse in cases where joinder is required since the decedent owner spouse need not be vested in title at death in order for the non-owner spouse to assert the right under G.S. 29-30.

G. Elective share and G.S. 30-3.1,et.seq.

The main thing to remember about rights under the elective share statutes discussed below is that if, for example, ***Spouse A*** conveys property to ***C*** for value, without the joinder of ***Spouse B*** and then ***Spouse A*** dies, there is no elective share for ***Spouse B*** to elect but ***Spouse B*** may have rights under G.S. 29-30 discussed in ***F.*** above unless ***Spouse B*** has waived those rights under G.S. 29-30. See G.S. 30-3.2 (4). Note that G.S 30-3.2(4)(f)creates a different rule if ***Spouse A*** gives ***C*** certain gifts.

The elective share statutes are found at G.S. 30-3.1 through G.S. 30-3.6.

G.S. 30-3.1 sets forth the "right of elective share." It states that the surviving spouse of a decedent who dies domiciled in North Carolina has a right to claim an "elective share." "Elective share" means an amount equal to (1) the *applicable share* of the Total Net Assets, defined in G.S. 30-3.2(4), less (2) the value of Property Passing to Surviving Spouse, as defined in G.S. 30-3.3(a). "Applicable share" of the Total Net Assets is specified in G.S. 30-3.1(a) as follows: (1) If the decedent is not survived by any lineal descendants, one-half of the Total Net Assets. (2) If the decedent is survived by one child, or lineal descendants of one deceased child, one-half of the Total Net Assets. (3) If the decedent is survived by two or more children, or by one or more children and the lineal descendants of one or more deceased children, or by the lineal descendants of two or more deceased children, one-third of the Total Net Assets. G.S. 30-3.1(b) contains a rule of "reduction of applicable share" where the surviving spouse is a second or successive spouse and G.S. 30-3.1(c) contains a rule for taking into account "death taxes," defined in G.S. 30-3.3(b).

G.S. 30-3.4 sets out the procedure for determining the elective share. The statute provides that the surviving spouse's right to file a claim for an elective share must be filed during that spouse's lifetime. Once the election is filed, if a surviving spouse dies before the claim for an elective share has been settled, the surviving spouse's personal representative shall succeed to the surviving spouse's rights to an elective share. (G.S. 30-3.4(a).)

G.S. 30-3.4(b) states that a claim for an elective share must be made within six months after the issuance of letters testamentary or letters of administration by (1) filing a petition with the clerk of superior court of the county in which the primary administration of the decedent's estate lies, and (2) mailing or delivering a copy of that petition to the personal representative of the decedent's estate. A surviving spouse's incapacity shall not toll the six-month period of limitations.

G.S. 30-3.4(f) provides that after notice and hearing as provided for by G.S. 30-3.4(b) and (c), the clerk shall determine whether or not the surviving spouse is entitled to an elective share, and if so, the clerk shall then determine the elective share and shall order the personal representative to transfer that amount to the surviving spouse. The clerk's order shall recite specific findings of fact and conclusions of law in arriving at the decedent's Total Net Assets, Property Passing to Surviving Spouse, and the elective share. It would seem that, the elective share transferred can be actual property or, if necessary in whole or in part, a cash equivalent after a sale to make cash. (See G.S. 30-3.5(c), discussed below.)

The decision of the clerk may be appealed to the superior court by any party in interest pursuant to G.S. 30-3.4(g). G.S. 30-3.5, entitled "Recovery of assets by personal representative," is ambiguous. G.S. 30-3.5(a) is captioned, "Recovery of Assets." It provides that the personal representative is entitled to recover proportionately from *all* persons, other than the surviving spouse, receiving or in possession of, any of the decedent's Total Net Assets a sufficient amount to enable the personal representative to *pay* the elective share. The apportionment shall be made in the proportion that the value of the interest of each person receiving or in possession of any of Total Net Assets bears to Total Net Assets, excluding any Property Passing to Surviving Spouse. However, after saying "all" persons, the statute then provides as follows: "The only persons subject to contribution to make up the elective share are (i) *original recipients of property* comprising the decedent's Total Net Assets, and subsequent gratuitous inter vivos donees or persons claiming by testate or intestate succession to the extent those persons have the property or its proceeds on or after the date of decedent's death, and (ii) a fiduciary; as to the property under the fiduciary's control at or after the time a fiduciary receives notice that a surviving spouse has claimed an elective share." There is no definition of the phrase "original recipients of property."

If ***A***, a devisee or heir, is the original recipient of real property and there is no sale of the real property by the personal representative pursuant to a statutory power or a power set forth in a will, ***A*** would be the original recipient under the statute. If ***A*** then conveys the property to ***B***, a purchaser for value, or if ***A*** mortgages the property to ***M, B*** or ***M*** would not be subject to contribution and recovery under G.S. 30-3.5(a). Apparently, if ***B*** records his deed and subsequently makes a gratuitous transfer to ***C***, a gratuitous donee, within the surviving spouse's election period, while G.S. 30-3.5(a) says a subsequent gratuitous donee is subject to contribution and recovery, it would seem that recovery against ***C*** would not be possible since, in order for contribution and recovery to be possible, the subsequent gratuitous inter vivos donee would have to be taking from an original recipient against whom contribution and recovery was possible ***(A)*** and not be taking from ***B***. It does not seem that "subsequent gratuitous inter vivos donees" is referring to ***C*** being subsequent to ***B***. To allow recovery from ***C*** would impair ***B's*** freedom to dispose of the property. But if ***A*** is the original recipient and makes a gratuitous transfer to ***B*** and ***B*** makes a gratuitous transfer to ***C***, all within the elective share period, recovery from ***C*** would be possible. The exact scope of who is a "subsequent gratuitous inter vivos donee" should be clarified.

If ***X***, a purchaser for value from ***PR***, the personal representative selling under a power of sale or court order, is deemed the original recipient of the property, contribution and recovery against ***X*** would be possible if the period for the surviving spouse's election has not expired. If the surviving spouse has not made an election prior to the conveyance to ***X***, should ***X*** be protected because no election was filed at the time of the conveyance or should ***X*** lose because ***X*** should know that the election period is unexpired? The latter would seem to be the answer. However, ***X*** might not have to answer that question, because an excellent argument can be made that *X* is not the original recipient. When the decedent dies, title vests in the heirs at law. (G.S.28A-15-2(b).) If a valid will is probated, title becomes vested in the devisees. (G.S. 28A-15-2(b).) It is noted that after title vests (1) in the heir in case of intestacy or (2) in the devisee in the event of a probated will, the fact that the P.R. sells land pursuant to authority to do so does not change the fact that title was previously vested in the heir or devisee. (*Linker v. Linker,* 213 N.C. 351, 196 S.E. 329 (1938) (intestate estate); *Wadford v. Davis,* 192 N.C. 484,135 S.E. 353 (1926) (testate estate).) If a P.R. obtains an order to sell intestate or testate property or if a P.R. exercises a power of sale to do so

in a will, it would seem that the heirs or devisees, as the case might be, would still be the "original recipients" pursuant to G.S. 30-3.5(a). This would be true if vesting of title is synonymous with receipt of property under the statute. If this is true, a purchaser from the P.R. would not be a party against which contribution and recovery could be maintained, since a purchaser would be a *subsequent* recipient but not a subsequent gratuitous inter vivos donee under G.S. 30-3.5(a). It seems that this is the proper interpretation of G.S. 30-3.5(a) for a court to adopt. This would also give priority to the P.R.'s power to sell that could otherwise be thwarted by the surviving spouse's refusal to waive rights absent a court order to sell in a proceeding making the surviving spouse a party requiring the spouse to waive the spouse's rights or selling free and clear of those rights. G.S. 30-3.2 should be amended to add a subdivision (5) to define the phrase "original recipients of property" consistent with this interpretation. G.S. 30-3.5(a) refers to the P.R. being able to recover from a fiduciary. However, the way that G.S. 30-3.5(a) is structured, "fiduciary" does not appear to include the estate's P.R. in a way to enable the P.R. to take advantage of the receipt of notice from surviving spouse rule.

However, it is possible that real property would not be deemed received by an heir or devisee while it is still subject to a P.R.'s power to sell it prior to "distribution" and "settlement." G.S. 28A-22-1 refers to distribution of assets. Subsequent sections of the article on distribution refer to distribution of real property. (G.S. 28A-22-2; G.S. 28A-22-8.) It is hoped that the court would deem either the heir or devisee on one hand or the P.R. on the other hand as the "original recipient" so that a purchaser for value ***X***, would not be the original recipient and would be protected as discussed above.

There is a way to eliminate problems with interpretation of G.S. 30-3.5(a) discussed above. If the heir or devisee and/or the personal representative wants to convey the property under any scenario, the surviving spouse can join in the execution of the instrument for purposes of waiving the surviving spouse's right to claim an elective share under Chapter 30 and the right to disclosure, as permitted by G.S. 30-3.6(b) discussed below. The waiver language would contain an affirmative statement that it was given voluntarily and that third parties are entitled to rely on the waiver. Of course, the real problem will come when the surviving spouse refuses to do so *and* controversy under G.S. 30-3.5(a) regarding who are or are not "original recipients of property" arise. Another way to eliminate such problems when the P.R. wants to sell property of an heir or devisee is to get an order to sell (even if the P.R. has the right to sell by express provision of the will) as a result of proceedings naming as parties the title holders under G.S. 28A-15-2(b) *and* the spouse with elective share rights. The order would decree a sale free and clear of elective share rights. (See G.S. 28A-17-4 and G.S. 28A-17-6 regarding naming parties.)

The rest of G.S. 30-3.5(a) deals with how the personal representative can withhold distribution of property and how the personal representative can recover deficiencies when otherwise recoverable.

G.S. 30-3.5(c) provides that a person receiving or in possession of any of the decedent's Total Net Assets may pay his proportionate elective share liability with respect to that property by any of the following methods: (1) conveyance of the property included in the decedent's Total Net Assets; (2) payment of the value of his liability in cash or, upon agreement of the surviving spouse, other property; or (3) partial conveyance and partial payment under subdivisions (1) and (2) of G.S. 30-3.5(c), provided the value conveyed and paid is equal to his liability.

G.S. 30-3.6 is entitled "Waiver of rights." It is quoted as follows:

> (a) The right of a surviving spouse to claim an elective share may be waived, wholly or partially, before or after marriage, with or without consideration, by a written waiver signed by the surviving spouse.
>
> (b) A waiver is not enforceable if the surviving spouse proves that:
>
> (1) The waiver was not executed voluntarily; or

(2) The surviving spouse was not provided a fair and reasonable disclosure of the property and financial obligations of the decedent, unless the surviving spouse waived, in writing, the right to that disclosure.

It would seem that a waiver signed only by the surviving spouse would be valid by virtue of the express terms of G.S. 30-3.6(a). There has been discussion of the fact that G.S. 30-3.6(b), in providing when a waiver is unenforceable, may impact adversely upon the rights of a purchaser for value-particularly a purchaser for value without knowledge of the reasons for unenforceability under G.S. 30-3.6(b). If a specific waiver of the elective right or a broad waiver that includes such rights is set forth in an agreement evidenced of record pursuant to G.S. 39-13.4 pertaining to separation agreements, a purchaser would be protected. Pursuant to that statute, the agreement or a memorandum thereof can be recorded. If the recorded document states that a husband or wife can convey property without joinder of the other spouse, a grantee from the husband or wife will take free of the interest of the other spouse unless an instrument of cancellation of the previously recorded instrument is recorded before the grantee records his deed. G.S. 39-13.4 can also be relied upon by lenders. It is important to note that G.S. 39-13.4 was designed to protect parties from what would otherwise be revocation of a separation agreement because of resumption of marital relations. We feel that G.S. 39-13.4 would probably control over G.S. 30-3.6(b). G.S. 30-3.6 should be amended to clarify the rights of purchasers and lenders for value. Also, in any G.S. 30-3.6 waiver, there should be recitals to the effect that (1) the waiver is being executed voluntarily and (2) the surviving spouse has been provided a fair and reasonable disclosure under G.S. 30-3.6(b) or the surviving spouse waives such disclosure and (3) transferees of title for value can rely upon such recitals.

EXAMPLE: ***A*** conveys land to ***H*** for value and ***H*** gives a deed of trust to secure purchase money to ***T,*** trustee for ***M.*** Pursuant to G.S. 29-30(g)(2), ***H's*** wife ***W*** need not join in such a deed of trust in order to waive G.S. 29-30 rights. Unlike G.S. 29-30 rights, the elective share right in G.S. 30-3.1, et seq. only applies to land that ***H*** died owning title to, when value is given by ***H*** for the property. (G.S.30-3.2(4)). Therefore, it is probable that ***M's*** deed of trust will not be subject to ***W's*** elective share, Also, if, for example, ***H*** acquires title during his marriage to ***W, H*** delivers a deed to ***P,*** a purchaser for value, and ***P*** records, the fact that ***W*** does not join in the execution of the deed means that ***P's*** interest will be subject to G.S. 29-30 rights (absent a waiver by ***W***) but will not be subject to G.S. 30-3.1 rights.

H. Uniform Disposition of Community Property Rights at Death Act.

The act applies to decedents dying on or after July 8, 1981.

Spouse A and ***Spouse B*** are married to each other. ***Spouse A*** takes title to Lot 1. Lot 1 was acquired with the proceeds of California community property that ***Spouse A*** had an interest in. ***Spouse A*** dies. Title to a one-half interest in Lot 1 is ***Spouse B's***. ***Spouse A*** cannot devise it. It cannot decend under the intestate succession laws as applied to ***Spouse A***. Title to a one half interest in Lot 1 is ***Spouse A's***. ***Spouse A*** can devise it. If ***Spouse A*** does not, it decends under the intestate succession act as applied to ***Spouse A.*** In this one-half, ***Spouse B*** has no elective share or elective life estate. ***Spouse B*** can perfect ***Spouse B's*** title in ***Spouse B's*** one half by an order of the clerk of superior court who appointed ***Spouse A's*** personal representative. (G.S. 31C-4.) If ***Spouse A*** has apparent title to all interests in Lot 1, a purchaser for value or lender takes ***Spouse A's*** apparent title free of ***Spouse B's*** interest. (G.S. 31C-7 (b).) However, there is some doubt that the purchaser or lender will be so protected if ***Spouse B*** has obtained the order perfecting ***Spouse B's*** interest, even though the order is filed only in the clerk's office in ***Spouse A's*** estate file. (This act is discussed in some detail in E. Urban and G. Whitney, *North Carolina Real Estate-With Forms* § 13-28 (Thomson * West, 1996, Suppl.2005).)

I. Equitable distribution.

Equitable distribution of "marital property" and "divisible property" is governed by G.S. 50-20 and G.S. 50-21. Obviously, these statues are used in the unfortunate circumstances of divorce.

The most important rule for title examiners to remember is G.S. 50-20 (h)'s special lis pendens rule:

> If either party claims that any real property is marital property or divisible property that party may cause a notice of lis pendens to be recorded pursuant to Article 11 of Chapter 1 of the General Statutes. Any person whose conveyance or encumbrance is recorded or whose interest is obtained by descent, prior to the filing of the lis pendens, shall take the real property free of any claim resulting from the equitable distribution proceeding.

Pursuant to G.S. 50-20(h), if, for example, ***H***, the husband, conveys Lot 1 to ***X*** and ***X*** records before the lis pendens is recorded, ***X*** will prevail over the equitable distribution action. This is true in a priority context even if the deed to ***X*** is a deed of gift. However, in the case of a deed of gift, ***W***, the wife, might be able to set aside the deed as a fraudulent conveyance. However, the problem with relief under the fraudulent conveyance laws might be ***W's*** lack of status as a creditor.

Suppose that before ***X*** records the deed a judgment of absolute divorce is entered, giving Lot 1 to ***W*** in equitable distribution, there being no lis pendens filed. G.S. 50-20(h) might not protect ***X.*** The reason is that the judgment is more than the equitable distribution *claim* referenced in G.S. 50-20(h) set forth above. At least the title examiner and title insurer should assume this.

In regard to transfer of title, it is noted that the statute provides that the court may enter an order transferring title pursuant to the Rules of Civil Procedure and the General Statutes, See **III. L.** below.

III. TRANSFER OF TITLE

A. Tenancy by the entireties deeds.

If ***Spouse A*** and ***Spouse B*** are married to each other and own the land as tenants by the entireties, both must execute the deed to grantee ***C***.

B. Mortgaging entireties property and related lien problems.

Spouse A and ***Spouse B*** own real property as tenants by the entirety. ***Spouse A*** places a recorded deed of trust on the property securing ***M***. ***Spouse B*** does not execute the deed of trust. ***M*** proceeds to foreclose. The deed of trust cannot be foreclosed. (G.S. 39-13.6(a).) If ***Spouse B*** dies before ***Spouse A***, the deed of trust probably can attach to the real property. (See discussion of the *BB&T* case below.) The deed of trust should be rerecorded after ***Spouse B*** dies and before ***Spouse A*** gives a lease, deed or deed of trust for value after ***Spouse B's*** death to protect ***M*** against those interests.

While the deed of trust will be good as between ***Spouse A*** and ***M*** without rerecording under principles of estoppel, it has been held that the first party to record after a party acquires title (as ***Spouse A*** would upon ***Spouse B's*** death) wins under the recording act. (*Door Co. v. Joyner*, 182 N.C. 518, 109 S.E. 259 (1909); *Schuman v. Roger Baker & Associates*, 70 N.C.App. 313, 319 S.E.2d 308 (1984); Hetrick & McLaughlin, *Webster's Real Estate Law In North Carolina* § 11-17; Urban & Whitney, *North Carolina Real Estate* § 21-113.)

However, if ***J-1*** and ***J-2*** docket judgments against ***Spouse A*** before or after the original recording of ***M's*** deed of trust the judgments will attach after ***B's*** death with priority over ***M's*** deed of trust. (G.S. 1-234; *Johnson* v. *Leavitt*, 188 N.C. 682, 125 S.E. 490 (1924).) This is because of G.S. 1-234 which allows the judgments to attach to after acquired property. And, even though ***J-1*** dockets before ***J-2***, the judgments have equal priority. (See *Johnson* v. *Leavitt*, 188 N.C. 682, S.E. 490 (1924).G.S. 1-233;G.S. 1-234.)

Spouse A and ***Spouse B*** own real property as tenants by the entirety. On 1-15-98, ***J-1*** dockets a judgment against only ***Spouse A***. On 6-12-99, ***J-2*** does the same. On 10-12-00, ***Spouse A*** and ***Spouse B*** give ***M*** a deed of trust which is recorded. On 6-5-02, ***Spouse B*** dies. ***M*** has priority over ***J-1*** and ***J-2***. The judgments of ***J-1*** and ***J-2*** have equal priority. (See Johnson v. Leavitt, 188 N.C. 682, 125 S.E. 490(1924); G.S. 1-233; G.S. 1-234.)

Spouse A and ***Spouse B*** own real property as tenants by the entirety. ***Spouse A*** borrows money and executes a deed of trust on the real property. The deed of trust is recorded. ***Spouse A*** and ***Spouse B*** get a divorce, which converts the tenancy by the entirety to a tenancy in common. Then, ***Spouse B*** receives the real property in equitable distribution. ***Spouse A*** and ***Spouse B*** hold title as tenants in common when the divorce is entered. The deed of trust given by ***Spouse A*** attaches to ***Spouse A's*** one-half undivided interest in the real property and ***Spouse B*** takes the real property subject to the deed of trust encumbering ***Spouse A's*** one-half undivided interest. (*Branch Bank and Trust Co. v. Wright*, 74 N.C.App. 550, 328 S.E.2d 840 (1985).) However, in the case, if ***Spouse B*** gave value for the distribution, it could have been argued that in order for BB&T to have won, BB&T should have re-recorded after the divorce and prior to the equitable distribution transfer. This rule in this case has also been applied to a judgment lien. (*Union Grove Milling & Mfg. Co. v. Faw, 103 N.C. App. 166, 404 S.E.2d 588(1991*).)

In the example in the immediately preceding paragraph, it has been asked if G.S. 39-13.6(a) changes this. We do not believe G.S. 39-13.6(a) changes the *BB&T* case. See Urban and Whitney, *North Carolina Real Estate*, Sec. 21-108 (Supp. 2005). This statute prevents one spouse from encumbering *the tenancy by the entirety*. It does not prevent a deed of trust which cannot encumber the tenancy by the entirety from subsequently attaching to the ***Spouse A's*** one-half undivided interest as a tenant in common with ***Spouse B***.

C. Purchase money mortgage or deed of trust – joinder.

X conveys land to ***Spouse A*** and ***Spouse A*** wants to give a deed of trust securing third party lender ***M*** to secure the portion of the purchase price other than ***Spouse A's*** down payment. ***Spouse A*** and ***Spouse B*** do not have a separation agreement. ***Spouse B*** is not required to join in the deed of trust. (See G.S. 29-30(g)(2).) The deed and deed of trust need not be recorded simultaneously or near simultaneously under the statute.(This is because the rule in G.S. 29-30(g)(2) is statutory and is not to be confused with the case law rule of instantaneous seisen pertaining to lien priority. See **IV. E**.) It applies to a mortgage to the seller or to a deed of trust securing the seller or a third party lender. An earlier statute, G.S. 39-13, seems to apply only to a mortgage to, or a deed of trust securing, the seller. (See G.S. 39-7(a) and G.S. 39-7(c).) The elective share (G.S. 30-3.1 through G.S. 30-3.6) does not apply, apparently. (See G.S. 30-3.2(4); G.S. 30-3.5.)

It is probable that the rule of G.S. 29-30(g)(2) pertains to a second lien purchase money deed of trust. This is because the rule is statutory as opposed to being based on case law pertaining to priority issues discussed in **IV. E**.

D. Married people under age 18.

Spouse A is 18 and ***Spouse B*** is under age 18. Title is vested in ***Spouse A***. ***Spouse B*** can lawfully join in ***Spouse A's*** deed or deed of trust. (G.S. 39-13.2 (a)(1).)

Spouse A is 18 and ***Spouse B*** is under age 18. Title is vested in ***Spouse A*** and ***Spouse B*** as either tenants by the entirety, joint tenants or tenants in common. ***Spouse B*** can lawfully execute a deed of trust, sign a note or execute a deed along with ***Spouse A***. (G.S. 39-13.2(a)(2).)

E. Separation agreements.

Spouse A owns the title to land. ***Spouse A*** and ***Spouse B*** have entered into a separation agreement which authorizes ***Spouse A*** to convey, mortgage and lease without joinder of ***Spouse B***. The separation agreement or a memorandum thereof containing that authorization and complying with the requirements of G.S. 52-10 (requiring both to sign and acknowledge) and G.S. 52-10.1 is recorded. If there is no instrument recorded canceling the previously recorded agreement or memorandum, ***Spouse A*** can convey or mortgage to another party without ***Spouse B's*** joinder, even if ***Spouse A*** and ***Spouse B*** have resumed the marital relationship. That transfer will be free of ***Spouse B's*** rights under G.S. 29-30 or ***B's*** other rights arising solely by marriage, including equitable distribution under G.S. 50-20. (See G.S. 39-

13.4.) If there is no recorded separation agreement or recorded memorandum as noted above, the separation agreement, as to third parties, will not survive resumption of the marital relationship. However, on a case by case basis, title insures have relied upon the unrecorded agreement if it contains the requisite language. Often, it is helpful to obtain an affidavit and indemnity from ***Spouse A*** to the effect that ***Spouse A*** and ***Spouse B*** are still separated and have not resumed the marriage. See the discussion of Chapter 31A, below.

F. Powers of attorney.

Spouse A owns tract no.1 individually and tract no.2 as tenants by the entirety with ***Spouse B***. ***Spouse A*** can grant ***C*** a power of attorney to convey his interest in any real property and to waive ***Spouse A's*** marital rights under any statute, including G.S. 29-30. ***Spouse B*** need not join in the execution of the power of attorney. (G.S. 39-12.) ***Spouse A*** could have granted the power of attorney to ***Spouse B*** instead of granting it to ***C***, subject to G.S. 52-10. (G.S. 39-12.) G.S. 39-12's reference to G.S. 52-10 in conjunction with G.S. 39-12's statement that the acknowledgment of ***Spouse B*** is not required may mean that ***Spouse A*** and ***Spouse B*** must be at least 18 and the power must not be against public policy, but ***Spouse B's*** joinder and acknowledgment is not necessary.

G. Conveyance by spouse without joinder of non-owner incompetent spouse.

Spouse A owns real property. ***Spouse B*** is incompetent. ***Spouse A*** can sell, lease, mortgage and convey the real property without ***Spouse B's*** joinder if a general guardian or guardian of the estate has been appointed and the guardian joins in the instrument. (G.S. 39-7 (b); G.S. 35A-1215(a).) The guardian apparently does not need an order, due to G.S. 39-7(b)'s broad language.

H. Conveyance of incompetent spouse's real property.

Spouse A owns real property and has been adjudicated incompetent. If a general guardian or guardian of the estate has been appointed by order of the clerk of the superior court pursuant to G.S. 35A-1215, the guardian can (1) complete a contract to sell the real property entered into when ***Spouse A*** was not adjudicated incompetent (G.S. 35A-1215(a); G.S. 35A-1251(4).); (2) relinquish title if the guardian feels the property is valueless or is so encumbered it is of no benefit to ***Spouse A*** (G.S. 35A-1215(a); G.S. 35A-1251(5).); (3) lease the real property for a term not in excess of 3 years (G.S. 35A-1215(a); G.S. 35A-1251(17).); or (4) sell, mortgage, exchange, or lease for a term of more than 3 years ***Spouse A's*** real property if a special proceeding is filed where the real property is located and an order to proceed with the transaction is obtained.(G.S. 35A-1215(a); G.S. 35A-1251(17); G.S. 35A-1301; G.S. 35A-1307.) (1), (2) and (3) above do not require a court order. In (1), (2) and (3) ***Spouse B*** should join to release marital rights under G.S. 29-30. It is advisable for ***Spouse B*** to join in any conveyance ordered in (4) but such joinder might not be required, especially if ***Spouse B*** is the petitioner or ***Spouse B*** is made a party to the special proceeding. (Since it is probable that, but unclear whether, ***Spouse B's*** joinder in the deed is required, it is recommended that in such a case, ***Spouse B*** be made a party under G.S. 35A-1301(b).) There is a similar procedure available when ***Spouse A*** and ***Spouse B*** own real property as tenants by the entirety and one or both spouses are mentally incompetent. (G.S. 35A-1310, et.seq.)

I. Premarital agreements.

A and ***B*** enter into a premarital agreement that permits ***A*** and ***B*** to convey, lease, mortgage or exchange real property that either owns solely without the joinder of the other, the agreement containing mutual releases and waivers of each party's rights in the other party's real property. (G.S. 52B-4 allows such agreements. The agreement can pertain to real property whenever acquired.) The agreement is acknowledged and recorded. The agreement must be signed by both parties but it need not be acknowledged to be enforceable as between the parties. (G.S. 52B-3; *Howell v. Landry*, 96 N.C.App. 516, 386 S.E.2d 610, cert. den., 326 N.C. 482, 392 S.E.2d 90 (1990). In order to be recorded, it must be acknowledged. Recording it does not have the same result as recording a separation agreement pursuant to G.S. 39-13.4, discussed above in **III. E**.) ***A*** and ***B*** marry and the agreement becomes effective. ***C***

conveys real property to ***Spouse A***. ***Spouse A*** wants to sell and convey the real property. If the agreement is enforceable, ***Spouse B*** need not join in the conveyance. However, the applicable statutes provide that the agreement is not enforceable if a party proves that it was not executed by the party voluntarily or it was "unconscionable" when the party executed it. (G.S. 52B-7.) There are no protective provisions for purchasers for value and lenders for value without knowledge. (G.S. 52B-8 may offer some protection if the agreement is otherwise not enforceable due to the marriage being void.) Therefore, the title insurer should be asked if the surrounding circumstances allow reliance upon such an agreement, whether it is recorded or not. Chapter 52B should be amended to afford protection to purchasers for value and lenders. (For example, add G.S. 52B-12: "If a premarital agreement is properly recorded, a purchaser for value, lender for value or lessee for value can rely upon the provisions of the premarital agreement notwithstanding G.S. 52B-6, G.S. 52B-7 or G.S. 52B-8 unless a revocation of the agreement or copy of a judgment establishing the unenforceability of the agreement pursuant to G.S. 52B-6, G.S. 52B-7 or G.S. 52B-8 has been properly recorded in the register of deeds' office where the real property in question is located.")

J. Abandonment of spouse.

Spouse A owns real property. ***Spouse B*** willfully and without just cause abandons ***Spouse A***. ***Spouse A*** may be able to sell and convey the real property without joinder of ***Spouse B*** during the continuance of separation due to abandonment.(G.S. 31A-1 (a)(3); G.S. 31A-1(b)(3); G.S. 31A-1(d)(2).) G.S. 31A-1(d)(2) seems to allow this result even if a conveyance happens during the separation but before it is determined that at ***Spouse A***'s death, ***Spouse A*** and ***Spouse B*** are not living together as a married couple. The statute should be clarified since there is some doubt.

K. Loss of rights by slayer.

Spouse A slays ***Spouse B***. Slaying includes ***Spouse A*** being convicted, pleading guilty, pleading nolo contendere, or being found guilty in a civil action within one year of ***Spouse B's*** death, and shall have died or committed suicide before being tried and before settlement of the estate. (G.S. 31A-3(3).) ***Spouse A*** cannot acquire by will or intestate succession any interest in real property owned by ***Spouse B***. (G.S. 31A-4(1).) If ***Spouse A*** has issue that would have taken the property if ***Spouse A*** had predeceased ***Spouse B*** and ***Spouse B*** died intestate, the property shall be distributed to the issue per stirpes. (G.S. 31A-4(2).) If ***Spouse B*** had a will, the devolution of the property is governed by G.S. 31-42(a) even though ***Spouse A*** did not die before ***Spouse B*** (G.S. 31A-4(3).)

Spouse A and ***Spouse B*** own real property as tenants by the entirety. ***Spouse A*** slays ***Spouse B*** (as noted above). One half of the property passes to the decedent's estate and the other one half shall be held by ***Spouse A*** during ***Spouse A's*** life subject to pass upon ***Spouse A's*** death to ***Spouse B's*** heirs or devisees as defined in the statutes.(G.S. 31A-5.) G.S. 31A-6 has a similar rule for real property held by spouses as joint owners.

If ***Spouse A*** (the slayer) conveys to ***C*** for value any interest that ***Spouse A*** would have received from the death of ***Spouse B*** before the interest of ***Spouse A*** is adjudicated, ***C*** is protected if ***C*** had no notice of the slaying. (G.S. 31A-12.)

L. Judgments and orders transferring title or ordering the transfer of title.

Such a transfer of title can take place in actions for child support (G.S. 50-13.4 (e) and G.S. 50-13.4(f)(2)), alimony and support (G.S. 50-16.7(a) and G.S. 50-16.7(c)) and equitable distribution (G.S. 50-20(g)). Where proper service of process exists in a case, the resulting judgment can (1) direct the owner to transfer an interest in title; (2) direct a person to transfer the interest on behalf of the owner or (3) actually transfer an interest in the title. It is critical to review the contents of the judgment to see if the judgment transfers title or if a deed is required. Also, if an owner- spouse's title is transferred to a third party, the non-owner spouse's marital rights must be considered.

As will be discussed in detail below, if ***Spouse A*** is ordered to make the conveyance to ***Spouse B*** but the judgment does not actually make the transfer, a deed must be obtained. The judgment cannot be relied upon. The deed should include a waiver of ***Spouse A's*** present or future marital rights in ***Spouse B's*** real property. However, the judgment or order can actually make the transfer if it has words of transfer of an interest in title. The judgment or order should contain ***Spouse A's*** waiver or transfer of present or future marital rights in ***Spouse B's*** real property.

If a judgment is the last link in the chain of title, or a recent link in the chain of title of record less than seven years, it is important for the title examiner to review the file to verify proper service of process upon the defendant(s). This is necessary for jurisdiction and validity of a judgment. If the judgment has been of record more than seven years, it is still important to ascertain these matters but reliance upon color of title can expedite things and remove the necessity of examining service of process *provided that the title insurer agrees.*

G.S. 1A-1, Rule 70 and G.S. 1-228 clearly apply to transfers of title by deed. Since G.S. 1A-1, Rule 70 refers to "a conveyance of land" and vesting title, G.S. 1A-1, Rule 70 and G.S. 1-228 could authorize a deed of trust as well.

The first sentence of G.S. 1A-1, Rule 70 provides that if a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the judge may direct the act to be done by some other person. This rule deals with a situation where the judgment directs a party to do something as opposed to the judgment actually transferring title. If ***R,*** such as a receiver, is the party who is appointed to make the conveyance for ***O***, the title holder ordered to make the conveyance, the instrument (for example, a deed) would come from ***O***, by ***R***. The deed vesting in title in ***O***, will be indexed in the *grantee* index under ***O's*** name, and the deed from ***R***, the person appointed to make the conveyance for ***O***, will be indexed in the *grantor* index under ***O's*** name. (See G.S. 161-22.1.)

The next sentence of G.S. 1A-1, Rule 70 goes on to provide in part that if real or personal property is within the State, the judge in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. This second rule permits the judgment or order to actually make the conveyance.

When the second rule in G.S. 1A-1, Rule 70 is used, G.S. 1-228 provides as follows:

> Every judgment, in which the transfer of title is so declared, shall be regarded as a deed of conveyance, executed in due form and by capable persons, notwithstanding the want of capacity in any person ordered to convey, and shall be registered in the proper county, under the rules and regulations prescribed for conveyances of similar property executed by the party. The party desiring registration of such judgment must produce to the register a copy thereof, certified by the clerk of the court in which it is enrolled, under the seal of the court, and the register shall record both the judgment and certificate. All laws which are passed for extending the time for registration of deeds include such judgments, provided the conveyance, if actually executed, would be so included.

The judgment transferring title would be indexed in the grantor index under ***O's*** name. (G.S. 161-22.1.)

G.S. 50-13.4(e) and G.S. 50-13.4(f)(2) allow the court in a child support action to enter an order transferring title as provided in G.S. 1A-1, Rule 70 and G.S. 1-228. G.S. 50-16.7(a) and 50-16.7(c), pertaining to alimony and support, and G.S. 50-20(g), pertaining to equitable distribution, provide for the same with respect to a judgment transferring title.

At the time a judgment or order transferring title under these statutes or in any other situation is entered, title to the real property might be vested in (1) the husband and wife, (2) the husband, or (3) the wife. It is noted that G.S. 1A-1, Rule 70 states that when a judgment transfers title the owner is divested of title, title is vested in the party mentioned in the judgment "and such judgment has the effect of a conveyance executed in due form of law." G.S. 1-228 states that the judgment "shall be regarded as a deed of

conveyance, executed in due form and by capable persons…" When, if at all, must the grantee be concerned about surviving spouse rights under G.S. 29-30? G.S. 29-30(a) provides that this interest is a life estate in one-third in value "of all the real estate of which the deceased spouse was seized and possessed of an estate of inheritance at any time during coveture," except for four exceptions involving real estate as to which the surviving spouse:

(1) Has waived his or her rights by joining with the other spouse in a conveyance thereof, or
(2) Has release or quitclaimed his or her interest therein in accordance with G.S. 52-10, or
(3) Was not required by law to join in conveyance thereof in order to bar the elective life estate, or
(4) Is otherwise not legally entitled to the election provided in this section.

If there is no waiver, release or quitclaim by the non-owner spouse, there is nothing in G.S. 1A-1, Rule 70 or G.S. 1-228 to constitute an exception within G.S. 29-30(a)(3) or (4). If there is no joinder, it has been held that where a married person conveys separate property without permission or joinder of their spouse and the non-owner spouse survives the owner spouse, the conveyed property is subject to the non-owner spouse's elective life estate. (*Melvin v. Mills-Melvin*, 126 N.C. App. 543, 486 S.E.2d 84 (1997).)

Several examples of situations giving rise to the determination created by G.S. 29-30 can be given, where ***Spouse A*** and ***Spouse B*** are married to each other:

Example 1: Title is vested solely in ***Spouse A***. The judgment transfers title to ***C***.

Example 2: Title is vested solely in ***Spouse A***. The judgment transfers title to ***Spouse B***.

Example 3: Title is vested in ***Spouse A*** and ***Spouse B*** as tenants by the entirety. The judgment transfers title to ***Spouse B***.

In Example 1, it would seem that ***C*** takes title subject to ***Spouse B's*** G.S. 29-30 rights unless (1) ***Spouse B*** joined in the judgment to release ***Spouse B's*** G.S. 29-30 interest; (2) ***Spouse B*** separately waived, released or quitclaimed ***Spouse B's*** G.S. 29-30 interest or (3) the judgment also expressly transferred, waived or released ***Spouse B's*** G.S. 29-30 interest. In order for (3) to occur, it would seem that ***Spouse B*** would have to be a party to the underlying action, which would be difficult unless ***Spouse B*** had liability in the underlying action.

In Example 2, the transfer of title by judgment from ***Spouse A*** to ***Spouse B*** can be for child support, spouse support, equitable distribution or for any other reason allowed by law. However, unless the judgment provides otherwise, as long as ***Spouse A*** and ***Spouse B*** remain married, ***Spouse A*** will have rights under G.S. 29-30 after the transfer of title. It is noted that, while G.S. 39-13.3(a) states that when one spouse conveys title to the other spouse the title is vested in the grantee, G.S. 39-13.3(a) does not say that the grantee holds title free of the grantor's G.S. 29-30 rights. Therefore, if the intent of the judgment is to completely bar those rights, the judgment should go on to state: "The transfer of title by this judgment also releases any right, title and interest, including, but not limited to, those rights under G.S. 29-30, which [A] now has or may hereafter acquire solely by reason of [A's] marriage to [B]."

In Example 3, the transfer can also take place for the reasons outlined in the discussion in Example 2. G.S. 39-13.3(c) states that a conveyance from one spouse to the other spouse of title held by the spouses as tenants by the entirety vests title in the grantee. However, G.S. 39-13.3(c) does not state that the grantee acquires title free and clear of the grantor's G.S. 29-30 rights. Therefore, the judgment should contain a clause as set forth the discussion in Example 2.

However, if the intent of G.S. 29-30 in Example 2 and Example 3 is to exempt G.S. 1A-1, Rule 70 and G.S. 1-228 transfers and execution saletranfers of ***Spouse A's*** title from G.S. 29-30 rights of ***Spouse A*** after the death of ***Spouse B***, G.S. 29-30(a) should be amended to add the following to G.S. 29-30's list of exceptions so that the surviving spouse will not have G.S. 29-30 rights where the surviving spouse:

(2a) Has been divested of title by a judgment pursuant to G.S. 1A-1, Rule 70 and G.S. 1-228 or by an execution sale pursuant to a docketed judgment.

Furthermore, if the intent of G.S. 29-30 in Example 1 is to exempt G.S. 1A-1, Rule 70 and G.S. 1-228 transfers and execution sale transfers of ***Spouse A's*** title from G.S. 29-30 rights of ***Spouse B*** after the death of ***Spouse A***, G.S. 29-30(a) should be additionally amended to add the following to the list of exceptions so that the surviving spouse will not have G.S. 29-30 rights where the surviving spouse:

(2b) Is married to a person whose title has been divested by a judgment pursuant to G.S. 1A-1, Rule 70 and G.S. 1-228 or by an execution sale pursuant to a docketed judgment.

G.S. 1A-1, Rule 70 provides that a judgment transferring title "has the effect of a conveyance executed in due form of law." G.S. 1-228 states that such a judgment "shall be regarded as a deed of conveyance, executed in due form." These statutes in their current form seem to overrule earlier cases. These cases seemed to require that the judgment not only state that the title was divested "out of the defendant" and was vested in the plaintiff, but also had to declare that it "shall be regarded as a deed of conveyance." (*Morris v. White*, 96 N.C. 91, 2 S.E. 254 and *Evans v. Brendle*, 173 N.C. 149, 91 S.E. 723 (1917).)

A judgment can blur what has occurred regarding transfer of title. The judgment could say: "The title of ***A*** is hereby transferred and conveyed to ***B***. ***A*** is directed to execute a deed to ***B*** if ***B*** so desires." The second sentence is surplussage as opposed to requiring ***A*** to execute a deed in order to effect title transfer. The first sentence of the judgment should be enough to effect the conveyance. In *Evans v. Brendle*, 173 N.C. 149, 91 S.E. 723 (1917), the judgment stated: "[The defendant] shall execute and deliver to [B], her heirs, a deed to the land, which is described as follows: [legal description]. It is further ordered…that the title to the said tract of land be and the same is hereby divested out of the defendant…and that the title to the same is hereby vested…in [B] and her heirs." But for the fact that the judgment did not continue and say, as discussed above, that it "shall be regarded as a deed of conveyance" as, apparently, the statute then required, the judgment would have transferred title without the necessity of an actual deed. If the judgment clearly transfers title, extra language requiring the owner to execute a deed should be interpreted as unnecessary to the passage of title.

Sometimes, the judgment will require the giving of a deed, but will not constitute a transfer of title.

For example, in one case, a consent judgment was entered confirming an agreement between the the party offering a will for probate and the caveator seeking to dispute it. The agreement provided that in exchange for the caveator paying the propounders of the will $3500, the propounders "shall execute and deliver to the caveator…a fee simple deed" to the property. The order decreed that the parties comply with the agreement. If the $3500 was not paid within 90 days of the consent judgment, "then the propounders shall not be required to transfer said real property to the caveator…" The court held that the consent judgment was not sufficient to transfer title within the contemplation of G.S. 1-227 (now G.S. 1A-1, Rule 70) and G.S. 1-228. (*In the Matter of the Will of Amos Gaston Smith*, 249 N.C. 563, 107 S.E.2d 89 (1959).) Family law attorneys frequently draw judgments that require a deed but do not act as a deed. In view of G.S. 1A-1, Rule 70 and G.S. 1-228, this does not seem prudent, particularly where joinder of the non-owner spouse is not required because the title transfer will be to one of the spouses and the judgment can contain appropriate language to eliminate the owner-grantor's future marital rights.

IV. LIENS AND PROPERTY

A. Tenancy by the entirety and mechanics' liens.

Spouse A and ***Spouse B*** own real property as tenants by the entirety. Only ***Spouse A*** contracts with ***C*** for ***C*** to furnish labor and materials to the property. ***C*** will be unable to file a claim of lien since he did not contract with ***Spouse B***. However, if ***Spouse B*** is deemed to also be bound by agency, ratification or estoppel, ***C*** will be entitled to file a claim of lien. ***Spouse B's*** participation in negotiations might be enough.(See *General A.C. Co. v. Douglas*, 241 N.C.170, 84 S.E.2d 828 (1954); *Clark v. Morris*, 2

N.C.App. 388, 162 S.E.2d 873 (1968); *Leffew v. Orell*, 7 N.C.App. 333, 172 S.E.2d 243 (1970); *Erwin v. Turner*, 35 N.C.App. 265, 241 S.E.2d 132, discr. rev. den., 295 N.C. 89, 244 S.E.2d 257 (1978).) However, if the lien is filed against both ***Spouse A*** and ***Spouse B***, the lien must be reported unless the 180 day lien enforcement period (computed from date of last furnishing) has expired without suit being filed or unless a final judgment is recorded against ***C***. If suit is filed and dismissed, it must be *with* prejudice.(See G.S. 44A-16(3) and G.S. 44A-16(4) for the methods of discharge discussed herein. The 180 day enforcement period is found in G.S. 44A-13(a). See *Newberry Metal Masters Fabricators, Inc. v. Mitek Ind., Inc*., 333 N.C. 250, 424 S.E.2d 383 (1993) construing G.S. 44A-16(4) and the requirement of a dismissal with prejudice in order for G.S. 44A-16(4) to apply.)

B. Entireties property, federal tax liens—*U.S. v. Craft*, regulations and I.R.S.

On April 17, 2002, the Supreme Court issued its decision in *United States v. Craft*, 535 U.S. 274 (2002) (2002-38 I.R.B. 548), and held that the federal tax lien that arises under section 6321 of the Internal Revenue Code on " all property and rights to property" of a delinquent taxpayer attaches to the rights of the taxpayer in property held as a tenancy by the entirety (entireties property), even though local Michigan law insulates entireties property from the claims of creditors of only one spouse.

The most important result of the I.R.S. regulations noted below is the position that the I.R.S. will take as noted in the I.R.S.'s ***A1***, as illustrated by our **EXAMPLE 1** and **EXAMPLE 2** thereunder.

On September 29, 2003, the I.R.S issued Notice 2003-60, 2003-39 I.R.B. 643 (9/29/2003) entitled, "Collection Issues Related to Entireties Property."

> Among the general principles announced are the following:
>
> (1) …The Court's decision…does not represent new law …
>
> (2) As a matter of administrative policy, the Service will, under certain circumstances, not apply *Craft*, with respect to certain interests created before *Craft*, to the detriment of third parties who may have reasonably relied on the belief that state law prevents the attachment of the federal tax lien …
>
> (3) Because of the potential adverse consequences to the non-liable spouse of the taxpayer, the use of lien foreclosure for entireties property subject to the federal tax lien will be determined on a case-by-case basis.
>
> (4) As a general rule, the value of the taxpayer's interest in entireties property will be deemed to be one-half.
>
> (5) Where there has been a sale or other transfer of entireties property subject to the federal tax lien that does not provide for the discharge of the lien, whether the transfer is to the non-liable spouse or a third party, the lien thereafter encumbers a one-half interest in the property held by the transferee.

There were several "questions and answers." The following questions and answers illustrate how the Service will apply *Craft.* Note: According to the I.R.S. Notice, the first two Q&As address the application of *Craft* with respect to interests in entireties property acquired *before* the date of the decision, while the remaining questions and answers address its application with respect to interests acquired *after* the date of the decision. We have set out the most interesting material nearly verbatim right from the IRS' Notice, with a parenthetical note regarding the other material. The IRS' Notice states that the principal author of this Notice is Deborah Grogan of the Office of Associate Chief Counsel (Procedure and Administration). For further information regarding this Notice, contact Ms. Grogan at (202) 622-3610.

Q&As when interest in existing entireties property is acquired from taxpayer before April 17, 2002.

Q1. If the Service has filed a notice of federal tax lien with respect to the taxpayer before *Craft* and an interest in entireties property was later acquired by a purchaser, holder of a security interest, a mechanic's lienor, or a judgment lien creditor within the meaning of section 6323, then will the Service assert lien priority over the subsequently acquired interest? What if the entireties property was transferred, before *Craft*, to the non-taxpayer spouse in a divorce? Does the result differ if, before *Craft*, the transfer was to a donee, such as family trust? Do the results differ depending on whether the jurisdiction at issue is one that recognizes tenancy by the entirety and completely prohibits the attachment of entireties property for separate debts of one spouse (*i.e.*, a full bar jurisdiction) or one that permits attachment to entireties property in connection with the separate debts of one spouse (*i.e.*, a modified or partial bar jurisdiction)?

A1. ***Application of Section* 6323**. Section 6323 provides that "[t]he lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary." Section 6323(a). The rule of *Craft*, with respect to entireties property, applies to federal tax liens regardless of when they arose. A federal tax lien, therefore, has priority over any interest of a purchaser, a holder of a security interest, a mechanic's lienor, or a judgment lien creditor (i.e., the class of persons protected by section 6323(a)) if notice of the federal tax lien was filed before such other interest arose.

Accordingly, with respect to entireties property located in full bar jurisdictions, the Service will not assert its federal tax lien priority over the interests of the class persons protected under section 6323 (a), if the section 6323 (a) interests were created before *Craft* was decided. For example, if a purchaser acquired entireties property before *Craft* was decided and meets the definition of a purchaser under section 6323 (h)(6), the Service will not assert lien priority even though a notice of federal tax lien had been filed prior to the purchase. [Note: North Carolina is a so-called "full bar" jurisdiction. Further, 26 U.S.C. Sec. 6323(h) defines "security interest" and "purchaser" in a way that indicates the person must record in order to achieve protected status.]

[Our Examples. We believe that the IRS, based on its notice, will take the following position in the following examples. Note that a federal tax lien docketed before or after title vests in a couple as tenants by the entireties is treated the same.

EXAMPLE 1. In the following order, a federal tax lien is docketed only against *H*, *H* and *W* (husband and wife) take title as tenants by the entirety; a different federal tax lien is docketed against only *H*; *H* and *W* convey title to *A*; *Craft* is decided. (Note: Under 26 U.S.C. § 6323(h), *A* arguably must record prior to *Craft* being decided.) The IRS will not assert its liens against *A*'s title. After *Craft*, *A* conveys title to *B*. We believe that the implication of the IRS' position is that the IRS will not assert its liens against *B*'s title. If the IRS will not assert its liens against *A*'s title because *A* acquired title before *Craft*, in order for that to mean anything, *A* should be able to convey to *B after Craft* without *B* having the liens asserted against *B*'s interest.

EXAMPLE 2. In the following order, a federal tax lien is docketed only against *H, H* and *W* acquire title as tenants by the entirety; a different federal tax lien is docketed against only *H*; *Craft* is decided; *H* and *W* convey title to *A*. The IRS will assert its liens against *A*'s title.]

Divorce. A spouse of the taxpayer who obtained entireties property in a divorce acquires the property subject to the federal tax lien. In the context of a divorce, a spouse is not in the class of persons protected by section 6323 (a). Consequently, if the assessment giving rise to the federal tax lien under section 6321 had occurred prior to the divorce, then the lien also attached to the taxpayer's rights in the entireties property. As a general rule, if the transfer occurred before *Craft*, then the Service will treat the transfer as one for value and will not assert its lien against the property in the hands of the ex-spouse of

the taxpayer. This will not apply if the Service determines that, notwithstanding the divorce, the transfer was fraudulent.

Donation. [Note: The IRS' position is that a donee of entireties property is not protected against a federal tax lien filed against only one spouse. Transfer to a donee before *Craft* will be evaluated on a case by case basis to see if the equities disfavor the assertion of the federal tax lien, for example, if the donee made substantial improvements. The identity of the donee may favor imposition of the lien, for example, when the donee is a family trust related to the taxpayer.]

[Note: As to "Q2" and "A2", the decision in *Craft* does not provide legal authority to rescind any accepted offer in compromise, terminate an installment agreement, or revoke any certification of subordination or discharge.]

Q&As when interest in existing entireties property is acquired from the taxpayer on or after April 17, 2002.

Q3. If entireties' property subject to the federal tax lien is sold or transferred after *Craft* and the Service does not discharge the lien, is the property subject to the federal tax lien in the hands of the transferee?

A3. A conveyance of entireties property terminates the entireties estate with respect to that property. Accordingly, after *Craft,* unless the service discharges the property from the federal tax lien, the lien will encumber a one-half interest in the hands of the transferee, regardless of whether the transferee is a donee or gives value. As explained below, the Service generally will deem the value of the taxpayer's interest in entireties property to be one-half of the total value of the property.

[Our Example. In the following order, *H* and *W* (husband and wife) take title as tenants by the entirety; a federal tax lien is docketed against only *H*; *Craft* is decided; *H* and *W* convey to *A*. The federal tax lien encumbers *H's* one-half undivided interest now vested in *A*.]

Q4. Does the federal tax lien on entireties property survive the death of the taxpayer? What effect does the death of the non-taxpayer have on the federal tax lien?

A4. As is the case with joint tenancy with the right of survivorship, if a taxpayer's interest in entireties property is extinguished by operation of law at the death of the taxpayer, then there is no longer an interest of the taxpayer to which the federal tax lien attaches. When a taxpayer dies, the surviving non-liable spouse takes the property unencumbered by the federal tax lien.

When a non-liable spouse predeceases the taxpayer, the property ceases to be held in a tenancy by the entirety, the taxpayer takes the entire property in fee simple, and the federal tax lien attaches to the entire property.

[Our Example 1. In the following order *H* and *W* take title as tenants by the entirety; a federal tax lien is docketed against only *H*; *Craft* is decided; *H* dies and leaves *W* surviving; *W* conveys title to *A*. *A* takes title free of the federal tax lien, according to the I.R.S.]

[Our Example 2. In the following order, *H* and *W* take title as tenants by the entirety; a federal tax lien is docketed against only *H*; *Craft* is decided; *W* dies; *H* conveys title to *A*. *A* takes subject to the federal tax lien.]

The rule that the federal tax lien does not survive the death of the taxpayer does not apply if the entireties estate previously has been terminated. For example, if the property has been conveyed to a third party, the federal tax lien will be deemed to encumber a one-half interest in the hands of the transferee and will not be affected by the subsequent death of either spouse.

Q5. Does the federal tax lien remain on entireties property awarded to a non-liable spouse in a divorce decree?

A5. Entireties property subject to the federal tax lien and then transferred after *Craft* to a non-liable spouse pursuant to a divorce remains encumbered in the hands of the ex-spouse.

Q6. After a notice of federal tax lien is filed, the taxpayer and spouse jointly mortgage entireties property to a bank. What effect would the death of either spouse have on the respective rights of the Government and the bank? Where the property is transferred either to a third party or as a result of a divorce, does the federal tax lien have priority over the bank?

A6. Under section 6323, the federal tax lien has priority over the bank's interest with respect to the taxpayer's interest in the entireties property.

If the taxpayer survives the spouse, the federal tax lien will be a senior lien against the whole property. The taxpayer's interest in the entireties property to which the federal tax lien attaches includes the taxpayer's right of survivorship. With the death of the taxpayer's spouse, the taxpayer becomes the fee simple owner of the property, and the federal tax lien attaches to that interest in the property, which is senior to the bank's interest.

As discussed in Q&A 4, if the taxpayer predeceases the spouse and his or her interest is extinguished by operation of law, the federal tax lien will be extinguished. The mortgage lien becomes the first lien on the property.

Since a divorce or transfer to a third party terminates the entireties estate (and, with it, the spouses' rights of survivorship), if the property is transferred to a third-party or to either spouse as a result of a divorce, then the federal tax lien generally will have priority with respect to a one-half interest in the property over the bank's subsequent security interest.

Q7. Will the Service administratively seize and sell the taxpayer's interest in entireties property?

A7. The Service can administratively seize and sell a taxpayer's interest in real and personal property held in a tenancy by the entirety. [Due to valuation and market problems related to factors noted above]…the Service has determined that an administrative sale is not a preferable method of collection with respect to entireties property.

Q8. Will the Service foreclose the federal tax lien against entireties property?

A8. The Service will foreclose the federal tax lien against entireties property in appropriate cases. While in an administrative sale the Service can sell only the taxpayer's interest in entireties property (i.e., not the entire property itself), in a foreclosure action, pursuant to section 7403, the district court has discretion to order the sale of the entire property, even where a non-liable spouse has a protected interest in the property. See *United States v. Rodgers,* 461 U.S. 677 (1983) (principle applied with respect to the sale of homestead property). If the court orders the sale of the property, then the non-liable spouse must be compensated for his or her interest: section 7403 requires "a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and the United States." Section 7403(c).

Q9. How is the Government's federal tax lien interest in entireties property valued for the purposes of discharge and subordination under section 6325? After private foreclosure on entireties property, what is the value of the Government's interest in proceeds left after the satisfaction of senior liens? How is entireties property valued for bankruptcy purposes? How is entireties property valued in offers in compromise?

A9. **Discharge and Subordination**. Under section 6325(b)(2)(A), the Service may issue a certificate of discharge of property subject to a federal tax lien upon payment of an amount not less than the value of

the Government's interest in that property to be discharged. If a taxpayer applies for a certificate of discharge when entireties property is to be sold by the taxpayer and the taxpayer's spouse, then the taxpayer generally must pay the Service one-half the proceeds of the sale in partial satisfaction of the liability secured by the federal tax lien.

Foreclosing mortgagees with interests that are senior to the federal tax lien often seek a certificate of discharge, rather than joining the United States in the judicial proceeding. By obtaining a discharge of the mortgaged property, the mortgagee eliminates the Service's rights under section 2410(c) of Title 28 to redeem the property from the purchaser after the foreclosure sale. As in the case of a taxpayer who seeks a certificate of discharge of the entireties property, the Service generally will determine the value of the Government's interest to be one-half the value of the property, which is determined for this purpose by first taking into account the amount of senior liens.

Under 6325(b)(4), an owner of property subject to a tax lien (for example, a subsequent purchaser), other than the taxpayer whose liability gave rise to the lien, may seek a certificate of discharge by making a deposit or posting a bond equal to the value of the interest of the Government in the property. In connection with an application for discharge of former entireties property under section 6325 (b)(4), the Service generally will determine the value of the Government's interest to be one-half the value of the property.

In light of the *Craft* decision, taxpayers and taxpayers' spouses will seek subordination of the federal tax lien in connection with refinancing mortgages on entireties property. If the requested subordination is for the purpose of securing a loan to refinance a senior lien, the Service will apply section 6325(d)(2). The Service will generally issue a certificate of subordination if the terms of the refinance loan, as compared to the terms of the loan secured by the senior lien, ultimately will enhance the taxpayer's equity or facilitate the collection of the tax from other property or income of the taxpayer.

If a taxpayer and a taxpayer's spouse seek a certificate of subordination for the purpose of obtaining cash or paying other debts not secured by a senior lien on the property (for example, in the case of a home equity loan), the Service will apply section 6325(d)(1). The Service generally will treat the value of the taxpayer's interest as one-half of the value of the entireties property. The Service would issue a certificate of subordination upon payment of one-half the amount of the lien or interest to which the federal tax lien will be subordinated.

Private Foreclosure. Where a senior creditor is foreclosing a mortgage or other lien on the property, the Service generally will determine the value of the taxpayer's interest to be one-half of the excess of the value of the property over the amount of the senior lien.

Bankruptcy. In bankruptcy cases, the Service, in determining the value of its secured claim, generally will value the debtor's interest in entireties property to be one-half of the total value of the property.

C. Federal tax liens and purchase money deeds of trust.

A federal tax lien is docketed against ***Spouse A***. ***Spouse A*** acquires title to Lot 1 and gives a deed of trust to ***M*** to secure purchase money. The deed and deed of trust are recorded on the same day as part of the same transaction. We will insure that the federal tax lien will be subordinate to the deed of trust since we believe that the federal government will respect the "purchase money rule." This rule, also called the "instantaneous seisen rule," is discussed in **E.** below.

D. Federal tax liens vs. judgment—after acquired property.

In the following order, the U.S. makes an assessment against the tax payers; a bank dockets a state court judgment against the tax payers; the U.S. dockets a federal tax lien against the tax payers; and ***Spouse A*** and ***Spouse B***, the tax payers, acquire Lot 1. The federal tax lien has priority over the judgment lien. *U.S. v. McDermott*, 113 S.Ct. 1526 (1993).

In the following order, ***Spouse A*** and ***Spouse B*** acquire title to Lot 1 as tenants by the entirety; a bank dockets a state court judgment against ***Spouse A*** and ***Spouse B***; and the U.S. dockets a federal tax lien against ***Spouse A*** and ***Spouse B***. The state court judgment has priority over the federal tax lien.

E. Judgments and liens having the effect of judgments.

The effect of judgments and liens that have the effect of judgments (such as income tax liens pursuant to G.S. 105-241 and G.S. 105-242) can best be illustrated by examples.

Spouse A and ***Spouse B*** are married and own land as tenants by the entireties. ***J*** dockets a judgment against ***Spouse A*** and ***Spouse B***. The lien attaches.

Spouse A and ***Spouse B*** are married and own land as tenants by the entireties. ***J*** dockets a judgment against ***Spouse A***. The lien does not attach. If later, ***Spouse A*** and ***Spouse B*** get a divorce, the lien attaches at that time to ***Spouse A's*** one-half undivided interest in the new tenancy in common. (For a landmark case discussing, tenancy by the entireties, see *Johnson v. Leavitt*, 188 N.C. 682, 125 S.E. 490 (1924).)

A judgment in favor of ***J*** is docketed against ***Spouse A*** and ***Spouse B,*** husband and wife. ***Spouse A*** and ***Spouse B*** acquire title to Lot 1 and simultaneously give a deed of trust securing ***M's*** loan (all of the proceeds of which are used to buy the property). The deed and deed of trust are recorded one right after another. One minute later N's second lien purchase money deed of trust is recorded. All proceeds are used to buy the property. The judgment attaches to ***Spouse A's*** and ***Spouse B's*** tenancy by the entireties but ***M's*** deed of trust has priority over the judgment due to the instantaneous seisen rule.

(*Supply Co. v. Rivenbark*, 231 N.C. 213, 56 S.E. 2d 431 (1949). However, in one case, where the deed and deed of trust were recorded eleven days apart, the rule did not apply. *Pegram-West*, Inc. v. *Hiatt Homes*, Inc., 12 N.C. App. 514, 184 S.E. 2d 65 (1971). In another case, a deed of trust secured both purchase money proceeds and construction advances. The construction advances did not get the benefit of the rule. *Dalton Moran Shook, Inc*. v. *Pitt Development Co*., 113 N.C. App. 707, 440 S.E. 2d 585 (1994). And in another case, where the deed was recorded one minute, a construction deed of trust was recorded the next minute and one minute later, the purchase money deed of trust was recorded, the rule did not apply. *Carolina Builders Corp*. v *Howard-Veasey Homes, Inc*., 72 N.C. App. 224, 324 S.E. 2d 626, cert. den., 313 N.C. 597, 330 S.E. 2d 606 (1985).)

It was very possible that ***N's*** second lien deed of trust, while subordinate to ***M's*** first lien deed of trust, is entitled to priority over ***J's*** judgment lien based on instantaneous seisen. See the detailed discussion in E. Urban, *Purchase Money Mortgages and Deeds of Trust-Can a Second Lien Deed of Trust Qualify For The "Instantaneous Seisen Rule"?* (Appearing at www.oldrepublictitle.com/nc,2005), discussing all aspects of the doctrine. Also, for a comprehensive discussion, see E. Urban, *North Carolina Real Property Mechanics' Liens, Future Advances And Equity Lines- Including Title Insurance* § 8-3 (Thomson * West, 2d ed.1998, Supp. 2005).)

A judgment in the above examples is treated the same for attachment and priority purposes whether it is a state court judgment (G.S. 1-234); a magistrates' judgment (G.S. 7A-224; G.S. 7A-225); a judgment docketed under the foreign judgments act pertaining to the judgments of other states (G.S. 1C-1703 (c)); another country's judgment docketed in North Carolina (G.S. 1C-1803); a federal court judgment (G.S. 1-237); and a judgment in favor of the United States (28 U.S.C. § 3010(a) governing the effect of lien and 28 U.S.C. § 3014 (a)(2)(B) pertaining to tenancy by the entirety). Note the difference between how a judgment in favor of the United States is treated as verses a federal tax lien when it comes to entireties property.

F. Bankruptcy – tenancy by the entirety and claiming §522 exemptions.

We will refer to husband and wife as ***H*** and ***W***. If ***H*** and ***W*** own land as tenants by the entirety, they may exempt the land pursuant to old 11 U.S.C §522(b)(2)(B), or new 11 U.S.C. §522(b)(3)(B). This can be

done if there are no joint debts of ***H*** and ***W***. For example, if there are only debts of ***H*** and only debts of ***W*** the exemption will allowed. If there are joint debts of ***H*** and ***W***, the exemption will not be available. The cases construing the Bankruptcy Code show that when ***H*** and ***W*** have encumbered the land with a deed of trust, it is the equity they seek to exempt under the Bankruptcy Code.

A debtor's interest in a tenancy by the entireties becomes part of the debtor's bankruptcy estate even if the debtor is the only spouse filing bankruptcy. (11 U.S.C. §541(a).) 11 U.S.C.§522(b)(3)(B) says a debtor may exempt any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant "to the extent that such interest….. is exempt from process under applicable non bankruptcy law." (Prior to the recent Bankruptcy Code's revisions, this section was 11 U.S.C. §522(b)(2)(B) as discussed in the cases noted below.) Examples based on the cases are set out below.

EXAMPLE 1: Title to the home is vested in ***H*** and ***W*** as tenants by the entireties. ***H*** and ***W*** file a joint bankruptcy petition. Each unsecured creditor's claim is against ***H*** or ***W*** but not against ***H*** and ***W***. Only ***H*** claims the exemption for the equity in the home. When ***H*** and ***W*** file a joint petition, a separate bankruptcy estate for ***H*** and a separate bankruptcy estate for ***W*** are created. ***H*** is allowed the exemption. (*In re Bunker*, 312 F.3rd 145 (4th Cir. 2002). (The Bunker bankruptcy).)

EXAMPLE 2: Same Facts as in EXAMPLE 1, except ***H*** and ***W*** claim the exemption. The exemption is allowed.(*In re Bunker*, 312 F.3rd 145 (4th Cir. 2002). (The Thomas bankruptcy).)

EXAMPLE 3: ***H*** and ***W*** own a home as tenants by the entirety. ***H*** files a Chapter 7 bankruptcy petition. ***H's*** schedule of debts lists $19,570.50 in unsecured claims including $1,474.78 in debts incurred *jointly* with his non-filing ***W***. ***H*** claims the $20,000 equity in the home as exempt under the entireties exemption noted above. The property is not exempt. The property can be administrated for the benefit of those joint creditors. (*Sumy v. Scholossbery*, 777 F. 2d. 921 (4th Cir. 1985).)

In that case, even though only ***H*** files bankruptcy, 11 U.S.C. §541 provides that the entirety property becomes part of the bankruptcy estate, subject to the applicability, if any, of 11 U.S.C. §522(b) exemptions. For property that becomes part of the estate under 11 U.S.C. §541 but that is not exempt under 11 U.S.C. §522(b), the trustee has the general power, after "notice and a hearing," to use, sell, or lease, other than in the ordinary course of business, property of the estate. (11 U.S.C. §363(b)(1).) 11 U.S.C. §363(f) allows a sale free and clear of liens. Here, the trustee objected to ***H's*** exemption and wanted to administer the property under 11 U.S.C. §363(h) for the benefit of joint creditors of ***H*** and ***W***. The court held that if bankruptcy filing ***H*** and non filing ***W*** have joint debts, their entirety property cannot be exempted under 11 U.S.C. §522(b)(3)(B) and the trustee can administer the property for the benefit of joint creditors under 11 U.S.C. §363(h).

The court discussed the interplay between 11 U.S.C. §522(b)(3)(B)'s exemption for entirety property and 11U.S.C. §522(f)(1)'s rule that a debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent such lien "impairs an exemption" to which the debtor would have been entitled under 11 U.S.C. §522(b), if such lien is a judicial lien. At 777 F. 2d at 931, 24, the court cited *In re Trickett*, 14 B.R. 85 (Bankr. W.D. Mich. 1981), which said, as to joint claimants, the property is not eligible for the 11 U.S.C. §522(b)(3)(B) exemption and so, there can be no impairment of a tenancy by the entirety exemption by a judicial lien docketed against ***H*** and ***W***.

EXAMPLE 4: ***H*** and ***W*** own the home as tenants by the entirety. ***W*** file a Chapter 7 petition and ***W*** claims her 11 U.S. C. §522(b)(3)(B) exemption. Within 180 days of filing the petition, ***W*** obtains a divorce which converts the interest to a tenancy in common. ***W*** loses her 11 U.S.C. §522(b)(3)(B) exemption. (See 11 U.S.C. §541(a)(5)(B).) 11 U.S.C. §541(a)(5)(B) applies to an interest acquired by the debtor within the 180 day period. The same thing would have occurred if ***H*** died within the 180 day period.

In *re Williams*, 104 F. 3d 688 (1997), ***W*** filed a Chapter 7 proceeding and listed a tenancy by the entirety ***H*** and ***W*** owned as exempt under 11 U.S.C. §522(b)(3)(B). There were six unsecured creditors holding joint claims against ***H*** and ***W*** for $14,445.29 and creditors with claims against ***W*** for $19,443.52. The trustee failed to object within 30 days of the claim under 11 U.S.C. §522(l) and F.R.B.P. 4003(b). This means that the trustee forfeited his right to object. (*Taylor v. Freeland and Kronz,* 503 U.S. 638, 643-44,

112 S. Ct. 1644, 1648 (1992).) ***W*** argued that the trustee lost his right to administer the tenancy by the entirety for both joint and non-joint creditors. The court held that since ***W*** made her claim under 11 U.S. C. §522(b)(3)(B), the trustee's failure did not preclude his ability to administer the property for joint creditors of ***H*** and ***W*** since those claims are not protected by 11 U.S. C. §522(b)(3)(B). ***W*** never claimed the real estate was exempt from the claims of joint creditors.

Also, see the case of *In re Payne and Payne* (no. 04-5212 4C-7W, U.S. Bankr., M.D.N.C.) It construes 11 U.S.C. §522. On 7-22-04, ***H*** and ***W*** filed a Chapter 7 petition. They owned their residence as tenants by the entirety. When spouses file a joint Chapter 7 petition, separate bankruptcy estates are created. In the case, each of the debtors exempted their residence pursuant to 11 U.S.C. §522(b)(2)(B) and the laws of North Carolina pertaining to entirety property.

The debtor must list all property claimed exempt under 11 U.S.C. §522 on the schedule of assets filed pursuant to Bankruptcy Rule 1007. (See Bankruptcy Rule 4003 (a).) Pursuant to Bankruptcy Rule 4003(b), a party in interest may file an objection within 30 days after conclusion of the meeting of creditors or within 30 days after any amendment to the list or supplemental schedule is filed, whichever is later. Before such expiration, a party of interest may file a request for an extension. Bankruptcy Rule 4003(d) states that a proceeding by the debtor to avoid a lien or other transfer of property exempt under 11 U.S.C. §522(f) of the Code shall be by motion in accordance with Rule 9014. Bankruptcy Rule 5003(a) provides that the clerk shall keep a docket and enter thereon each judgment, order or activity. Bankruptcy Rule 5003(c) requires the clerk to keep a correct copy of every judgment or order affecting title to real property or a lien on real property.

