



CHICAGO TITLE INSURANCE COMPANY

TOPIC: <u>Marital Rights of Spouses</u>

TITLE SEARCH & CLOSING RULES:

1. **General Rule:** Any married person conveying or mortgaging property must be joined in the conveyance by their spouse.
2. **Property held in the name of only one spouse:** Property in the name of only one spouse is still potentially subject to the following inchoate and other rights including the right to an elective share in the decedent spouse's estate, the right to elect a life estate in certain real property of the decedent, equitable distribution upon divorce, quasi-community property rights, dower and curtesy estates (for estates of decedents dying prior to July 1, 1960). These rights terminate upon divorce (except that equitable distribution may be preserved by filing of a lawsuit and lis pendens prior to divorce).

Judgments against the owning spouse or both spouses will attach to the real estate. Judgments against only the non-owning spouse will not attach.

These potential marital interests constitute a potential title problem that should be addressed at closing, and carefully explained to the client. Too often a client, involved in a separation or divorce, has been surprised at the closing table to find that their spouse (whether current, former or soon-to-be-former) has an inchoate but very real interest in the property. Likewise many closing attorneys have been surprised at the closing table to find that their clients are married! The inchoate marital interest is of particular concern to title insurers in North Carolina because it could result in a legitimate claim against title held by a third party. For example, an individual owner could convey title to real property to a third party, then die months or years later while still married, at which point the deceased's spouse could assert a claim against the property based on one or more of the contingent rights listed above. This would cause a major problem for the third-party purchaser, and if exception to marital rights has not been taken in said purchaser's title policy, a title claim would likely be asserted. For this reason, title insurers will be diligent to make sure that, with the cooperation of the closing attorney, marital rights will be properly addressed.

As a general rule, the non-title-holding spouse of any individual must either join in the conveyance, or have their marital interest properly addressed and released, in order for the owning spouse to convey marketable, insurable title to property (including any lien granted thereon). In a title commitment involving property shown to be owned by an individual, title companies will initially require any conveyance instrument to be insured to be executed by the fee owner "*and their spouse, if any.*" It is the duty of the closing

attorney to discover and disclose whether a client is single or married, and to address the marital rights issue appropriately. Obtaining a marital status affidavit is a good practice, especially since the attorney is ultimately going to render an opinion on title without exception for marital rights. (This is included in Chicago Title's comprehensive Owner/Seller/Contractor Affidavit and Indemnity Agreement.)

Some commonly occurring Scenarios and the analysis of each are provided at the end of this manuscript.

3. **Exceptions to the General Rule:**

Sometimes though, obtaining the signature of a non-owning spouse is not feasible. There are different ways that marital rights can be addressed, and title companies can be consulted to alter requirements in situations where the signature of a spouse on the instrument to be insured can not be obtained.

- a. **Waivers:** These rights may be waived by adequate premarital (or antenuptial) agreements, separation agreements, agreements during marriage or waivers of elective shares or rights above. However, these agreements or waivers should be carefully reviewed by underwriting counsel. Statutory requirements and risk factors to consider may include:
 - Execution and acknowledgment before a notary by both spouses,
 - Full disclosure of assets,
 - Avoidance of unconscionability, duress, undue influence or excessive overreaching,
 - Voluntariness of the waivers, indicating the need for specific affidavits or indemnities,
 - Recordation of the instrument or a sufficient memorandum thereof in the public records of the county in which the property to be insured is located, for marketability purposes even if not specifically required by statute.
 - b. **Purchase Money Mortgages:** When property is purchased by one spouse who provides a contemporaneous mortgage either back to the seller or to a third party lender solely as a portion of the purchase price for the property and fully disbursed at closing without provisions for construction or equity line or other future advances, the marital rights of the non-owning spouse are subordinate to this purchase money interest, by statute and at common law.
 - c. **Incompetent non-owning spouse:** The owner-spouse may convey with joinder of the guardian of the incompetent non-owning spouse.
4. **Tenancy by the entireties:** Any conveyance to the husband and wife while they are married will constitute a tenancy by the entireties in the property unless either:
- a. The conveyance specifically states some other estate is intended, or
 - b. The conveyance is upon voluntary partition where only one spouse was a tenant in common. In this situation, even a deed purporting to be to both spouses does not

create a tenancy by the entirety unless the conveyance specifically expressly states that intent and the tenant-in-common spouse joins in the execution of the conveyance.

Upon divorce, the tenancy by the entirety is immediately severed and the property is held by the former spouses as tenants in common. Therefore, judgments of one spouse can attach to that spouse's ½ undivided interest immediately upon entry of the divorce decree.

Upon death of one spouse, the property immediately vests solely in the surviving spouse. Therefore, judgment creditors of the surviving spouse attach to the property immediately upon death of the first spouse. Otherwise, judgment creditors of either spouse individually do not attach to property taken and held as tenancy by the entirety, so long as no interest was ever held solely in the name of the debtor-spouse on or after entry of the separate judgment; only judgments entered against both spouses would attach to tenancy-by-entireties property. One exception is that federal tax liens against one spouse do attach to the spouse's "share" of the tenancy by the entirety under federal case law. United States v. Craft, 535 U.S. 274, 122 S. Ct. 1414, 152 L. Ed. 2d 437 (2002)

Conveyance by one spouse to the other, severing the tenancy by the entirety, may vest title in the grantee spouse, pursuant to G.S. 39-13.3. However, the inchoate rights of the now non-owning spouse (discussed above) still attach to the property unless specifically and expressly waived as required above.

5. Conveyances & marital status: Any conveyance or mortgage should clearly show the current marital status of the grantor, for future marketability of the title, to address the need (or not) for joinder of a spouse, or attachment of a spousal interest.

6. Execution and notarization:

Pursuant to G.S. 39-8, the proof or acknowledgment of the spouses may be at different times and before different offices or notaries. In addition, so long as the procedure for notarial act required by statute (personal appearance of signer before the notary, acknowledgment or swearing or affirmation, etc.) is met, the certificate of acknowledgment can be actually applied to the document at a later time. [Lawson v. Lawson](#), 321 N.C. 274, 362 S.E.2d 269 (1987). Of course, this affixation may affect the validity of any recordation in the interim vis-à-vis third parties relying on the public records under the recording statutes. See G.S. 47-18 and G.S. 47-20, for example.

7. Powers of Attorney Among Spouses:

Married persons may appoint their spouse as their attorney-in-fact under a power of attorney, so long as duly signed and acknowledged before a notary or other official authorized to take oaths, and subject to the terms of the power of attorney, pursuant to G.S. 39-12. The power of attorney may even authorize the spouse serving as attorney-in-fact to waive the principal spouse's marital interests in property under G.S. 29-30. However, the attorney should be cautious about authority of spouse as attorney-in-fact to waive a right to the benefit of that spouse as same may violate common law rules against

self-dealing of the fiduciary, and the power of attorney much contain adequate gifting and self-dealing authority under Chapter 32A of the General Statutes. For example, in the case of In re Doerfer, __ Bankr. __ (Bankr., M.D.N.C. Nov 1, 2006), the husband lacked authority to subject his wife's tenancy-by-entireties interest to the lien of a deed of trust, such that the lien was not a secured lien in their subsequent bankruptcy. (For more details, see separate topic, "Power of Attorney")

TITLE INSURANCE REQUIREMENTS, EXCEPTIONS AND COVERAGE:

If the property is owned by one person, the commitment will typically contain requirements for deeds or deeds of trust from that individual *and their spouse*. Or, in situations involving premarital, property settlement or separation agreements, the commitment may contain a requirement that a satisfactory agreement or memorandum thereof containing satisfactory waiver and conveyance language be recorded prior to closing, such as:

Recording of agreement between * and * wherein each party releases all of his/her marital rights in the real property of the other.

If a conveyance does not include either sufficient verification the party was unmarried or joinder of the spouse, exception may be taken to the marital rights of the person's spouse, as follows:

Marital rights of the spouse of *.

The policy exclusion for matters suffered, assumed or agreed to by the insured would also prevent coverage of the owner-insured against the rights of that owner's non-owner spouse.

FORMS:

Marital Status Affidavit and Indemnity

Memorandum of Property Agreement -- Between Husband and Wife

Marital Rights - Deed Between Spouses Provision

Marital Rights – Deed of Trust Provision - Spouse Subordinates Interest in Property

LEGAL DISCUSSION:

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Title must be conveyed by *all* title holders, which includes both spouses if the property is held in both names. A conveyance from one spouse to the other may sever their joint ownership and convey *title*. (*See, for example, G.S. 39-13.3*).

However, despite the title being held by only one spouse, the other spouse still may retain certain *inchoate and statutory rights or interests*, described below in Section A., absent satisfactory additional step of waiver or conveyance, the methods for which are described

below in Section B. This requires more than a simple conveyance from one spouse to the other if they are still married.

A. “INCHOATE” MARITAL RIGHTS -- STATUTORY AND OTHERWISE:

Even if record title appears vested in only one spouse, certain potential contingent marital interests and rights devolve upon the non-title-holding spouse with regard to these otherwise separate real property interests held at any time during the marriage. These immediately attach to properties owned by one spouse at the time of marriage, or acquired during the marriage. Once attached, and unless waived in writing by the non-owning spouse pursuant to the methods in B. below, these rights remain attached to the property until they are either exercised or expire under the applicable statutes below, even if the owning spouse has long since conveyed the record title away.

These rights attach to fee simple, to remainders, and even for purposes of releasing negative easements (restrictive covenants). Moore v. Shore, 208 N.C. 446, 181 S.E. 275 (1935). However, they would not attach to a life estate only in the decedent spouse, since that estate terminates before the condition precedent for the marital interest occurs, *i.e.*, the death of the “owning” spouse.

These rights include the following:

1. Intestate Succession and Contingent Statutory Marital Rights: If the “owning” spouse dies intestate, the surviving (“non-owning”) spouse inherits by Intestate Succession from 1/6 to all of the title of a decedent spouse dying on or after July 1, 1960, depending upon the number of children surviving and whether the spouse is from a first or later marriage, under G.S. 29-14(a) (since 3/5/81).

- (a) Real Property. - The share of the surviving spouse in the real property is:*
- (1) If the intestate is survived by only one child or by any lineal descendant of only one deceased child, a one-half undivided interest in the real property;*
 - (2) If the intestate is survived by two or more children, or by one child and any lineal descendant of one or more deceased children or by lineal descendants of two or more deceased children, a one-third undivided interest in the real property;*
 - (3) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, but is survived by one or more parents, a one-half undivided interest in the real property;*
 - (4) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, or by a parent, all the real property.*

(For decedents dying between 10/1/79 and 3/5/81, see transition rules in notes after G.S. 29-14.)

Any such distribution will be adjusted for properties allocable to the survivor as a result of an equitable distribution decree entered after the death of the decedent-spouse pursuant to G.S. 50-20(c)(11b).

2. Right to Dissent from the Will (for estates of decedents dying prior to January 1, 2001): If one spouse died prior to January 1, 2001, leaving a will, the surviving spouse could have elected to take a share determined by the contingent statutory marital share in 1. above, if larger than the testate share, under G.S. 30-1 *et seq.* Generally, the dissent must have been filed with the Clerk of Superior Court within 6 months following issuance of letters testamentary or of administration with will annexed. This statutory right has now been repealed.

3. Elective Share: Effective for estates of decedents dying on or after January 1, 2001, the above right to dissent has been replaced by a right to petition for an elective share under G. S. 30-3.1 *et seq.* The surviving spouse's total share in the Total Net Assets (as adjusted) of the estate may be as much as one-half if the decedent had no children or only one child of this spouse, one-third if the decedent had 2 or more children (at least one with this spouse), reducing to one-quarter and one-sixth respectively for a second spouse and children of a prior marriage of the decedent. A Petition must be filed with the Clerk of Superior Court within 6 months after the issuance of Letters Testamentary or Letters of Administration in the decedent's estate. Pursuant to G. S. 30-3.6, waiver may be done if:

- a. In writing, signed by the waiving spouse
- b. Before or after marriage
- c. With or without consideration
- d. Voluntarily
- e. After either: (1) fair and reasonable disclosure of the property and financial obligations of the decedent; or (2) the surviving spouse waived, in writing, the right to that disclosure.

Any such distribution will be adjusted for properties allocable to the survivor as a result of an equitable distribution decree entered after the death of the decedent-spouse, pursuant to G.S. 50-20(c)(11b).

4. Right to elect a life estate: The surviving spouse of a decedent dying on or after July 1, 1960, can petition to take a life estate in 1/3 of the 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" under G. S. 29-30, as an alternative to either the intestate share or the elective share above, and to the extent not otherwise waived or conveyed (Section B. below).

As an additional alternative, the surviving spouse may give notice of election of a life estate in the usual dwelling owned at time of decedent's death and appurtenances, pursuant to G.S. 29-30(b), which provides:

Regardless of the value thereof and despite the fact that a life estate therein might exceed the fractional limitation provided for in subsection (a), the life estate provided for in subsection (a) shall at the election of the surviving spouse include a life estate in the usual dwelling house occupied by the surviving spouse at the

time of the death of the deceased spouse if such dwelling house were owned by the deceased spouse at the time of his or her death, together with the outbuildings, improvements and easements thereunto belonging or appertaining, and lands upon which situated and reasonably necessary to the use and enjoyment thereof, as well as a fee simple ownership in the household furnishings therein.

The election must be by filing a notice with the Clerk of Superior Court and service on fiduciary and other heirs and/or devisees within certain statutorily defined times – either 1 month following expiration of the period for dissent from the will of the deceased spouse; or 12 months after death of an intestate decedent if no letters of administration; or within one month following expiration of period to file claims against the estate if letters of administration were issued within 12 months after death; or according to court order if litigation affecting surviving spouse’s share is pending. The allotted share is determined by a jury of 3 disinterested parties appointed by the Clerk. If not made timely and in compliance with the statute, it is deemed waived. G.S. 29-30(h).

5. Equitable Distribution: In the event of separation and divorce, under G. S. 50-20 even property held in only one name may be claimed to be “marital property” and subject to division between the parties. A civil action must be filed regarding the property prior to entry of the final divorce decree. A notice of lis pendens can and should be filed in conjunction with any claim to real estate in an equitable distribution action. However, this is not mandated by the statute. G.S. 50-20(h), referencing Article 11 of Chapter 1 of the General Statutes. However, G.S. 50-20(h) further provides that: “[a]ny 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.”

PRACTICE POINTER: If it is anticipated that a recently separated or divorced spouse will not join in a conveyance or mortgage of property in one spouse’s name, it is critical for the attorney to assure that no equitable distribution action has been filed claiming the property as marital property, *whether or not a lis pendens has been filed!* Therefore, civil actions must be checked as part of the title examination.

Property held as tenants by the entireties is presumed to be “marital” absent clear, cogent and convincing evidence otherwise. Such a high burden of proof has proven difficult to meet. Thompson v. Thompson, 93 N.C.App. 229, 377 S.E.2d 767 (1989).

Quitclaim deeds between spouses do *not* take property outside the ambit of ED unless they are executed in compliance with G.S. 52-10. Beroth v. Beroth, 87 N.C.App. 93, 359 S.E.2d 512 (1987). However, under G.S. 50-20(d), “[b]efore, during or after marriage the parties may by written agreement, duly executed and acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1, or by a written agreement valid in the jurisdiction where executed, provide for distribution of the marital property or divisible property, or both, in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties.” (See more detailed discussion under B. below.)

The final ED judgment cannot be entered until after the divorce judgment, pursuant to G.S. 50-21. The right to a claim of equitable distribution does not change the vested ownership of the property, but is a claim to be determined by the court only upon divorce. Since a tenancy by entireties is automatically and immediately severed upon divorce, the separate lien creditors of one spouse would attach to the 1/2 undivided interest of the spouse immediately upon divorce. Therefore, if a creditor's judgment is entered, since divorce is entered prior to actual equitable distribution order allocating and vesting title in the non-debtor spouse, the creditor's judgment will attach prior to the distribution determination. Union Grove Milling and Manufacturing Co. v. Faw, 103 N.C.App. 166, 404 S.E.2d 508 (1991). Similarly, the lien of a deed of trust signed by only one spouse attached to the debtor spouse's 1/2 interest, even though the ED judgment transferred the property to the non-debtor spouse and the default occurred after the transfer. Branch Banking & Trust Co. v. Wright, 74 N.C.App. 550, 328 S.E.2d 840, *cert. granted* 314 N.C. 662, 335 S.E.2d 321, *appeal withdrawn* 318 N.C. 505, 353 S.E.2d 225 (1985). *Caution:* Under Union Grove and BB&T v. Wright, the filed *lis pendens* may not be sufficient to prevent attachment of a single spouse's lien to their 1/2 undivided interest in a severed tenancy by the entireties after the divorce, even if later allocated to the non-debtor spouse's distributive share. Presumably, however, if the creditor is actually joined as a party to the equitable distribution action, the court could enter an order otherwise addressing payment of the creditor's claim and releasing the property of the nondebtor spouse from same.

As with any civil action, courts may and frequently do enter appropriate orders requiring a party to transfer title, or failing compliance with the orders or in circumstances in which a party is anticipated to be noncompliant with the court's order, the court itself may enter an order with actual conveyance language thereby transferring title to the spouse determined entitled. G.S. 50-20(g), referencing requirements of [G.S. 1A-1, Rule 70](#) and [G.S. 1-228](#).

6. Dower and curtesy:

For decedents dying before July 1, 1960, the surviving husband received a life estate in *all* property of their decedent wife *if* they had issue born alive and the wife did not devise the property elsewhere (curtesy). Fleming v. Sexton, 172 N.C. 250, 90 S.E. 247 (1916). In contrast, the surviving wife received a life estate in 1/3 of their decedent husband's properties, which the husband could not devise elsewhere, whether or not the couple had had issue born alive (dower). Gatewood v. Tomlinson, 113 N.C. 312, 18 S.E. 318 (1893). Common law curtesy and dower were abolished by G.S. 29-4.

7. Community Property:

Real property in North Carolina acquired with the rents, issues or income of, or proceeds from, or in exchange for, property held in another jurisdiction as community property may retain its status as community property under Chapter 31C of the General Statutes. Upon filing of the appropriate clerk's order or instrument by the personal representative and heirs or devisees of the decedent, the one-half interest of a decedent spouse would pass through their estate free of the elections discussed in items 2 and 3 above and the

other half interest in the property would remain in the surviving spouse, each devisable through the estate of that particular spouse.

However, importantly, third parties purchasing or lending based on a security interest in the property prior to filing of the community property notice are protected in reliance on the public records pursuant to G.S. 31C-7.

B. EXCEPTIONS AND METHODS OF WAIVER OF THE ABOVE RIGHTS

Under certain circumstances, the above rights can effectively be waived or released, either with regard to a specific parcel of property or with regard to all properties of the spouses. Strict compliance with the requirements of the applicable provisions is necessary to assure the effectiveness of the waiver and marketability of the title thereafter.

NOTE: A simple quitclaim conveyance from one spouse to the other while they are still married, absent a marital, separation or other agreement, is *not* enough to release marital rights. Such a conveyance only conveys record title, not inchoate statutory marital interests, unless the conveyance also complies with the requirements of G.S. 39-7(a), G.S. 52-10 or G.S. 52-10.1 (as applicable). See, for example, G.S. 39-7(b) and (c), G.S. 39-13.3(e) Beroth v. Beroth, *infra*.

G.S. 39-7, “Instruments affecting married person's title; joinder of spouse; exceptions,” subsections (a) and (c) specifically provide for execution of a waivers meeting specific execution, notarization and recordation formats, as follows:

(a) In order to waive the elective life estate of either husband or wife as provided for in [G.S. 29-30](#) [Election of surviving spouse to take life interest in lieu of intestate share provided], every conveyance or other instrument affecting the estate, right or title of any married person in lands, tenements or hereditaments must be executed by such husband or wife, and due proof or acknowledgment thereof must be made and certified as provided by law.

. . .

(c) Subsection (a) shall not be construed to require the spouse's joinder or other waiver of the elective life estate of such spouse as provided for in [G.S. 29-30](#) [Election of surviving spouse to take life interest in lieu of intestate share provided] where a different provision is made or provided for in the General Statutes including, but not limited to, [G.S. 39-13](#) [Spouse need not join in purchase-money mortgage], [39-13.3](#) [Conveyances between husband and wife], [39-13.4](#) [Conveyances by husband or wife under deed of separation], [31A-1\(d\)](#) [Acts barring rights of spouse], and [52-10](#) [Contracts between husband and wife generally; releases]

The types of “waivers” or actions terminating these marital rights are discussed below in more detail.

1. Ante- or Pre-Nuptial Agreements: Pursuant to N.C.G.S. Chapter 52B, The Uniform Premarital Agreement Act (effective 1/1/87), and Howell v. Landry, 96 N.C.App. 516, 386 S.E.2d 610 (1989) decided thereunder, a man and woman contemplating marriage may enter into a valid contract with respect to property rights. Premarital agreements are not against public policy and presumably are intended to avoid later marital re-distribution. Harlee v. Harlee, 151 N.C. App. 40, 565 S.E.2d 678 (2002).

In order to be recordable and clearly govern rights regarding real property, the agreement must be signed by both, after “fair and reasonable disclosure of properties and financial obligations” of each to the other and ultimately should be recorded in the office of the Register of Deeds of the county in which the property to be released is located. Under G.S. 52B-2, a “premarital agreement” is defined as “an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage.” Under G.S. 52B-3, it “*must be in writing and signed by both parties. It is enforceable without consideration.*” Under G.S. 52B-4(a):

“Parties to a premarital agreement may contract with respect to [among other things]:

(1) The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;

(2) The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;

(3) The disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;

Most importantly, under G.S. 52B-7, the agreement is not enforceable if a party objecting to the enforcement can prove:

(1) That party did not execute the agreement voluntarily; or

(2) The agreement was unconscionable [a question of law to be decided by the court] when it was executed and, before execution of the agreement, that party:

a. Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;

b. Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

c. Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.

Unconscionability is defined in commercial, contract and even domestic law, including such common law standards as “protection against one-sidedness, oppression, or unfair surprise” or “not void for fraud” and not “manifestly unfair, inequitable or unconscionable” or involving “overreaching, concealment of assets or sharp dealing not consistent with the obligations of marital partners...” considering the relative economic circumstances and sophistication of the parties and whether each was represented by

separate legal counsel. The agreement must not render one party reliant on public assistance.

The agreement becomes effective only upon marriage, G.S. 52B-5, even if that marriage is later voided, at least to the extent necessary to avoid an inequitable result. G.S. 52B-8. The agreement can be amended only by an instrument in writing signed by both parties under G.S. 52B-6, in effect a document of equal dignity with the original agreement.

2. Conveyances by husband or wife under deed of separation - Separation Agreements

Separation agreements must be in writing, signed by both parties, after full disclosure, duly acknowledged in recordable form, all in compliance with applicable provisions of G.S. 39-13.4, G.S. 52-10(b), G.S. 52-10.1, and G.S. 50-20(d). The provisions should waive all the contingent rights in A. above, whether with regard to the particular property or with regard to all properties of the spouses. The provisions must be fair, reasonable and just, without coercion or undue influence. [Eubanks v. Eubanks](#), 273 N.C. 189, 159 S.E.2d 562 (1968); [Stegall v. Stegall](#), 100 N.C. App. 398, 397 S.E.2d 306 (1990), *cert. denied*, [328 N.C. 274](#), 400 S.E.2d 461 (1991). The agreement should provide that it can be relied upon by third parties once recorded and unless rescinded of record. Third parties have a right to rely on the document *only to the extent their rights arise after the time of recordation of the marital settlement.* N.C.G.S. 47-25.

Specifically, G.S. § 39-13.4. Conveyances by husband or wife under deed of separation, provides as follows:

Any conveyance of real property, or any interest therein, by the husband or wife who have previously executed a valid and lawful deed of separation which authorizes said husband or wife to convey real property or any interest therein without the consent and joinder of the other and which deed of separation or a memorandum of the deed of separation setting forth such authorization is recorded in the county where the land lies, shall be valid to pass such title as the conveying spouse may have to his or her grantee and shall pass such title free and clear of all rights in such property and free and clear of such interest in property that the other spouse might acquire solely as a result of the marriage, including any rights arising under [G.S. 29-30](#), unless an instrument in writing canceling the deed of separation or memorandum thereof and properly executed and acknowledged by said husband and wife is recorded in the office of said register of deeds. The instrument which is registered under this section to authorize the conveyance of an interest in real property or the cancellation of the deed of separation or memorandum thereof shall comply with the provisions of [G.S. 52-10](#) or [52-10.1](#).

All conveyances of any interest in real property by a spouse who had previously executed a valid and lawful deed of separation, or separation agreement, or property settlement, which authorized the parties thereto to convey real property

or any interest therein without the consent and joinder of the other, when said deed of separation, separation agreement, or property settlement, or a memorandum of the deed of separation, separation agreement, property settlement, setting forth such authorization, had been previously recorded in the county where the property is located, and when such conveyances were executed before October 1, 1981, shall be valid to pass such title as the conveying spouse may have to his or her grantee, and shall pass such to him free and clear of rights in such property and free and clear of such interest in such property that the other spouse might acquire solely as a result of the marriage, including any rights arising under [G.S. 29-30](#), unless an instrument in writing canceling the deed of separation, separation agreement, or property settlement, or memorandum thereof, properly executed and acknowledged by said husband and wife, is recorded in the office of said register of deeds. The instrument which is registered under this section to authorize the conveyance of an interest in real property or the cancellation of the deed of separation, separation agreement, property settlement, or memorandum thereof shall comply with [G.S. 52-10](#) or [52-10.1](#).

G.S. § **52-10.1**. Separation agreements, provides as follows:

Any married couple is hereby authorized to execute a separation agreement not inconsistent with public policy which shall be legal, valid, and binding in all respects; provided, that the separation agreement must be in writing and acknowledged by both parties before a certifying officer as defined in [G.S. 52-10\(b\)](#). Such certifying officer must not be a party to the contract. This section shall not apply to any judgment of the superior court or other State court of competent jurisdiction, which, by reason of its being consented to by a husband and wife, or their attorneys, may be construed to constitute a separation agreement between such husband and wife.

Upon any reconciliation of the parties, the executory provisions of the agreement immediately becomes null and void and of no further effect, if the separate is consideration for the property settlement. Therefore, provision for the property settlement portions of the agreement to remain in full force and effect upon later reconciliation of the parties may be recommended, especially in the event one of the parties is to retain title. *In re Estate of Tucci*, 94 N.C.App. 428, 380 S.E.2d 782 (1989) *aff'd per curiam*, 326 N.C. 359, 388 S.E.2d 768 (1990). However, under G.S. 52-10.2, Resumption of marital relations is statutorily defined as “voluntary renewal of the husband and wife relationship, as shown by the totality of the circumstances. Isolated incidents of sexual intercourse between the parties shall not constitute resumption of marital relations.”

A separation agreement is *not a conveyance unless it contains the minimum requirements of a deed, i.e.,* grantor, grantee, granting clause, habendum clause, under seal, and satisfactorily acknowledged. Nor does a Separation Agreement sever a tenancy by the entireties, at least until it serves as a conveyance and all conditions have been met. *See*

[Dealer Supply Co. v. Greene](#), 108 N.C. App. 31, 422 S.E.2d 350 (1992), *cert. denied*, 333 N.C. 343, 426 S.E.2d 704 (1993) (property was conveyed to husband's parents before he and wife divorced, then reconveyed to he and new wife after their marriage, preventing the judgment liens of husband's individual creditors from attaching). *But see* [Riley v. Riley](#), 86 N.C.App. 636, 359 S.E.2d 252 (1987); [Higgins v. Higgins](#), 86 N.C.App. 513, 358 S.E.2d 553 (1987).

A separation agreement may serve as a renunciation of an earlier will benefiting the estranged spouse. [Sedberry v. Johnson](#), 62 N.C.App. 425, 302 S.E.2d 924, *cert. denied* 309 N.C. 322, 307 S.E.2d 167 (1983).

Typically parties do not want their entire Separation Agreement on public record. Therefore, a recorded *Memorandum of Property Agreement -- Between Husband and Wife (suggested format attached)* reciting the specific provisions relating to the above legal issues is common in any situation where a deed from *both* parties to the third party is unattainable or where one of the separating spouses is retaining title.

3. Contracts between husband and wife generally; releases -- Agreements during marriage:

Pursuant to N.C.G.S. 52-10,

(a) 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 a valuable consideration, release and quitclaim such rights which they might respectively acquire or may have acquired by marriage in the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estate so released. 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.

(b) Such certifying officer shall be a notary public, or a justice, judge, magistrate, clerk, assistant clerk or deputy clerk of the General Court of Justice, or the equivalent or corresponding officers of the state, territory or foreign country where the acknowledgment is made. Such officer must not be a party to the contract.

(c) This section shall not apply to any judgment of the superior court or other State court of competent jurisdiction, which, by reason of its being consented to by a husband and wife, or their attorneys, may be construed to constitute a contract or release between such husband and wife.

The agreement should be recorded in the office of the Register of Deeds of the county in which the property to be released is located. The provisions should include waivers of the

marital rights discussed in Section A hereof. However, no statutory “reliance” protection is available absent a “marital settlement” (above), even upon recording of the instrument.

A recorded *Memorandum of Property Agreement -- Between Husband and Wife* (suggested format attached) reciting the specific provisions relating to the above legal issues is common in any situation where a deed from *both* parties to the third party is unattainable or where one of the separating spouses is retaining title.

As with premarital and separation agreements, the agreement must be fair, reasonable and entered into voluntarily, without coercion or over-reaching.

4. Joint conveyance to third parties:

In the event neither spouse is retaining title, a deed directly from *both* spouses to the third party is probably preferable, in order to avoid any question at all about spousal rights in the future.

But see Schiller v. Scott, 345 S.E.2d 444, 82 N.C.App. 90 (1986): Husband signed deed of trust, wife signed solely to release her marital interest and without consideration. Husband then gave a deed of trust to wife who reached the courthouse before the lender. Held: Wife’s deed of trust was first priority, even though she had signed lender’s deed of trust. Since Wife’s deed of trust was for consideration, she was a bona fide protected party under G.S. 47-20 and won the race to the courthouse.

Case law has added a presumption that the non-owning spouse joins only to release the inchoate interests. Hughes v. Young, 115 N.C.App. 325, 444 S.E.2d 248 (1994); Wellons v. Hawkins, 46 N.C.App. 290, 264 S.E.2d 788 (1980); Maples v. Horton, 239 N.C. 394, 80 S.E.2d 38 (1954); Taylor v. Bailey, 49 N.C.App. 216, 271 S.E.2d 296 (1980).

However, it is important that any document clearly identify the capacity in which each grantor signs. This is especially important on a deed of trust, referencing a Note or other obligation from the “Grantor” of the deed of trust when in fact the borrower is only one of the spouses (See separate Topic under “Deeds of Trust” on Hypothecated Securities).

Some sample language for both a deed and a deed of trust in which only one spouse is “granting” and the other is joining solely to convey or subordinate their interest, as the case may be, is attached hereto:

Marital Rights - Deed Between Spouses Provision
Marital Rights – Deed of Trust Provision - Spouse Subordinates Interest in
Property

5. Divorce from Bed and Board:

The *innocent* spouse is protected in making conveyances of separate property. G. S. 31A-1. However, a divorce from bed and board does *not* dissolve a tenancy by the entireties because it does not dissolve the marriage. Turlington v. Lucas, 186 N.C. 283, 119 S.E. 366 (1923).

6. Slayer statute:

Under G.S. 31A-4 through G.S. 31A-11, a “slayer” is barred or limited in their ability to take title to property as a result of their acts causing the death of the decedent. Depending upon the type of interest, this loss of title ranges from reduction of any otherwise survivorship rights to a life estate in their pro rata share down to entire disinheritance of any share coming through the decedent. A “slayer” is defined under G.S. 31A-3(3) as any of the following:

- a. A person who, by a court of competent jurisdiction, is convicted as a principal or accessory before the fact of the willful and unlawful killing of another person.
- b. A person who has entered a plea of guilty in open court as a principal or accessory before the fact of the willful and unlawful killing of another person.
- c. A person who, upon indictment or information as a principal or accessory before the fact of the willful and unlawful killing of another person, has tendered a plea of nolo contendere which was accepted by the court and judgment entered thereon.
- d. A person who is found by a preponderance of the evidence in a civil action brought within two years after the death of the decedent to have willfully and unlawfully killed the decedent or procured the killing of the decedent. If a criminal proceeding is brought against the person to establish the person's guilt as a principal or accessory before the fact of the willful and unlawful killing of the decedent within two years after the death of the decedent, the civil action may be brought within 90 days after a final determination is made by a court of competent jurisdiction in that criminal proceeding or within the original two years after the death of the decedent, whichever is later. The burden of proof in the civil action is on the party seeking to establish that the killing was willful and unlawful for the purposes of this Article.
- e. A juvenile who is adjudicated delinquent by reason of committing an act that, if committed by an adult, would make the adult a principal or accessory before the fact of the willful and unlawful killing of another person.

The term "slayer" does not include a person who is found not guilty by reason of insanity of being a principal or accessory before the fact of the willful and unlawful killing of another person.

However, the interests of innocent third party purchasers and lenders purchasing or lending based on security interest in the property from the apparent title holder prior to

adjudication of the slayer's liability or notice of circumstances bringing the property within the terms of this statute are protected pursuant to G.S. § 31A-12. Persons acquiring from slayer protected

For estates of decedents dying on or after July 13, 2006, prior common law is overridden to the extent that, under § 31A-12.1, since July 13, 2006, the remedies under the statute are exclusive

7. Final Divorce:

Subject to final determination of equitable distribution if filed, the marital interests of a spouse end when the marriage ends; the person's rights are the same as any single person. The title examiner should be alert to locate both the final judgment of divorce and the female spouse's possible change of name, since the woman may file with the Clerk of Superior Court to revert to a former name under G.S. 50-12, including:

- (1) *Her maiden name; or*
- (2) *The surname of a prior deceased husband; or*
- (3) *The surname of a prior living husband if she has children who have that husband's surname.*

8. Purchase Money Mortgages:

With regard to property to which title is taken, with simultaneous deed of trust solely to finance a portion of the purchase proceeds (without construction, equity line, revolving credit or other future advance provisions), joinder of the non-owning spouse is not necessary. See G.S. 39-13, and Section 29-30(g)(1) through (4), Instantaneous Seisin, *infra*.

*§ 39-13. Spouse need not join in purchase-money mortgage.
The purchaser of real estate who does not pay the whole of the purchase money at the time when he or she takes a deed for title may make a mortgage or deed of trust for securing the payment of such purchase money, or such part thereof as may remain unpaid, which shall be good and effectual against his or her spouse as well as the purchaser, without requiring the spouse to join in the execution of such mortgage or deed of trust.*

§ 29-30 Election of surviving spouse to take life interest in lieu of intestate share provided.

*. . .
(g) Neither the household furnishings in the dwelling house nor the life estates taken by election under this section shall be subject to the payment of debts due from the estate of the deceased spouse, except those debts secured by such property as follows:*

. . .

(2) By a purchase money mortgage or deed of trust, or by a conditional sales contract of personal property in which title is retained by the vendor, made prior to or during the marriage . . .

BUT, if the lien to be insured secures 100% purchase money, with no construction, equity line, revolving credit or other future advance provisions, it is possible that the purchaser-spouse could grant an insurable “purchase money” lien that would take priority over marital rights of the non-owning spouse. G.S. 39-13 clearly covers the situation where the purchase money lien is granted to the Seller (*true* purchase money), in which case the signature of the non-owning spouse is clearly not necessary. Common law and practice have expanded this purchase money priority protection to include deeds of trust which are given to third party lenders at the time the purchaser purchases the property. The significance of the PMDT in the marital rights context is that it can give the lien of the deed of trust priority over the marital interests of the purchaser's spouse, so long as the spouse is not a named grantee in the conveyance (NCGS §39-13). This means that the spouse does not have to sign a purchase money deed of trust for property held in the other spouse's name in order for a title company to insure the priority of the loan, without exception for marital rights. In any event, these matters do attach to the owner's interest and exceptions should be taken in the owner's policy.

This instant priority for a PMDT relies upon the doctrine of instantaneous seisin. The doctrine of instantaneous seisin “is a legal fiction which provides that when a deed and a purchase money deed of trust are executed, delivered, and recorded *as part of the same transaction*, the title conveyed by the deed of trust attaches at the instant the vendee acquires title and constitutes a lien superior to all others.” (*emphasis added*) (See Dalton Moran Shook, Inc. v. Pitt Development Company, 113 N.C. App. 707, 440 S.E.2d 585 (1994)). This means that the PMDT must be recorded in the “same transaction” as the deed. The courts have provided that the “same transaction” occurs when the deed and PMDT are recorded at the same time (not necessarily at the same minute). It is plain in the case law that actual “simultaneous” recording is not a requirement in order to establish instantaneous seisin. While the courts have not specifically defined what is meant by “same transaction,” a good rule of thumb is that if there is nothing recorded between the deed and PMDT, then they may be considered part of the “same transaction.”

The benefits of a PMDT are at least partially lost if the loan is part purchase money and part something else (e.g., where loan funds are used to acquire land AND build improvements thereon). The protections afforded the seller or the third-party lender under the doctrine are extended only to those funds actually used to purchase the property. Therefore, the protection does not extend to construction loan proceeds (See Carolina Builders, Corp., v. Howard-Veasey Homes, Inc., 72 NC App 224). One twist to look out for involves a PMDT that is also a construction loan. In Dalton Moran Shook, Inc v. Pitt Development Company, 113 N.C. App. 707, 440 S.E.2d 585 (1994), the Court of Appeals held that the purchase money portion of the loan received priority under instantaneous seisin, but that the future advances for the construction portion of the loan did not receive priority and were subject to prior liens against the purchaser. Presumably the same result would apply with

respect to marital rights, which is why title companies will require sufficient evidence that the lien is for purchase only and is fully advanced at closing.

Most title companies have started to agree to insure purchase money lenders without exception for the marital rights of the non-owning spouse in instances where the non-owning spouse is not available to sign the deed of trust. But this solution should not be accepted as a routine practice on the part of the closing attorney. The prudent thing to do is to always have the spouse sign, if only to subordinate their marital; their signature may be limited such that the only purpose for their execution is to so subordinate—a spouse may not want an implication that they are obligated by the debt secured by said lien. Some sample language, “Marital Rights – Deed of Trust Provision - Spouse Subordinates Interest in Property,” addressing this is attached hereto.

The attorney should always explain the significance of un-addressed marital rights on future transactions to the potential purchaser, whether or not the non-owning spouse joins in the new purchase money deed of trust.

The general rule is that only a first lien can be purchase money. A second lien should not rely upon the doctrine, even if to the same lender. There is an argument that voluntarily subordinating lien position acts as a waiver of the doctrine of instantaneous seisin; therefore, marital interests of the borrower’s spouse will take priority over the purported “second” lien. However, an interesting issue that comes up frequently is: What happens when there is a first and a second lien, both intended to secure the purchase of property? These types of financing arrangements are fairly common, and arguably 100% of the collective “loan” is for purchase money. Most companies would probably insure both liens without exception for marital rights so long as there is adequate evidence/certification to the title company that 100% of the proceeds of the loans are for purchase, that 100% of the proceeds are being disbursed at closing, and that the second lien is a conventional amortized mortgage and not an equity line or a revolver. Still the owner’s interest is subject to the spousal inchoate interest, even if lender’s interest under the purchase money deed of trust has priority (i.e. that spousal interest is subordinate to the lien of the purchase money portion of the deed of trust).

9. Incompetent non-owning spouse.

The owning spouse can convey his/her separate property without joinder of the incompetent spouse, *if* a guardian has been appointed for the incompetent and joins in the conveyance. G.S. 39-7(b) provides:

A married person may bargain, sell, lease, mortgage, transfer and convey any of his or her separate real estate without joinder or other waiver by his or her spouse if such spouse is incompetent and a guardian or trustee has been appointed as provided by the laws of North Carolina, and if the appropriate instrument is executed by the married person and the guardian or trustee of the incompetent spouse and is probated and registered in accordance with law, it

shall convey all the estate and interest as therein intended of the married person in the land conveyed, free and exempt from the elective life estate as provided in G.S. 29-30 and all other interests of the incompetent spouse.

C. TENANTS BY THE ENTIRETIES, TENANTS IN COMMON OR OTHER JOINT OWNERSHIP BETWEEN SPOUSES:

Any conveyance made on or after October 1, 1969, to persons married to each other at the time of the conveyance is presumed to be as tenants by the entireties pursuant to G.S. 39-13.6 *unless*: (1) the conveyance specifically provides otherwise, *e.g.*, G.S. 39-13.3(b), or (2) the conveyance is in partition of property held by only one spouse as a tenant in common with others under G.S. 39-13.5 (discussed below). G.S. 39-13.6 specifically provides as follows:

(a) A husband and wife shall have an equal right to the control, use, possession, rents, income, and profits of real property held by them in tenancy by the entirety. Neither spouse may bargain, sell, lease, mortgage, transfer, convey or in any manner encumber any property so held without the written joinder of the other spouse. This section shall not be construed to require the spouse's joinder where a different provision is made under G.S. 39-13, G.S. 39-13.3, G.S. 39-13.4, or G.S. 52-10.

(b) A conveyance of real property, or any interest therein, to a husband and wife vests title in them as tenants by the entirety when the conveyance is to:

(1) A named man "and wife," or

(2) A named woman "and husband," or

(3) Two named persons, whether or not identified in the conveyance as husband and wife, if at the time of conveyance they are legally married;

unless a contrary intention is expressed in the conveyance.

(c) For income tax purposes, each spouse is considered to have received one-half (1/2) the income or loss from property owned by the couple as tenants by the entirety.

Prior to enactment of G.S. 39-13.6(b)(3) above (effective 10/1/69), the conveyance was required to state that the grantees were husband and wife. Davis v. Bass, 188 N.C. 200, 124 S.E. 566 (1924).

Property conveyed to two persons prior to their marriage does not become tenancy-by-the-entireties solely because of their subsequent marriage. *See* G.S. 39-13.6(b), Lawrence v. Heavner, 232 N.C. 557, 61 S.E.2d 697 (1950).

Property held as a tenancy-by-the-entireties is exempt from creditors of a single spouse, Gas Light Co. v. Leggett, 273 N.C. 547, 161 S.E.2d 23 (1968); Dealer Supply Co. v. Greene, 108 N.C.App. 31, 422 S.E.2d 350 (1992), including mechanics' and materialmen's liens contracted by one party and not ratified by the other, Air Conditioning Co. v. Douglass, 241 N.C. 170, 84 S.E.2d 828 (1954), but with the notable

exception for federal tax liens under the 2002 case of United States v. Craft, 535 U.S. 274, 122 S. Ct. 1414, 152 L. Ed. 2d 437 (2002). However, as a matter of administrative policy, the Internal Revenue Service chose not to enforce the decision retroactively, their enforcement position being outlined in Internal Revenue Bulletin 2003-39, Notice 2003-60, "Collection Issues Related to Entireties Property," (September 29, 2003), on-line at: http://www.irs.gov/irb/2003-39_IRB/ar13.html

Pursuant to G.S. 39-13.5, voluntary partition conveyances can create a tenancy by the entireties of the tenant-in-common and spouse in the new severed estate only *if*:

- (a) both spouses sign the conveyance in conformity with G.S. 52-10;
- (b) the conveyance is dated after 1/1/78; and
- (c) the conveyance expressly provides it is intended to vest the interest as a tenancy by the entireties between the spouses.

G.S. 39-13.5, Creation of tenancy by entirety in partition of real property, provides as follows:

When either a husband or a wife owns an undivided interest in real property as a tenant in common with some person or persons other than his or her spouse and there occurs an actual partition of the property, a tenancy by the entirety may be created in the husband or wife who owned the undivided interest and his or her spouse in the manner hereinafter provided:

(1) In a division by cross-deed or deeds, between or among the tenants in common provided that the intent of the tenant in common to create a tenancy by the entirety with his or her spouse in this exchange of deeds must be clearly stated in the granting clause of the deed or deeds to such tenant and his or her spouse, and further provided that the deed or deeds to such tenant in common and his or her spouse is signed by such tenant in common and is acknowledged before a certifying officer in accordance with [G.S. 52-10](#);

(2) In a judicial proceeding for partition. In such proceeding, both spouses have the right to become parties to the proceeding and to have their pleadings state that the intent of the tenant in common is to create a tenancy by the entirety with his or her spouse. The order of partition shall provide that the real property assigned to such tenant and his or her spouse shall be owned by them as tenants by the entirety.

A conveyance to husband, wife and a third party is *presumed* to vest a 1/2 undivided interest as tenants by the entireties in the husband and wife (the old common law unity of interest), as tenants in common with the third party which holds the other 1/2 undivided interest. In re Gardner, 20 N.C.App. 610, 202 S.E.2d 318 (1974), Lawrence v. Lawrence, 100 N.C.App. 1, 394 S.E.2d 267 (1990). Therefore, any conveyance including husband and wife as grantees which is other than as tenants by the entireties or includes other grantees should be very specific as to the estate intended in each party.

However, a tenancy by the entirety, and these protections against individual creditors, terminate upon the following events:

- a. Upon divorce, the tenancy by the entirety is severed and the judgments attach to the one-half interest of the debtor spouse, Union Grove Milling and Manufacturing Co. v. Faw, 103 N.C.App. 166, 404 S.E.2d 508 (1991), *infra*;
- b. Upon death of one spouse, the surviving spouse inherits all, so his/her creditors' liens will attach, or the death of the non-conveying spouse may feed the estoppel of a prior conveyance by the surviving spouse. Hallyburton v. Slagle, 132 N.C. 947, 44 S.E. 655 (1903); Harrell v. Powell, 251 N.C. 636, 112 S.E.2d 81 (1960). However, the conveyance is subject to an intervening conveyance to a bona fide purchaser or mortgagee for value under the recording statutes, the Conner Act, G.S. 47-18 or 47-20, respectively;
- c. North Carolina Racketeer Influenced and Corrupt Organizations Act, Chapter 75D, allows enforcement against both spouses, though just against an "undivided interest" in the criminal spouse;
- d. Voluntary conveyance from the nondebtor spouse to the debtor spouse, severing the tenancy by the entirety under G.S. 39-13.3 or otherwise. Proceeds of any voluntary sale are severed into property held as a tenancy in common, other than a condemnation action (presumed involuntary). Koob v. Koob, 283 N.C. 129, 195 S.E.2d 552 (1973).
- e. Slayer Statute prohibitions of G.S. 31A-5, *infra*;
- f. On simultaneous death of husband and wife, G. S. 28A-24-3 presumes a 1/2 undivided interest in each.

COMMONLY OCCURRING SCENARIOS

SCENARIO #1: *Husband and Wife own a piece of property as tenants-by-the-entireties. Husband has executed a non-warranty deed to his wife in order to sever the tenancy-by-the-entireties and place title to the property in her name alone. The non-warranty deed contains no language regarding a waiver of marital rights. May wife now convey marketable/insurable title to the property without the joinder of her husband? May she place an insurable lien on the property without the joinder of her husband? **NO and NO.***

A simple deed from one spouse to the other for the purpose of severing a tenancy-by-the-entireties will not, in and of itself, waive the contingent statutory marital rights that attach. The conveyance only conveys record title, and does not waive potential marital interests. However, waiver language can and should be inserted into the Deed which effectively provides for the waiver in conjunction with conveyance of the actual title interest. The language in the deed must confirm full disclosure of assets and contain a waiver of all such marital rights. Such deed must be executed and acknowledged before a notary by both spouses and be recorded in the office of the Register of Deeds of the county in which the affected real property is located, all in compliance with NCGS 52-10 or NCGS 52-10.1. Some suggested comprehensive language for this purpose is set forth as “MARITAL RIGHTS – DEED BETWEEN SPOUSES PROVISION” hereafter.

It should be noted that if the husband executes a non-warranty or quitclaim deed in favor of a third party, the marital rights of the husband shall be released with respect to that particular piece of property, even if specific waiver language with respect to marital rights is not included in the deed. But again, if the deed is from one spouse to another for the purpose of vesting one spouse with title and severing a tenancy-by-the-entireties, the waiver language must be included in order to allow the retaining spouse to convey title free and clear of those marital rights. The deed alone is not sufficient.

III. SCENARIO #2: *Wife owns a piece of property that is vested solely in her name. She is under contract to sell the property to a third party buyer. Marital status is not initially known to the closing attorney, and wife arrives at the closing and discloses that she is married, but separated, and that her husband “will never sign anything to help her.” There is no separation agreement with a waiver of marital rights, and divorce is not final. A power of attorney from husband is not a possibility; nor is a quitclaim deed.*

a. *May wife now convey marketable/insurable title to the property without the joinder of her husband? **NO. Period.***

If the husband and wife are separated, but not yet divorced, both spouses must sign the conveyance unless there is a separation agreement or other property settlement agreement containing the waiver of marital rights recorded in the registry of the county where the property is situated, or a court order that contains sufficient language to release the marital rights of the spouses. The requirements for a valid separation or property

settlement agreement are discussed in detail above. On a related note, joinder of the husband would also be required in order for the wife to grant an insurable lien on the property. In the absence of such an agreement, the title insurer will enforce the “and spouse, if any” requirement, which presumably would not be acceptable to either a new purchaser or a new lender. Or, the title insurer will except to marital rights of the non-owning spouse, which will likely not be acceptable to a closing attorney for a Buyer or a subsequent Lender on a loan policy.

This raises a question: What if the wife lies and says she’s not married? The risk is to the purchaser, the new lender and the title company that has insured the transaction without exception to the marital rights of the non-signing husband. In the event wife dies (prior to a divorce) and the husband asserts one or more of his marital rights, the purchaser and lender will be faced with a potential loss, the title company will be faced with a claim, and any or all may seek recoupment from the closing attorney if the attorney did not adequately disclose or investigate marital status. Obtaining a marital status affidavit (*suggested form attached*) is an advisable practice, especially since ultimately the attorney is going to render an opinion on title without exception for marital rights.

NOTE: Reflecting the marital status on the deed is a good practice for notice to future title searchers. This may be informational only, but if the grantor warrants to the marital status and especially if the notarial certificate acknowledges the status, this may provide evidence in the event of ambiguity as well as being an affirmative misrepresentation for which the seller is liable if it turns out to be erroneous..

b. What if the wife can produce evidence that she has obtained a divorce?

Generally a final divorce will terminate the marital rights of both spouses, subject only to any court order or other action arising from an ongoing equitable distribution proceeding. Marital interests end when the marriage ends; the person’s rights are the same as any single person. Since this property is titled only in the wife, once the divorce is final and absent an equitable distribution claim that the property is marital property, the wife should be free to convey free of the husband’s interest.

NOTE: This would not be the case in a tenancy-by-the-entireties situation since divorce would create a tenancy in common between the spouses, vesting ½ undivided interest in each (and allowing attachment of individual creditors’ interests).

To conclude, satisfactory evidence of final divorce, together with a title certification reflecting no lis pendens with regard to an Equitable Distribution proceeding, is enough for the wife to be able to convey marketable title, insured without exception for marital rights of the non-owning spouse.

IV. SCENARIO #3: *Wife owns a piece of property that is vested solely in her name. Pursuant to a “free trader agreement,” husband and wife have mutually agreed that any property owned by either of them individually may be conveyed without the joinder of the other spouse, as though they weren’t married, as follows:*

“RIGHT TO CONTRACT: The parties agree that the Wife shall have the right, independent of the Husband, to bargain, sell, encumber or otherwise contract and deal with real property owned by Wife in her name only, without the permission of or the consent in joinder of the Husband. Wife holds the Husband harmless from any liability relating to said property and agrees to indemnify the Husband from any liability incurred as a result of her ownership of said property as her sole and separate property.”

- a. *Based on the above language, may wife now convey marketable/insurable title to the property without the joinder of her husband? May she place an insurable lien on the property without the joinder of her husband? **NO and NO.***

Even if this “free trader agreement” is recorded in the local registry, there is not a sufficient waiver of marital rights. The language of the free trader agreement (though somewhat common) is insufficient to divest the non-owning spouse of their marital rights. Be aware that these exist, and are not a substitute for a valid waiver of marital rights.

V. SCENARIO #4: *Wife owns a piece of property that is vested solely in her name. Pursuant to a sufficiently recorded Separation Agreement, husband and wife have mutually waived all marital rights either may have in property owned by the other spouse.*

- a. *May wife convey marketable/insurable title to the property without the joinder of her husband? May she place an insurable lien on the property without the joinder of her husband? **YES and YES.***

Assuming that a sufficient agreement is of record in which the marital rights have been waived, the wife may convey title free and clear of the marital rights of her husband, and the husband will not be required to be a signatory on the insured deed or deed of trust. Suggested language and a format for a Memorandum of Property Agreement is attached.

It should be noted that this waiver may be contained in prenuptial agreements, property settlement agreements, or separation agreements (or in a non-warranty deed between spouses, as discussed in Scenario #1 above). In any event, these agreements must be executed and acknowledged before a notary by both spouses, and be recorded in the office of the Register of Deeds of the county in which the affected real property is located, all in compliance with NCGS 52-10, NCGS 52-10.1, NCGS 29-30(a)(2) and NCGS 39-13.4. The “agreement must be untainted by fraud, must be in all respects fair,

reasonable and just, and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties.” The agreement must contain specific waiver of all the contingent marital rights outlined earlier, and must confirm a full disclosure of assets. The agreement should provide that it can be relied upon by third parties once recorded and unless rescinded of record. Third parties have a right to rely on the document only to the extent their rights arise after the time of recordation of the “marital settlement.” The document is “valid against creditors and purchasers for value only from registration” (NCGS 47-25). Title companies require recordation, as recordation protects against a future marketability issue. Typically spouses do not want their entire Separation Agreement on public record. Therefore, a recorded Memorandum of Separation citing the above provisions is common in any situation where a deed from both parties to the third party is unattainable or where one of the separating spouses is retaining title. And the agreement provide that the property settlement portions (including waiver of marital rights) shall remain in full force and effect upon later reconciliation of the parties, especially in the event one of the parties is to retain title.

VI. SCENARIO #5: *Wife is under contract to purchase a piece of property in her name alone. She arrives at closing and discloses that she is married but estranged from her husband, and that he is out of the country and will not be available to sign anything. (In fact she prefers that he know nothing about her purchase!. Further, no separation agreement or other property settlement agreement containing waiver of marital rights has been recorded, nor does one exist.*

a. *May wife purchase the property for cash? Will she obtain good title even though her husband will not be on the deed? **YES.***

From a title insurance perspective, there is no document to be signed by the wife in a cash purchase, and therefore the title commitment would not have a requirement for the signature of a spouse. To be safe, most companies will take exception to marital rights of the non-owning spouse, if any. Arguably she could not make a claim on such basis anyway, as these rights would fall into the title insurance exclusion of “matters created, suffered, assumed or agreed to” by the insured, or matters “not known to the Company ... but known to the insured claimant.”

b. *May wife encumber the property and grant an insurable lien on the property?
General rule: **MAYBE!!***

If the wife acquires with cash and later refinances and attempts to put a lien on the property, marital rights of the non-owning spouse would have to be addressed. BUT, if the lien to be insured secures 100% purchase money, with no construction, equity line, revolving credit or other future advance provisions, it is possible that the wife could grant an insurable “purchase money” lien that would take priority over marital rights of the non-owning spouse. The attorney should always clearly explain the significance of un-addressed marital rights on future transactions (discussed below).

- c. *What about a future refinance or future sale? May the wife alone convey marketable, insurable title in either instance? **NO.***

Even though they may be able to get a clean title policy, attorneys must be careful in counseling clients to close on a cash purchase or a purchase using purchase money financing without addressing the issue of marital rights. Too often, such clients only discover that there is an issue when they go to refinance or to sell, at which time they will likely blame their attorney for not warning them beforehand. The simple fact is that, assuming a final divorce is not obtained (which may be difficult if a spouse is estranged and uncooperative), a future sale or a refinance will require either the signature of the non-owning spouse or a satisfactory waiver of such spouse's marital rights. [*See discussion in Scenario #2 above*] Title companies may agree to issue a loan policy for a purchase money lender without requiring the signature of the non-owning spouse, but this should only be done in an emergency, and with full disclosure to the client about the legal significance of marital rights (and the fact that, unless a divorce is obtained, they will have to be addressed at some point!).

MARITAL RIGHTS – DEED BETWEEN SPOUSES PROVISION

This conveyance is made pursuant to N.C.G.S. 39-13.3, N.C.G.S. 52-10 and N.C.G.S. 52-10.1 in order to vest title to the within described property solely in the Grantee herein, free and clear of any right, title and interest of the Grantor herein. (For purposes of this provision, the "Grantor" shall mean any Grantor other than the individual Grantee spouse in whom title is to remain vested herein). This conveyance is made after fair and reasonable disclosure of the property and financial obligations, both real and personal, of each spouse to the other, as between Grantee and Grantee's spouse Grantor.

For this purpose and with regard to the property and any interests and rights described herein or related thereto, by execution of this deed, the Grantor hereby waives, releases and quitclaims forever unto the Grantee (1) any and all right to share in the estate of the Grantee upon the Grantee's death as provided in N.C.G.S. 29-14, or pursuant to a Last Will and Testament or codicil thereto of the Grantee, (2) all and every right to elect to take a life estate in said real estate pursuant to N.C.G.S. 29-30 upon the death of the Grantee, (3) all and every right to an elective share in the estate of the Grantee pursuant to N.C.G.S. 30-3.1 *et seq*, (4) any and all rights arising out of any action for equitable distribution under N.C.G.S. 50-20, (5) any and all rights arising from application of the community property laws of any state, and (6) any and all other rights and interests in said real estate which the Grantor now has or may hereafter have or acquire arising out of or accruing to said Grantor by reason of past, current or future marital relationship with the Grantee.

[NOTE TO DRAFTER: DEED MUST BE SIGNED BY BOTH SPOUSES, ACKNOWLEDGED BEFORE A NOTARY BY BOTH AND RECORDED, IN ORDER TO COMPLY WITH THE "AGREEMENT" PROVISIONS OF G.S. 52-10 OR G.S. 52-10.1, AS THE CASE MAY BE.]

MARITAL RIGHTS – DEED OF TRUST PROVISION
Spouse Subordinates Interest in Property

_____ [Spouse] _____ hereby joins in this conveyance solely for the purpose of subordinating and subjecting any interest of said _____ [spouse] _____, of any nature, whether now owned or hereafter acquired, to the lien of this deed of trust and all terms and conditions hereof or of the loan secured hereby; provided, however, _____ [spouse] _____ is not a Borrower or obligor on the indebtedness and shall have no personal liability therefor solely by execution of this instrument and _____ [spouse] _____ makes no warranties of title or otherwise hereunder.

MEMORANDUM OF PROPERTY AGREEMENT
Between Husband and Wife

STATE OF NORTH CAROLINA
COUNTY OF _____

This MEMORANDUM OF PROPERTY AGREEMENT, made and entered into this the _____ day of _____, 20____, by and between _____ (herein "husband") and _____ (herein "wife");

WITNESSETH:

WHEREAS the parties were duly married on _____, _____;

AND WHEREAS the parties have heretofore entered into an agreement with regard to certain properties owned by them either separately or together and wish to record a memorandum of their agreement as to the disposition of certain properties, pursuant to North Carolina General Statutes Sections 52-10, 29-30 and any other provisions affecting rights of spouses to property of the other, said properties being more particularly described as follows:

[HEREIN RECITE THE ACTUAL LEGAL DESCRIPTION OF THE PROPERTY IN WHICH ALL MARITAL RIGHTS ARE BEING WAIVED.]

NOW THEREFORE, the parties hereto hereby agree as follows:

1. Waiver. With regard to the property above described,
[HEREIN RECITE VERBATIM THE SPECIFIC RIGHTS AND PROVISIONS WAIVED, WHICH MAY INCLUDE PROVISIONS SUCH AS: _____ [PARTY WAIVING], by execution of this agreement, hereby waives, releases and quitclaims forever unto the [OTHER PARTY] (1) any and all right to share in the estate of the Grantee upon the Grantee's death as provided in N.C.G.S. 29-14, or pursuant to a Last Will and Testament or codicil thereto of the Grantee, (2) all and every right to elect to take a life estate in said real estate pursuant to N.C.G.S. 29-30 upon the death of the Grantee, (3) all and every right to an elective share in the estate of the Grantee pursuant to N.C.G.S. 30-3.1 et seq, (4) any and all rights arising out of any action for equitable distribution under N.C.G.S. 50-20, (5) any and all rights arising from application of the community property laws of any state, and (6) any and all other rights and interests in said real estate which the Grantor now has or may hereafter have or acquire arising out of or accruing to said Grantor by reason of past, current or future marital relationship between said parties.]

[PARTY WAIVING] agrees that the [OTHER PARTY] may hereafter hold, acquire and dispose of the above described real property, as though free and unmarried, without the consent or joinder of the other party.

Each agrees that this agreement is executed voluntarily, after fair and reasonable disclosure of the property and financial obligations, both real and personal, of each to the other.

2. Reliance. All third parties shall be forever held harmless from any liability for any breach of this Agreement by the parties hereto and such third parties shall be entitled to rely upon the releases, waivers and authority granted herein and the actions taken pursuant hereto *prior to* recordation or filing in the county in which land affected is located of (a) a rescission hereof signed by both parties hereto in the office of the Register of Deeds, or (b) a judgment rescinding or modifying this agreement in the office of the Clerk of Superior Court, which judgment constitutes a rescission or modification hereof.

IN WITNESS WHEREOF, the parties hereto and their attorneys have hereunto set their respective hand(s) and seal(s), the day and year first above written.

Husband (SEAL)
Represented by:

Attorney

Wife (SEAL)
Represented by:

Attorney

State of _____
County of _____

I certify that the following person(s) personally appeared before me this day, each acknowledging to me that he or she signed the foregoing document: _____
_____ [insert name(s) of principal(s)].

Date: _____

Notary Public

Notary's Printed or Typed Name

(Official/Notarial Seal)

My commission expires: _____

State of _____
County of _____

I certify that the following person(s) personally appeared before me this day, each acknowledging to me that he or she signed the foregoing document: _____
_____ [insert name(s) of principal(s)].

Date: _____

Notary Public

Notary's Printed or Typed Name

(Official/Notarial Seal)

My commission expires: _____

MARITAL STATUS AFFIDAVIT AND INDEMNITY

State of North Carolina
County of _____

Affiant: _____
Current Address: _____

Closing Attorney: _____
Title Insurance Company: _____
Property to be insured: _____

I, the above Affiant, am a resident of the above county and state, currently residing at the address above. I hereby certify as follows:

- () I am unmarried, having never been married.
- () I am separated from _____, pursuant to Separation Agreement dated _____, and duly recorded (or a memorandum thereof recorded) in the Office of the Register of Deeds of _____ County, North Carolina.
- () I am divorced from _____, pursuant to decree dated _____, issued by the _____ of _____ County, State of _____, and have never remarried.
- () I am a widow/widower, having been married to _____ who died on _____, a resident of _____ County, State of _____, and have never remarried.

I hereby give this affidavit for the purpose of inducing the above Closing Attorney to close the transaction regarding the Property above, and the above Title Insurance Company to insure title without exception to rights of any spouse of mine. I agree to hold the Closing Attorney and the Title Insurance Company harmless from any and all costs, losses or damages, including courts costs and attorney fees, it may incur with the defense of said assurance or due to any inaccuracy in the statements made herein.

This the _____ day of _____, 20__

(SEAL)
AFFIANT

State of _____
County of _____

Signed and sworn to (or affirmed) before me this day by _____ [insert name(s) of principal(s)], and I certify that each of the aforesaid person(s) personally appeared before me this day acknowledging to me that he or she signed the foregoing document.

Date: _____, Notary Public

Notary's Printed or Typed Name

(Official/Notarial Seal) My commission expires: _____