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Perry v. Perry: Retroactive Application of North Carolina General Statutes Section 39-13.6 under a Vested Rights Analysis

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Perry v. Perry: Retroactive Application of North Carolina General Statutes Section 39-13.6 Under a Vested Rights Analysis

At common law, property held as tenants by the entirety was subject to the exclusive control of the husband, who retained the right to receive all rents and profits from the property during his lifetime.[1] Not until 1982 did the North Carolina General Assembly remedy this anomalous situation by passing North Carolina General Statutes section 39-13.6, providing in part:

> (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.[2]

Perry v. Perry[3] presented the North Carolina Court of Appeals with the question of whether to apply North Carolina General Statutes section 39-13.6 to tenancies by the entirety created before the effective date of the statute.[4] After deciding this question affirmatively, the court faced defendant's claim that retroactive application of the statute unconstitutionally divested him of his property right in the rents and profits that were his due under the former law.[5] In holding that retroactive application of the statute is not unconstitutional, the court considered both the due process and equal protection issues raised by the case.[6]

This Note discusses the court's treatment of the due process question raised in *Perry*. Although the court reached an appealing and equitable result, it relied on a conclusory "vested rights" analysis, thereby missing the opportunity to articulate a more meaningful basis for considering the constitutional problem of retroactive application of statutes. After examining the problem of retroactivity in the context of civil statutory law, the Note concludes that courts and commentators have suggested a more meaningful analysis that North Carolina courts should adopt.

Plaintiff wife and defendant husband were married in November 1945 and remained married at the time of trial.[7] During their marriage they acquired and

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1. Davis v. Bass, 188 N.C. 200, 206-07, 124 S.E. 566, 570 (1924); 4A R. POWELL, THE LAW OF REAL PROPERTY § 622(2) (1986); Lee, *Tenancy by the Entirety in North Carolina*, 41 N.C.L. REV. 67, 78-79 (1962).

2. N.C. GEN. STAT. § 39-13.6(a) (1984).

3. 80 N.C. App. 169, 341 S.E.2d 53, *disc. rev. granted*, 317 N.C. 336, 346 S.E.2d 502, *appeal dismissed*, 320 N.C. 170, 357 S.E.2d 925 (1986).

4. *Id.* at 170, 341 S.E.2d at 54.

5. *Id.* at 172-76, 341 S.E.2d at 56-58.

6. *Id.* at 172-73, 341 S.E.2d at 56.

7. *Id.* at 169, 341 S.E.2d at 54. In defendant's cross action for a declaratory judgment he alleged that plaintiff had "wrongfully separated herself from the defendant on numerous occasions." Record at 16, *Perry* (No. 857SC382). Plaintiff denied this allegation in her answer to cross action, and in turn alleged that defendant "refused to adequately support the plaintiff while living together." *Id.* at 18. No further mention of their marital situation is in the record or briefs.

held as tenants by the entirety two farms, a house, and a lot.[8] The couple acquired these properties between 1965 and 1978.[9] In March 1983 plaintiff brought an action seeking a declaratory judgment entitling her under section 39-13.6 to an equal right to control, use, possession, rents, income, and profits of the properties held by the entirety.[10] Defendant denied the applicability of section 39-13.6 to the property on the grounds that it had been acquired prior to the effective date of the statute, and further sought a declaratory judgment that section 39-13.6 would not be retroactive in effect.[11] The trial court held that defendant had a vested property right in the control, possession, and income from the property. Thus, retroactive application of section 39-13.6 to estates by the entirety created before 1983 would amount to an unconstitutional divestment of defendant's property right.[12]

Upon plaintiff's appeal, the North Carolina Court of Appeals first considered whether the general assembly intended the statute to have retroactive effect. The general assembly amended section 39-13.6 in 1983 by deleting the first sentence in subsection (c), which provided that the statute was applicable only to conveyances made on or after January 1, 1983.[13] The amending bill was entitled, "An Act to Amend Chapter 39 to Further Equalize Between Married Persons the Right to Income, Possession and Control in Property Owned Concurrently in Tenancy by the Entirety."[14] Based on the deletion of a provision that gave the statute prospective effect only, and the amendment's goal of further equalizing the rights between married persons regarding entireties property, the court concluded that the general assembly "clearly manifested its intention that G.S. 39-13.6 . . . apply to estates by the entirety created before 1 January 1983."[15]

The court of appeals next considered whether applying section 39-13.6 to tenancies by the entirety created before 1983 violated defendant's due process rights under the fourteenth amendment to the United States Constitution[16] and article 1, section 19 of the North Carolina Constitution.[17] The court accepted

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8. *Perry*, 80 N.C. App. at 169, 341 S.E.2d at 54.

9. Plaintiff-Appellant's Brief at 4, *Perry*.

10. For the relevant text of this statute, see *supra* text accompanying note 2.

11. *Perry*, 80 N.C. App. at 169, 341 S.E.2d at 54.

12. *Id.* at 170, 341 S.E.2d at 54.

13. Act of June 6, 1983, ch. 449, § 1, 1983 N.C. Sess. Laws 381, 381 (codified at N.C. GEN. STAT. § 39-13.6 (1984)). The deleted sentence read, "This section shall apply to all conveyances on and after January 1, 1983." Act of June 18, 1982, ch. 1245, § 1, 1981 N.C. Sess. Laws 136, 137 (codified as amended at N.C. GEN. STAT. § 39-13.6 (1984)).

14. Act of June 6, 1983, ch. 449, § 1, 1983 N.C. Sess. Laws 381, 381 (codified at N.C. GEN. STAT. § 39-13.6 (1984)).

15. *Perry*, 80 N.C. App. at 172, 341 S.E.2d at 56.

16. The amendment reads in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

17. The article reads:

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or

the premise that a "statute may not be given retroactive effect when such construction would interfere with vested rights acquired by reason of transactions completed prior to its enactment,"[18] but rejected the argument that defendant had a vested right to plaintiff's share of the income and control of the entireties property.

Citing *Shelley v. Kraemer*,[19] the court stated "[t]he claim of a vested property right may not rest upon State enforcement of common law which is unconstitutionally discriminatory."[20] The court discerned no valid state purpose in denying a married woman the right to control and receive income from her own property.[21] Therefore, the court refused to enforce the common law rule, which it described as "gender-biased in favor of males . . . beyond dispute."[22] That the parties could have elected to hold their property by other forms of concurrent ownership did not influence the court.[23] " 'The "absence of an insurmountable barrier" will not redeem an otherwise unconstitutionally discriminatory law.' "[24] The court noted the particular appropriateness of allowing a statute to be applied retroactively to change the common law in this case: " '[T]he great office of statutes is to remedy defects in the common law as they are developed, and to adopt it to the changes of time and circumstances.' "[25]

The court reached the correct result in *Perry*, and its equal protection analysis is unobjectionable, indeed laudable. Underlying the discussion of the equal protection issue, however, is the court's acceptance of a distinction between vested and nonvested rights as the proper basis for deciding whether a statute

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outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

N.C. CONST. art. I, § 19.

18. *Perry*, 80 N.C. App. at 173, 341 S.E.2d at 56.

19. 334 U.S. 1 (1948).

20. *Perry*, 80 N.C. App. at 175, 341 S.E.2d at 57.

21. *Id.* at 174, 341 S.E.2d at 57.

22. *Id.*

23. *Contra* D'Ercole v. D'Ercole, 407 F. Supp. 1377 (D. Mass. 1976), which upheld the constitutionality of the common law incidents of tenancy by the entirety. Plaintiff was an estranged wife who refused a divorce from her husband on religious grounds, *id.* at 1379, but sought a share in the marital home occupied by defendant husband. *Id.* The husband refused any plan to share the occupancy of or equity in the home unless plaintiff granted him an uncontested divorce. *Id.* Plaintiff sought an injunction and declaratory relief, claiming deprivation of due process and equal protection of the law because the case law, as enforced by the state, gave her husband the right to possession and control of their home, held as tenants by the entirety, during his lifetime. *Id.* The court entered judgment for defendant, noting that tenancy by the entirety is "but one option open to married persons seeking to take title in real estate . . . ." *Id.* at 1382; *see also* Homanich v. Miller, 28 N.C. App. 451, 455, 221 S.E.2d 739, 741 (statute provided different property rights regarding entireties property for wife who slays husband than for husband who slays wife; statute held constitutional, because "tenancy by the entirety is a purely voluntary method of acquiring and retaining realty . . . ."), *disc. rev. denied*, 289 N.C. 614, 223 S.E.2d 392 (1976). While *Perry* did not specifically overrule *Homanich*, the *Perry* court did depart from the rationale used in *D'Ercole* and *Homanich*. *Perry*, 80 N.C. App. at 174-75, 341 S.E.2d at 57.

24. *Perry*, 80 N.C. App. at 175, 341 S.E.2d at 57 (quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981)).

25. *Id.* at 176, 341 S.E.2d at 58 (quoting Munn v. Illinois, 94 U.S. 113, 134 (1877)).

should be applied retroactively. This assumption leads to a missed opportunity to set forth a more meaningful analysis of retroactivity.

At English common law, a husband and wife could hold title to real property by only one form of concurrent ownership—tenancy by the entirety.[26] Entirety was not strictly considered *concurrent* ownership because the wife, as a *femme covert*, lost her legal identity upon marriage.[27] Thus, while husband and wife took the whole estate as "one flesh," it was the husband who had the right to all management of and income from the property during his lifetime.[28]

In the United States tenancy by the entirety was originally adopted by all common law jurisdictions except Connecticut, Nebraska, and Ohio.[29] The passage of Married Women's Property Rights Acts[30] between 1839 and 1895, giving women management power and ownership of income from their own property during marriage, was viewed by many courts as inconsistent with the common law incidents of tenancy by the entirety.[31] Courts developed three different interpretations:

> (1) that tenancy by entireties, incapable of existence apart from the common law property relations of spouses and the husband's dominance, was necessarily destroyed through the wife's emancipation; (2) that tenancy by entireties, not being specifically mentioned, was not affected in any way by the Married Women's Acts or other legislation dealing with general marital relations, and therefore it still existed as at common law; (3) that the destroyed incidents of the husband's dominance and the wife's disabilities were incidents of the common law marital status and not peculiarly incidents of tenancy by the entireties, and therefore the tenancy may and does still exist, although without such incidents.[32]

North Carolina, along with Massachusetts and Michigan, adopted the second view.[33] Thus, until the passage of North Carolina General Statutes section 39-13.6, the husband retained exclusive rights to income and control from entireties property in North Carolina.[34] This result had been criticized by scholars and

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26. 4A R. POWELL, *supra* note 1, § 620(1); Phipps, *Tenancy by Entireties*, 25 TEMP. L.Q. 24, 24 (1951).

27. Reppy, *North Carolina's Tenancy by the Entirety Reform Legislation of 1982*, 5 CAMPBELL L. REV. 1, 3 (1982); Comment, *Tenancy by the Entirety in North Carolina: An Idea Whose Time Has Gone?*, 58 N.C.L. REV. 997, 998-99 (1980).

28. These rights included the ability to possess, convey a life interest, lease, and encumber the property without the wife's consent, but subject to her right of survivorship. 4A R. POWELL, *supra* note 1, § 622(2); Reppy, *supra* note 27, at 3.

29. Phipps, *supra* note 26, at 32.

30. For a discussion of the effects of the Married Women's Property Rights Acts, see Johnston, *Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U. L. REV. 1033, 1061-89 (1972).

31. Reppy, *supra* note 27, at 4.

32. Phipps, *supra* note 26, at 28 (footnotes omitted).

33. Phipps, *supra* note 26, at 28 n.10.

34. Koob v. Koob, 283 N.C. 129, 137, 195 S.E.2d 552, 558 (1973); L. & M. Gas Co. v. Leggett, 273 N.C. 547, 551, 161 S.E.2d 23, 26 (1968); Atkinson v. Atkinson, 225 N.C. 120, 129, 33 S.E.2d 666, 673 (1945); Lewis v. Pate, 212 N.C. 253, 254, 193 S.E. 20, 20 (1937) (per curiam); Bryant v. Bryant, 193 N.C. 372, 378, 137 S.E. 188, 191 (1927); Davis v. Bass, 188 N.C. 200, 205-06, 124 S.E.

judges as far back as 1906.[35]

In 1982, the North Carolina General Assembly acted to remedy this anomalous situation by passing section 39-13.6, which gave married women equal rights to income from and control of their entireties property.[36] As originally enacted, the statute applied only to conveyances made on or after January 1, 1983.[37] This immediately raised concerns regarding the statute's constitutionality, because it required one-half the income from such property to be reported by each spouse for income tax purposes, regardless of when the conveyance was made.[38] In *Boyce v. Boyce*,[39] decided after the enactment of section 39-13.6 but before its amendment, the North Carolina Court of Appeals awarded the husband all rights to income from entireties property.[40] No constitutional issues were raised in *Boyce*. By amending section 39-13.6 to delete the requirement that tenancies by the entirety be created on or after January 1, 1983 for the statute to apply, and by clarifying the tax repercussions,[41] the general assembly demonstrated its intention that married women in North Carolina be given equal rights in tenancies by the entirety created before 1983.[42] *Perry v. Perry* was the first case to interpret section 39-13.6 as amended.

Historically, retroactive laws have been disfavored since the times of the Greeks and Romans.[43] The principle of disfavoring retroactive laws was well established at English common law[44] and came to be considered part of the "natural law" as described by Coke and Blackstone.[45] Because of Parliament's sovereignty over the courts, however, English judges respected express provisions that statutes have retroactive effect.[46] The principle was a rule of construction, not a limitation on legislative power.[47]

566, 569 (1924); Bynum v. Wicker, 141 N.C. 95, 96, 53 S.E. 478, 478 (1906); Comment, *supra* note 27, at 999.

35. *See, e.g.*, Bynum v. Wicker, 141 N.C. 95, 96, 53 S.E. 478, 478 (1906) ("This estate by entirety is an anomaly, and it is perhaps an oversight that the Legislature has not changed it into a cotenancy, as has been done in so many states."); Lee, *supra* note 1, at 79 ("The estate by the entirety is indeed an anomaly. It seems strange in modern times that during marriage, the wife's interest in the property held by the entirety should be her husband's and not hers.").

36. *See supra* text accompanying note 2.

37. Act of June 18, 1982, ch. 1245, § 1, 1981 N.C. Sess. Laws 136, 137 (codified as amended at N.C. GEN. STAT. § 39-13.6 (1984)).

38. *Id. See also* Reppy, *supra* note 27, at 20 (arguing that "all of the reforms of subsection (a) should apply to all tenancies by the entirety in North Carolina regardless of when created").

39. 60 N.C. App. 685, 299 S.E.2d 805, *disc. rev. denied*, 308 N.C. 190, 302 S.E.2d 242 (1983).

40. *Id.* at 690, 299 S.E.2d at 808.

41. Act of June 6, 1983, ch. 449, § 1, 1983 N.C. Sess. Laws 381, 381 (codified at N.C. GEN. STAT. § 39-13.6 (1984)).

42. *See supra* text accompanying notes 13-15.

43. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 775 (1936).

44. The principle was introduced into English common law by Bracton and further developed by Lord Coke. *Id.* at 776-77.

45. *Id.* at 777, 780; *see also* Greenblatt, *Judicial Limitations on Retroactive Civil Legislation*, 51 NW. U.L. REV. 540, 540-41 (1956) (describing how the theory of natural justice reinforced the prohibition against interpreting acts of Parliament to apply retroactively; judicial decisions, as opposed to statutes, were presumed to have retroactive effect).

46. Greenblatt, *supra* note 45, at 541; Smead, *supra* note 43, at 778.

47. Greenblatt, *supra* note 45, at 541; Smead, *supra* note 43, at 778.

In the New World, the framers of the Constitution expressly prohibited passage of ex post facto laws, bills of attainder, and laws impairing the obligation of contract,[48] all characterized by retroactivity. English authorities had used ex post facto laws and bills of attainder against political dissidents;[49] the prohibition against impairment of contracts had its origin in American colonial experience.[50] A bias against retroactive laws extended to other types of retroactive statutes not expressly banned by the Constitution, as evidenced by the writings of Chancellor Kent and Justice Story.[51] One commentator suggested that retroactivity must be isolated from its "evil associations" rooted in "political philosophy" before it can be properly evaluated as a legal principle.[52]

What are the objections to retroactive laws? Before undertaking this discussion it is helpful to define "retroactive." Commentators have had a field day defining and exploring the nuances of such terms as "retroactive" and "retrospective."[53] For purposes of this Note, a retroactive statute is defined as "one which gives to preenactment conduct a different legal effect from that which it would have had without the passage of the statute."[54] In the *Perry* case, for example, the husband was legally entitled to all the rents and profits from the couple's entireties property before the passage of section 39-13.6. After passage of the statute, the wife was entitled to one-half the rents and profits, even though the couple had taken title to the property by the entirety prior to the passage of the statute. Thus, the preenactment conduct of placing the properties in tenancy by the entirety status had a different effect after the passage of section 39-13.6.

One of the most fundamental objections to retroactive laws is that they are unfair. Individuals are held to knowledge of the law—a legal fiction in many circumstances—and are thus credited with having planned their behavior ac-

48. *See, e.g.*, U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed"); U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ."); *see* Smith, *Retroactive Laws and Vested Rights* (pt. 2), 6 TEX. L. REV. 409, 412-13 (1928).

49. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323-24 (1866); Smith, *supra* note 48, at 412.

50. Smith, *supra* note 48, at 412.

51. Justice Story called retroactive statutes "generally unjust." 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1398 (1851); Chancellor Kent wrote that "[a] retroactive statute would partake in its character of the mischiefs of an *ex post facto* law . . . ." 1 J. KENT, COMMENTARIES ON AMERICAN LAW *455.

52. Smith, *supra* note 48, at 414.

53. *Compare* DeMars, *Retrospectivity and Retroactivity of Civil Legislation Reconsidered*, 10 OHIO N.U.L. REV. 253, 254-57 (1983) (distinguishing retroactivity from retrospectivity and noting that treating the terms as synonymous "obfuscates differences which may hinder the accomplishment of important legislative and societal goals"); Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CALIF. L. REV. 216, 217-18 (1960) (defining "method retroactivity" and "vested rights retroactivity"); Smith, *Retroactive Laws and Vested Rights* (pt. 1), 5 TEX. L. REV. 231, 232-33 (1927) (describing three different ideas behind the term retrospective) *with* 2 SUTHERLAND, STATUTORY CONSTRUCTION § 41.01, at 337 (C. Sands 4th ed. 1986) ("[T]he terms 'retroactive' and 'retrospective' are synonymous in judicial usage and may be employed interchangeably."); BLACK'S LAW DICTIONARY 1184 (5th ed. 1979) (" '[R]etroactive' or 'retrospective' laws are generally defined from a legal viewpoint as those which take away or impair vested rights acquired under existing laws, create new obligations, impose a new duty, or attach a new disability in respect to the transactions or considerations already past.").

54. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 692 (1960).

cording to the law as it then exists.[55] Retroactive laws deprive individuals of notice or fair warning of the legal consequences of their actions. Further, the legislature may pass such a law with knowledge of exactly who will be affected, rather than with the detached concern of a policymaker.[56] This knowledge goes against the common-law tradition of the judge as an impartial decision-maker regarding known parties and the legislator as a prescriber of future, impersonal policies.[57] In addition, retroactive laws disrupt certainty; the past, normally regarded as settled, becomes open to reinterpretation.[58] This effect is offensive because it leaves vulnerable matters considered over and done with.

Despite the historical bias against retroactive laws and the reasons behind the bias, situations arise which call for retroactive legislation. While legislating before rather than after the fact may be preferable, "situations arise where a law may be better late than never and a retroactive law than no law at all."[59] The inquiry therefore becomes whether a retroactive law is "better late than never," or whether it should be struck due to unfairness. Equating "retrospective" or "retroactive" with "unconstitutional" is not a satisfactory analysis. "The question of validity rests on further subtle judgments concerning the fairness of applying the new statute."[60]

The court in *Perry* wrote that "[a] statute may not be given retroactive effect when such construction would interfere with vested rights acquired by reason of transactions completed prior to its enactment."[61] Many other courts have echoed this analysis in cases almost too numerous to be counted.[62] However, the following criticism of such judicial statements is typical:

> Judicial opinions are full of standards which purport to govern decision[s] concerning the legality of retroactive application of new law. On close examination most of them turn out to be little more than ways to restate the problem. Probably the most hackneyed example of such a rule is to the effect that a law cannot be retroactively applied to impair vested rights. But the statement of that proposition does nothing more than focus attention on the question concerning what circumstances qualify a right to be characterized as "vested."[63]

Commentators have long recognized the impossibility of defining a vested right and have established the circuitous working definition that "a right is vested when it is immune to destruction, and . . . is not vested when it is liable to destruction, by retroactive legislation."[64] This "definition" exposes the entirely

55. SUTHERLAND, *supra* note 53, § 41.02, at 340-41; Hochman, *supra* note 54, at 692.

56. Smith, *supra* note 48, at 417.

57. Hochman, *supra* note 54, at 693; Smith, *supra* note 48, at 417.

58. Hochman, *supra* note 54, at 692-93.

59. Smith, *supra* note 53, at 237.

60. SUTHERLAND, *supra* note 53, § 41.05, at 364.

61. *Perry*, 80 N.C. App. at 173, 341 S.E.2d at 56.

62. See SUTHERLAND, *supra* note 53, § 41.06, at 378-80 n.1, for a table of cases espousing this principle; *see also infra* note 65 (listing North Carolina cases).

63. SUTHERLAND, *supra* note 53, § 41.05, at 364-65.

64. Smith, *supra* note 53, at 231. For a compilation of examples from the case law of what rights have been considered vested and nonvested, see SUTHERLAND, *supra* note 53, § 41.06, at 376-77.

conclusory nature of the vested rights analysis.

North Carolina courts have used a vested rights analysis when considering retroactivity as it relates to a variety of statutes.[65] Although the courts have often used the vested rights analysis uncritically,[66] in several cases they have questioned its use. In *Pinkham v. Mercer*,[67] Justice Seawell discussed the difficulty of defining a vested right:

> There has been no satisfactory general rule to aid us in making the distinction, which is necessary here, between mere personal powers and privileges created by statute or existing at common law and subject to legislative withdrawal, and those to be recognized as "vested rights" under constitutional protection. When dealing with rights of the latter class it will be found that text writers and courts are usually forced to define them in terms of themselves, or "beg the question."[68]

Nevertheless, Justice Seawell did not depart from the standard characterization, ultimately defining the right of revocation of a future interest as a personal power, not a vested right.[69]

More recently, Justice Exum (now Chief Justice) acknowledged the circular logic of the vested rights analysis in *Gardner v. Gardner*:[70]

> We recognize, of course, that the phrases "vested right" or "substantive right" are themselves statements of legal conclusion. "Vested" rights may not be retroactively impaired by statute; a right is "vested" when it is so far perfected as to permit no statutory interference. The tautology is apparent. As was pointed out by Justice Holmes, "for legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that [the public] force will be brought to bear upon those who do things said to contravene it . . . ." Our concern here, however, is less with the metaphysics of plaintiff's right to her chosen venue than with the constitutional requirement that the judgment which accords that right be stable.[71]

Justice Exum thus shifted his focus at the critical moment from the vested rights tautology to the particular issues of the case. Though he did not label plaintiff's

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65. *See* Bolick v. American Barmag Corp., 306 N.C. 364, 293 S.E.2d 415 (1982) (denying retroactive application of statute of repose; plaintiff's cause of action vested or accrued at time of injury); Smith v. American & Efird Mills, 305 N.C. 507, 290 S.E.2d 634 (1982) (right to recover under workers' compensation act vested at time of permanent disability); Gardner v. Gardner, 300 N.C. 715, 268 S.E.2d 468 (1980) (right to venue as established by statute and adjudication is vested right and subsequent amendment of the statute will not invalidate it); Wachovia Bank & Trust Co. v. Andrews, 264 N.C. 531, 142 S.E.2d 182 (1965) (statute creating presumption of adopted child's right to inherit not applied retroactively); Pinkham v. Mercer, 227 N.C. 72, 40 S.E.2d 690 (1946) (statutory power of revocation of voluntary conveyance of future interest not a vested right, and amendment of statute applied retroactively); Stanback v. Citizens Nat'l Bank, 197 N.C. 292, 148 S.E. 313 (1929) (future interest in voluntary trust not a vested right and application of amended statute constitutional).

66. *See, e.g.*, Wood v. J.P. Stevens & Co., 297 N.C. 636, 650, 256 S.E.2d 692, 701 (1979).

67. 227 N.C. 72, 40 S.E.2d 690 (1946).

68. *Id.* at 78, 40 S.E.2d at 695.

69. *Id.* at 79, 40 S.E.2d at 696.

70. 300 N.C. 715, 268 S.E.2d 468 (1980).

71. *Id.* at 719, 268 S.E.2d at 471 (quoting Holmes, *Natural Law*, 32 HARV. L. REV. 40, 42 (1918)).

right to venue as "vested," he held it to be "firmly fixed" so that "[t]he question was then settled, and it could not be reopened by subsequent legislative enactment."[72] The traditional vested rights analysis was therefore questioned, but ultimately given effect once again. Two subsequent North Carolina Supreme Court opinions have used the vested rights analysis without criticism or comment.[73]

Courts and commentators have suggested alternative approaches for considering the due process problems inherent in retroactive application of statutes. Because the due process clause of the fourteenth amendment was not specifically designed to deal with these problems, no definite criteria can be found in the Constitution to resolve the issue.[74] In *Linkletter v. Walker*[75] the United States Supreme Court stated that "the Constitution neither prohibits nor requires retrospective effect. As Justice Cardozo said, 'We think the federal constitution has no voice upon the subject.' "[76] Therefore, a variety of tests have been described for considering the effects arising from retroactive application of laws.

One scholar characterized surprise as the common element in pre-1939 cases that disallowed retroactive application of a statute as contrary to due process.[77] "On the other hand, in the cases holding the retroactive application of a statute consistent with due process of law, the element of surprise is lacking."[78] In his discussion of the reasoning of cases considering retroactive application of a statute, however, he equated surprise with reliance.[79] Actual reliance by individuals on a statute does indeed invoke strong policy considerations against retroactive change, particularly in areas in which the public is likely to consult the law and adapt their behavior accordingly.[80] For example, most tort law and civil procedure is not likely to be consulted and relied on by the public; consequently, retroactive application of such laws would be less objectionable than a regulatory statute.[81]

Reasonableness of the legislative objectives in passing the statute is another factor to be considered. Under standard due process review, if the objectives are reasonable, "the court must then determine whether, in light of alternative means, it is reasonable to implement those objectives by destroying the type of

72. *Id.* at 720, 268 S.E.2d at 472.

73. *See* Bolick v. American Barmag Corp., 306 N.C. 364, 371, 293 S.E.2d 415, 420 (1982); Smith v. American & Efird Mills, 305 N.C. 507, 511, 290 S.E.2d 634, 637 (1982).

74. J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 471 (2d ed. 1983).

75. 381 U.S. 618 (1965).

76. *Id.* at 629 (quoting, Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364 (1932)).

77. Stimson, *Retroactive Application of Law—A Problem in Constitutional Law*, 38 MICH. L. REV. 30, 37 (1939).

78. *Id.* at 38.

79. "A person who has changed his position, omitted to change it, or made commitments in reliance upon the law in force at the time is suddenly confronted with a change in the law applicable to his prior conduct, resulting in a liability or loss of investment which he has no opportunity to anticipate and avoid." *Id.* at 37-38.

80. Greenblatt, *supra* note 45, at 566-67.

81. Greenblatt, *supra* note 45, at 567.

interest in issue and thus changing the effects of antecedent events."[82] The need for this type of balancing is inherent in the problem of retroactivity. "Retroactivity is always an aspect of the broader problem of weighing the interests in stability against the constant demands for change inherent in the flux of modern life."[83]

Although commentators have regarded reliance as the appropriate test for the constitutionality of retroactive laws, Supreme Court cases have not supported reliance as the sole determinant.[84] In 1960 one commentator suggested that courts must consider three factors in every case: "[T]he nature and strength of the public interest served by the statute, the extent to which the statute modifies or abrogates the asserted preenactment right, and the nature of the right which the statute alters."[85] In addition to this test, a court may review the constitutionality of retroactivity in light of prohibitions associated with substantive due process: "(1) protection from undue loss of property . . . ; (2) protection from the demands of government officials acting irresponsibly; and (3) protection from being punished and condemned for choices made without knowledge of their wrongful character."[86]

In *Linkletter* the Supreme Court adopted none of these tests, but embarked on an odyssey of jurisprudence regarding retroactivity.[87] What is often referred to as the *Linkletter* test was actually enunciated in *Stovall v. Denno*,[88] decided two years after *Linkletter*. This approach involves a balancing of the purpose of the new rule, the reasonableness and extent of reliance on the overturned law, and the effect of a retroactive application of the new rule on the administration of justice.[89] Reliance and reasonableness of legislative objectives had previously been suggested by commentators as factors for consideration. While both *Linkletter* and *Stovall* involved criminal defendants, the Court in *Chevron Oil Co. v. Huson*[90] made it clear that doctrines developed regarding retroactivity were to be applied to civil as well as criminal cases.[91]

Applying the *Linkletter/Stovall* test to *Perry*, one must first consider the purpose of the new statute. The legislative objective in amending section 39-13.6 was evidenced by the title to the amending legislation: "An Act to Amend Chapter 39 to *Further Equalize* Between Married Persons the Right to Income,

82. Greenblatt, *supra* note 45, at 554.

83. Greenblatt, *supra* note 45, at 567.

84. Hochman, *supra* note 54, at 696.

85. Hochman, *supra* note 54, at 697. For an application of this three-part test, see Note, *Vested Rights and the Constitutionality of Retroactive Application of the 1980 Pennsylvania Divorce Code*: Krenzelak v. Krenzelak, 46 U. PITT. L. REV. 1123, 1134-37 (1985).

86. Slawson, *supra* note 53, at 251.

87. *See* Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557 (1975) (discussing *Linkletter* and its progeny from the years 1965 to 1975); Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied,"* 61 N.C. L. REV. 745 (1983) (criticizing the *Linkletter* doctrine on the basis of confusion and inconsistencies present in lower federal court decisions).

88. 388 U.S. 293 (1967).

89. *Id.* at 297.

90. 404 U.S. 97 (1971).

91. *Id.* at 105-06; Beytagh, *supra* note 87, at 1581-82.

Possession and Control in Property Owned Concurrently in Tenancy by the Entirety."[92] The reasonableness of this goal is illustrated by the fact the North Carolina General Assembly was following the lead of nearly every state in the country when it accorded wives half the income from their jointly-owned property.

The extent of the reliance on the old law is difficult to measure. Married couples are not forced to hold their property as tenants by the entirety; they may take title as tenants in common or joint tenants.[93] The availability of a choice may indicate that the parties actively chose to hold title as tenants by the entirety. In North Carolina, however, married persons are presumed to take title to real property as tenants by the entirety in the absence of an affirmative election for joint tenancy or tenancy in common.[94] Therefore, it is not known how many couples elect tenancy by the entirety actively rather than passively.[95] The issue, however, is not whether couples chose tenancy by the entirety, but whether they chose it for the reason that the husband would receive all the rents and profits therefrom. Today it seems likely that most wives and husbands would elect to share equally in the rents and control of concurrently owned property. Whether or not this generalization is true, some couples probably did act in reliance on the former law's effect of giving the husband all rents and control of tenancies by the entirety created before 1983.

The third aspect of the *Linkletter/Stovall* test is to consider the effect of a retroactive rule on the administration of justice.[96] Unlike criminal cases, the situation in *Perry* raised minimal concern regarding administration. No law enforcement or regulatory agency was involved, therefore the amendment's provision should have been relatively self-executing. That some small number of wives may bring actions to enforce their rights to the property involved under section 39-13.6 should not impose an undue burden on the courts.

In conclusion, considering the strength of the legislative policy behind amending section 39-13.6, the questionable reliance involved, and the minimal governmental burden, retroactive application of section 39-13.6 is justified. Although this result is the same as that reached by the *Perry* court, that court used a conclusory vested rights analysis to reach the correct result. More mean-

92. Act of June 6, 1983, ch. 449, § 1, 1983 N.C. Sess. Laws 381, 381 (codified at N.C. GEN. STAT. § 39-13.6 (1984)) (emphasis added).

93. 2 R. LEE, NORTH CAROLINA FAMILY LAW § 121 (4th ed. 1980).

94. N.C. GEN. STAT. § 39-13.6(b) (1984); *see* R. LEE, *supra* note 93, at § 113.

95. One reason why couples might have actively elected tenancy by the entirety is the effect of that form of ownership on creditors' rights. In North Carolina, a tenancy by the entirety is not subject to levy by judgment creditors of either the husband or wife alone. L. & M. Gas Co. v. Leggett, 273 N.C. 547, 550, 161 S.E.2d 23, 26 (1968); *see* R. LEE, *supra* note 93, § 116; Reppy, *supra* note 27, at 5. However, retroactive application of N.C. GEN. STAT. § 39-13.6 does not change this result. Instead, it "removes the inconsistent incidents of husband dominance that made [the rule] illogical." Reppy, *supra* note 27, at 8. Thus, a couple could not have relied to their detriment on the effect of holding property as tenants by the entirety on creditors' rights, because the effect remains unchanged.

96. *See supra* text accompanying notes 88-89.

ingful inquiries should be made by North Carolina courts when considering whether to give statutes retroactive effect.

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