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regulation and control. Because of the questionable status and future of national health insurance, reliance by North Carolina on federal regulation is not feasible for the present. Until such time as the sanctions under Pub. L. No. 92-603 become effective to curtail expansion by cream skimming private hospitals, the State must shoulder the burden. In assuming this role, North Carolina should adopt legislation that is suited to protect the public interest. The most viable solution is public utilities regulation applicable to all hospitals alike. As has been shown, it is a form of regulation which the court may accept, and however distasteful the rate regulation aspect may appear to hospital management, the more orderly development of health care facilities that will result therefrom will make the legislation significantly worthwhile.

ROBERT A. BRADY

Would You Sue Your Spouse?

The majority of the jurisdictions in the United States view the marital relationship as a disability to the marital partners, and toll the running of statutes of limitations as to claims arising between them.[1] However, in *Fulp v. Fulp*[2] North Carolina cast its lot with the minority and disallowed a wife's claim against her husband on the ground that the statute of limitations barred the action. Justice Sharp took the following dicta from *Graves v. Howard*[3] to support the decision.

> The statutes of limitations contain no exception in favor of the wife when she holds a claim against her husband . . . Disputes with respect to property may arise between them when the separate existence of the wife, and a separate right of property, are recognized at law, as in this state, as well as other matters; and when they do arise, there is a great necessity for a judicial determination of the questions as when they arise between other parties. A litigation of the kind between husband and wife may be unseemly and abhorrent to our ideas of propriety, but a litigation in one form can be no more so than another, and no more so that the necessity itself which gives rise to the litigation.

1. *See, e.g.*, Wehoffer v. Wehoffer, 176 Or. 345, 156 P.2d 830 (1945); Campbell v. Mickelson, 227 Wis. 429, 279 N.W. 73 (1938); Graham v. Wilson, 168 Mo. App. 185, 153 S.W. 83 (1912); Stockwell v. Stockwell, 92 Vt. 489, 105 A. 30 (1918); Hamby v. Brooks, 86 Ark. 448, 111 S.W. 277 (1908); Barnett v. Harshbarger, 105 Ind. 410, 5 N.E. 718 (1886).

2. 264 N.C. 20, 140 S.E.2d 708 (1965).

3. 159 N.C. 594, 598, 75 S.E. 998, 1000 (1912).

As illustrated by the above excerpt, the court in *Graves* as well as in *Fulp* did not give consideration to the effects of litigation on the marriage. Instead, the court deals with the husband and wife as strangers who will part ways with the adjudication of the claim—unfortunately, this is literally true in many cases. In so ruling, the court has effectively ordered married persons in North Carolina to speak now against your spouse or forever hold your peace.

The purpose of this comment is to illustrate the pressure such a ruling places upon the marriage, and thus why the decision should be reversed or the statutes of limitations amended to specifically exempt claims arising between married persons. First, notice should be given to the development of this area of the law in North Carolina, as well as some of the states which comprise the majority.

I. EARLY DEVELOPMENTS

At common law a woman lost all her legal capacity with marriage in exchange for the guardianship of her husband. In the exchange she received dower and whatever protection her husband could afford her.[4] At this point in time, it was uniformly agreed that claims one spouse might have against the other would not be subject to the statutes of limitations during the continuance of the union. The reasoning was based upon the principle of "unity of person".[5] Under this principle, it was an impossibility for one spouse to sue the other because they were considered one.

Some common law limitations began to disappear around 1850 with the enactment of the Married Woman's Enabling Acts. By the end of that century virtually all states had statutes enlarging the rights of women, but these enactments by no means succeeded in conferring full legal capacity upon married women.[6] This partial liberation often placed the married woman in a precarious position, and so to protect her rights some legislatures included a saving clause in their statutes of limitations in favor of *feme covert*. Under these statutes, marriage was considered a disability coextensive with infancy.[7]

Near the end of the Nineteenth Century, women were attaining most of their civil rights, and the stage was set for the question of whether the statutes of limitations were applicable to claims between spouses.

4. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 406 (2d ed. 1898).

5. 1 BLACKSTONE, COMMENTARIES OF THE LAWS OF ENGLAND 445 (Cooley 3d ed. 1884).

6. 1 SHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS § 287 (6th ed. 1921); H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 222 (1968).

7. *See* Summerlin v. Cowles, 101 N.C. 473, 7 S.E. 881 (1888).

As indicated above, the majority of the jurisdictions did not subject such claims to the statute. Interestingly enough, the law developed in these states from at least three different lines of reasoning. In some of the states the statutes of limitations contain a saving clause in favor of married women, which except from the statute the claims of husband and wife against each other.[8] Suit in these states is not barred until lapse of the statutory time after the termination of coverture. Thus, there is no pressure upon a spouse to bring suit against his partner while the marriage continues. The statute is held in abeyance until such time as litigation will have no effect upon the domestic relationship.

In the absence of exemption by statute, via a saving clause, the courts have been faced with the problem of the applicability of the statutes of limitations to causes of action arising between husband and wife. The courts have responded, with but few exceptions,[9] that the statutes of limitations do not apply to such claims during the continuance of the marriage.

There are two views taken to support such holdings. One line of decisions argues that the statutes contemplate the common law unity of husband and wife and that since under the common law spouses could not sue each other, the statute does not begin to run in favor of either during marriage.[10] The reasoning for this view appears particularly vulnerable in light of the fact that statutes have abolished most of the disabilities of *feme covert*, and have enabled the married woman to maintain a suit with respect to her separate property.

The alternate view is founded upon public policy. The states following this course have weighed the relative advantages of foreclosing stale claims (the primary purpose of statutes of limitations) against the disadvantages of the domestic discord surely to be spawned by suits between the marital partners. Their decision has been that it is not good public policy to encourage suit between spouses, while the marital relationship continues.[11] The policy in these states is to refrain from

8. *See, e.g.*, Wilson v. Wilson, 36 Cal. 447, 95 Am. Dec. 194 (1868); Yocum v. Allen, 58 Ohio St. 280, 50 N.E. 909 (1898).

9. Vanna v. Elkins, 20 Ariz. App. 557, 514 P.2d 510 (1973); Hays v. Hays' Adm'r, 290 S.W.2d 795 (Ky. 1956); Wagner v. Mutual Life Ins. Co., 88 Conn. 536, 91 A. 1012 (1914); Bromwell v. Bromwell, 139 Ill. 424, 28 N.E. 1057 (1891); *In re* Deaner, 126 Iowa 701, 102 N.W. 825 (1905); Muus v. Muus, 29 Minn. 115, 12 N.W. 343 (1882); Wyatt v. Wyatt, 81 Miss. 219, 32 So. 317 (1902); Rosenberger v. Mallerson, 92 Mo. App. 27 (1901); Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965); De Baun's Ex'x v. De Baun, 119 Va. 85, 89 S.E. 239 (1916).

10. *See, e.g.*, Barnett v. Harshbarger, 105 Ind. 410, 5 N.E. 718 (1886); Morrison v. Brown, 84 Me. 82, 24 A. 672 (1891); Marsteller v. Marsteller, 93 Pa. 350 (1880).

11. *See, e.g.*, Hamby v. Brooks, 86 Ark. 448, 111 S.W. 277 (1908); Graham v. Wilson, 168 Mo. App. 185, 153 S.W. 83 (1912); Yeomans v. Petty, 40 N.J. Eq. 495, 4 A. 631 (1885); Morrish v. Morrish, 262 Pa. 192, 105 A. 83 (1918); Stockwell v. Stockwell, 92 Vt. 489, 105 A. 30 (1918).

fostering the domestic difficulties certain to follow litigation instituted for fear that the running of the statute will bar the action. One court has stated the concept in the following manner:

> . . . The policy of the law is to prevent litigation between husband and wife. The doctrine contended for (to make the claims subject to the statute) would frequently render it inevitable and also disastrous to domestic peace.[12]

The policy is salutary, and is pressed here as the rule which should be adopted by North Carolina. It embraces a consideration of the fragility of a marriage, and takes caution not to impede its vitality. It is mindful that the meaningful relationship of husband and wife should not be subjugated to the relationship of debtor and creditor or claimant and tortfeasor. Indeed, it is a law which serves the people rather than the legal technician.

II. Development of the North Carolina Rule

North Carolina first considered the question of the applicability of statutes of limitations to claims between husband and wife and set forth a definitive holding in this regard in *Summerlin v. Cowles.*[13] Earlier cases mentioned the applicability of the statutes, but were not directly on point or were not definitive in their holdings.[14] In *Summerlin,* the court found that the statute, contained:

> . . . a general saving as to all the statutory limitations . . . in favor of any person who, at the time of the accruing of the cause of action, is . . . *feme covert* . . . and reserves to such the right to bring the same actions, within the times as before limited after his coming or to being . . . discovert.[15]

Hence, in 1888 North Carolina had aligned itself with the majority of other states in regard to the applicability of the statutes of limitations to those claims one spouse might have against the other. It should be noted that no mention was made of the ramifications of one spouse litigating against the other. Instead, the general saving clause simply tolled the statute until the wife stood in parity with the husband or until his death, at which time an action against his estate would be proper. A great deal of criticism cannot be directed at the court for the statute was explicit, and there was really no need for the court to articulate the public policy supporting it at that time.

By 1912, when *Graves v. Howard*[16] reached the court, the legislature

12. Yeomans v. Petty, 40 N.J. Eq. 495, 498, 4 A. 631, 634 (1885).
13. 101 N.C. 473, 7 S.E. 881 (1888).
14. Leggett v. Coffield, 58 N.C. 382 (1860); Fall v. Torrence, 11 N.C. 412 (1826).
15. 101 N.C. at 478, 7 S.E. at 882.
16. 159 N.C. 594, 75 S.E. 998 (1912).

had removed the disability of coverture,[17] and this was the first occasion the court addressed the question of the applicability of the statutes of limitations to causes of action arising between spouses without benefit of a saving clause or the common law principle of "unity of person". Though beyond the *ratio decidendi* of the case,[18] the court stated that,

> . . . The statutes of limitation contain no exception in favor of the wife when she holds a claim against her husband. It therefore appearing that the common-law disability has been removed, that the wife may sue her husband, and that there is no exception in the statute of limitations, . . . the right of action is barred.[19]

Thus, the court mechanically placed the husband and wife in the precarious position of enforcing claims against each other or suffering the consequences of waiver via lapse of time—hardly an enviable position for a spouse wishing to promote marital harmony while anxious to prevent the loss of a cause of action. The opinion gives no indication as to whether the court considered the ramifications of such a policy upon the institution of marriage; except that contra decisions ". . . resting on statutes somewhat similar to ours do not meet our approval".[20]

Following the *Summerlin* and *Graves* decisions, the stage was set for the North Carolina Supreme Court to hear *Fulp v. Fulp*,[21] and to deliver the first holding since the repeal of the *feme covert* statutes.

III. The Fulp Rule and Its Effects on the Marriage

In *Fulp* the plaintiff wife entrusted to her husband between $2500 and $3000 of her money with which he made improvements to the family home. The home was in his name. This was done upon his promise to convey to her a one half undivided interest. During the construction of the house, the wife made repeated requests of her husband to fulfill his promises, and on each occasion she was assured that the transaction would be performed after completion of the work. In 1952, when the construction was completed, the wife again sought to have her name placed upon the deed. To this request the husband rejoined, ". . . You don't think I'm a damn fool, do you?"[22] The matter was then apparently laid to rest until December 19, 1959, some six and one half months after the parties had separated. At that time, Mrs. Fulp instituted suit to recover the money she had contributed.

17. Law of February 13, 1889, Ch. 78 § 2 and 3.
18. In *Graves* the statute had already begun to run when the wife became the owner of her husband's note. Under the general rule, nothing stops the statute once it begins to run. Frederick v. Williams, 103 N.C. 189, 9 S.E. 298 (1889).
19. 159 at 598, 75 S.E. at 1000.
20. *Id.* at 600, 75 S.E. at 1002.
21. 264 N.C. 20, 140 S.E.2d 708 (1965).
22. *Id.* at 26, 140 S.E.2d at 714.

Justice Sharp, speaking for the court, found that the wife was entitled to an equitable lien, but that the three year statute of limitations had run on the claim and thus the action was barred.

The holding referred to the *Graves* decision, and adopted the reasoning therein. Thus, the court recognized the repeal of the *feme covert* statutes, found no exception in the statutes of limitation in favor of suits between married persons, and could see no apparent reason why such claims should not be treated as though the parties were strangers.[23] It cannot be denied that the legal mechanics of the holding are sound, for indeed there is no exception expressed in the statute.[24] This brand of autonomic reasoning, however, disregards the realities of the marital relationship and does considerable damage to the policy of the law to promote domestic tranquility. Indeed, the *Fulp* holding makes it incumbent upon the claimant spouse to press his or her claim in a judicial forum or forego remedy of the cause of action forever. Admittedly, a marriage in which one partner is unwilling to settle accounts with the other is far from perfect. Yet, it seems unnecessary to place a spouse in the untenable position of suing or forgiving the claim. Such pressure can only serve to further alienate the parties and decrease the chances of a non-judicial settlement.

A hypothetical situation may serve to illustrate the argument. Let us assume that A and B are married, and that A loans B a sum of money to bolster B's foundering business. After the business is successfully underway again, A suggests B repay the loan from profits of the business as they are earned. B retorts that A will enjoy the profits of the business and refuses to repay the loan. Let us further assume that other than the disagreement over the loan A and B are happily married and have children. With this factual situation, North Carolina has, by virtue of the *Fulp* decision, stated that A must bring an action on the debt within three years or forgive the loan.[25]

Thus, given the circumstances above, A must now decide which is worth more the happiness of his or her home and children or the money loaned to B. In many cases, undoubtedly, this decision will be directly influenced by the amount of money involved. Hence, A's question becomes how much is the marriage really worth? This is a decision no spouse should ever be faced with.

It can be argued that refusal to settle such claims is in itself unsettling to the marriage and not the least conducive to a permanently blissful union. But this is easily rebutted when one considers that the plaintiff

23. *Id.* at 26, 140 S.E.2d at 714.
24. *See* N.C. GEN. STAT. § 1-14-§ 1-57.
25. N.C. GEN. STAT. § 1-52.

spouse is less likely to be anxious over the claim when comforted by the fact that no time limit is pressing for a decision. The demand can be laid to rest until request for payment reaches more sympathetic ears, or until the marriage fails for other reasons. Finally, if all else fails the claimant spouse can sue the deceased spouse's estate, or if the claimant spouse predeceases his partner, his representative can bring the action. All this is accomplished without forcing one to decide how much money must be involved before the marriage must undergo the test of litigation, and with the distinct possibility that the claim will be settled out of court.

An additional consideration is that of the children of the marriage, and the effect on them of having one of their parents suing the other. Needless to say, the policy of the law should be toward discouraging suits of this nature, but this is not the case in North Carolina. Instead, North Carolina commands the spouse to bring suit within the statutory period or waive the right.

The *Fulp* decision with its ramifications on the marriage and the children paints a rather grim picture for those who find themselves in such a situation. Yet the most tragic component of this debacle is the ease with which it could have been avoided. The court could have merely found that the marital relationship is of such a nature that claims arising between spouses should not be subject to the statutes of limitation. On balance, such a holding would be congruent with the purposes of the statutes of limitations which are for the benefit and repose of the individual creditor against stale claims.[26] The question then is whether the need for security against stale claims by the defendant spouse should weigh more heavily than the policy of promoting domestic tranquility. Again it must be emphasized that the parties to such a suit are not strangers. The situation is not such that the defending party is likely to be prejudiced by the claimant failing to bring timely suit. Prospective creditors of the defending party would likewise go unaffected, so long as they were without notice. Indeed, the only apparent reason for coercing suit is the desire of the judiciary to prosecute claims while the evidence is new. This is indeed a slender reed upon which to rest a policy which has such an ignominious effect upon the institution of marriage. The *Fulp* decision does not recognize that husband and wife cannot be expected to leave the courtroom and forget all that has occurred therein; nor can they be expected to continue the same relationship, undaunted by the fact that they have been legal adversaries. People simply do not live the unemotional life contemplated by the *Fulp* decision.

26. Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957).

CONCLUSION

It should never be the policy of the law to antagonize the relationship of husband and wife. The law should promote harmony within the marital unit, and the rules of law should have as their goal the mitigation of discord within that unit. Sadly, the *Fulp* decision creates a profound pressure upon marriage. It is a complete and utter disservice to the institution. It has caused and will continue to cause dissension in North Carolina homes. Yet, the most confounding part of the *Fulp* rule is that there seems to be no good reason why it should exist. Its only redeeming quality is that it prevents the litigation of stale claims. But this purpose shrinks to insignificance when compared to the potential consequences of forcing one spouse to sue the other. There are already sufficient pressures upon the institution of marriage without the Supreme Court adding another. North Carolinians deserve a rule of law that will foster domestic harmony, not sabotage it.

WILLIAM W. RESPESS, JR.

Victimless Crime Laws

Victimless crime laws have been criticized by many people as misguided and unnecessary. Others have defended these laws as serving an important role in our society. In evaluating our victimless crime laws, one should first consider what the aim and purpose of the criminal law is, and whether such laws are within the scope of the criminal law.

The basic function of the criminal law is to protect one's person and property, and to safeguard the young and the incompetent from exploitation. Crimes of violence against the person are generally recognized as harmful to society. These *mala in se* offenses are defined as those crimes which are wrong in themselves. By their very nature, they are illegal. Crimes classified *mala prohibita* on the contrary are those crimes which are forbidden by statute, but do not in and of themselves violate the social order. This category of crime tends to change with the social attitudes of the time.

Victimless crimes are not *mala in se* but rather *mala prohibita* and thus subject to change according to the times.[1] They fall within that category of crime that varies from country to country, and from era to

1. Samuels, *Legalization of Gambling on Sports Events*, 18 N.Y.L.F. 897 (1973) [hereinafter cited as Samuels, *Sports Events*].