

# FAMILY LAW

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Cheryl Howell, Editor

## RECENT DEVELOPMENTS: EQUITABLE DISTRIBUTION AFTER THE DEATH OF A PARTY

Cheryl Howell

N.C. Session Law (hereinafter "S.L.") 2003-168, titled "AN ACT ALLOWING A CLAIM FOR EQUITABLE DISTRIBUTION TO SURVIVE THE DEATH OF A SPOUSE WHEN THE PARTIES ARE LIVING SEPARATE AND APART AT THE TIME OF DEATH AND THE CLAIM IS TIMELY FILED," became law on June 12, 2003. The act is a significant development in an area of law that has been the subject of much debate during the last several years. The purpose of this Bulletin is to review the development of the law in North Carolina regarding equitable distribution actions after the death of a party and to identify the applicable time limitations for pursuing a claim for equitable distribution following the death of a spouse. In addition, the Bulletin discusses in general terms how a trial court should consider the death of a spouse in determining an equitable distribution.

### Developments before S. L. 2003-168

It is a long-standing rule of law in North Carolina that an action for divorce abates upon and does not survive the death of one of the spouses.<sup>1</sup> However, the question of whether an action for equitable distribution survives or abates upon the death of one of the spouses has been a more difficult issue to for the courts and the General Assembly to resolve.

Before amendment in 1995, N.C. Gen. Stat. (hereinafter "G.S.") 50-21(a) provided that "[a] judgment for equitable distribution shall not be entered prior to a decree of absolute divorce." Based on this statute, the court of appeals held that if the possibility of a divorce was eliminated by the death of a spouse, there could be no equitable distribution. Accordingly, if the parties were not divorced at the time of death, the court held that a claim for equitable distribution would abate and not survive the death of the spouse.<sup>2</sup> However, the

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<sup>1</sup> See *Caldwell v. Caldwell*, 93 N.C. App. 740, 379 S.E.2d 271 (1989)(death itself dissolves the marital status and accomplishes the chief purpose for which the action is brought), citing *Elmore v. Elmore*, 67 N.C. App. 661, 313 S.E.2d 904 (1984)(same).

<sup>2</sup> *Caldwell*, 93 N.C. App. at 743, 379 S.E.2d at 273 (equitable distribution must follow a decree of absolute divorce). See also *Trogdon v. Trogdon*, 97 N.C. App. 330, 388 S.E.2d 212 (1990)(equitable distribution "cannot be obtained" when parties were not divorced at the time of death).

court held that once a judgment of absolute divorce is entered “a claimant cannot be divested of the right to equitable distribution, and, therefore his claim survives his death.”<sup>3</sup>

The North Carolina General Assembly amended G.S. 50-21(a) in S.L. 1995-245 to delete the provision prohibiting the entry of an equitable distribution before the entry of a divorce judgment. The court of appeals held that this amendment allows “a claim for equitable distribution to proceed on its own at any time after a married couple separates” and supports the conclusion that “a divorce decree is not necessary for a judgment in an equitable distribution action.”<sup>4</sup> Therefore, “[a] claimant now cannot be divested of the right to equitable distribution after the parties have separated, regardless of whether or not they divorce.”<sup>5</sup> The court of appeals concluded that, due to the statutory change, equitable distribution actions do not abate upon and survive the death of a party as long as the parties are separated at the time of death, regardless of whether there has been an absolute divorce.

The North Carolina Supreme Court disagreed and reversed the court of appeals.<sup>6</sup> According to the supreme court, the 1995 statutory amendment “remove[d] all limitations on the timing of an equitable distribution judgement, *vis-à-vis* the granting of a divorce[, but did not] remove the link between a divorce proceeding and a request to the court to distribute property acquired during the marriage.”<sup>7</sup> Because equitable distribution remains “inextricably linked” to divorce, the court held that when death “ends any chance for divorce,” an action for equitable distribution abates.<sup>8</sup>

The General Assembly responded to the *Brown* decision in 2001 by adding new section G.S. 50-20(l) to provide that “[a] pending action for equitable distribution shall not abate upon the death of a party.”<sup>9</sup>

<sup>3</sup> *Tucker v. Miller*, 113 N.C. App. 785, 440 S.E.2d 315 (1994)(equitable distribution is a property right). *See also Swindell v. Lewis*, 82 N.C. App. 423, 346 S.E.2d 237 (1986)(heirs of defendant were necessary parties to the equitable distribution action where defendant died after the entry of an absolute divorce).

<sup>4</sup> *Brown v. Brown*, 136 N.C. App. 331, 524 S.E.2d 89, *reversed*, 353 N.C. 220, 539 S.E.2d 621 (2000).

<sup>5</sup> *Brown*, 136 N.C. App. at 334, 524 S.E.2d at 92 Citing *Tucker, supra*.

<sup>6</sup> *Brown v. Brown*, 353 N.C. 220, 539 S.E.2d 621(2000).

<sup>7</sup> *Id.* at 226, 539 S.E.2d at 625.

<sup>8</sup> *Id.* at 227, 539 S.E.2d at 625.

<sup>9</sup> S.L. 2001-364. This amendment applied to all actions pending on, or filed on or after, August 10, 2001. *See Bowen*

And, in S.L. 2003-168, the General Assembly expanded G.S. 50-20(1) to provide that “[a] claim for equitable distribution, whether an action is filed or not, survives the death of a spouse so long as the parties are living separate and apart at the time of death.”<sup>10</sup>

With the enactment of S.L. 2003-168, the law now provides that equitable distribution claims will survive the death of a spouse, regardless of whether the parties were divorced at the time of death, as long as the parties were living separate and apart at the time of death.

## Time limits applicable to the prosecution of claims after death

The new law allows a claim for equitable distribution that is pending at the time of death to proceed upon substitution of the appropriate parties. In addition, the law allows an equitable distribution claim to be filed after the death of a spouse, either by the surviving spouse or by the estate of the deceased spouse. Whether pending at the time of death or filed after death, claims are subject to dismissal for failure of a party to act within required time frames.

## Death of a party in a pending case

As the only requirement under new G.S. 50-20(l) for a pending claim to survive the death of a party is that the parties be living separate and apart at the time of death, all pending claims for equitable distribution will survive the death of a party. That is because G.S. 50-21(a) prohibits the filing of a claim for equitable distribution until “after a husband and wife begin to live separate and apart from each other.” Therefore, there should be no pending claim if the parties are living together at the time of death.

Upon the death of a party in a pending case, the personal representative or the collector of decedent’s estate must be substituted for the deceased party in

*v. Mabry*, 154 N.C. App. 734, 572 S.E.2d 809 (2002)(because the amendment clarifies a statute misconstrued by the courts, it must be given retroactive effect; so amendment applied to an equitable distribution claim that was pending on the effective date even though one party had died before the effective date).

<sup>10</sup> This amendment probably applies to claims filed on or after the effective date, June 12, 2003. *See Morris v. Morris*, 79 N.C. App. 386, 339 S.E.2d 424 (1986)(statutes that do not say otherwise are presumed to apply prospectively only); *Gardner v. Gardner*, 300 N.C. 715, 268 S.E.2d 468 (1980)(amendments presumed to apply prospectively unless they are procedural in nature). *But cf. Bowen v. Mabry, supra*.

order for the action to continue.<sup>11</sup> Rule 25 of the North Carolina Rules of Civil Procedure addresses the substitution of an estate into a pending action. That rule provides:

No action abates by reason of the death of a party if the cause of action survives. In such case, the court, on motion at any time within the time specified for the presentation of claims in G.S. 28A-19-3, may order the substitution of said party's personal representative or collector and allow the action to be continued by or against the substituted party.<sup>12</sup>

According to Rule 25, either the surviving spouse or the estate of the deceased spouse can request substitution of the estate.<sup>13</sup> However, both the surviving spouse and the estate must make the motion to substitute within the time limits of G.S. 28A-19-3. A failure to act within this time limit set out in Rule 25 results in the dismissal of the pending action.<sup>14</sup>

The time limit imposed by G.S. 28A-19-3 in any specific case cannot be ascertained until the estate of the deceased spouse is opened and the personal representative provides the notice to creditors required by other sections of G.S. Chapter 28A, titled "Decedents' Estates." In general, however, once an estate is opened, the statute "imposes a working deadline of approximately 6 months."<sup>15</sup> In addition, G.S. 28A-19-3(f) will apply to provide that any motion to substitute an estate into a pending action will be barred if an estate is not opened and the required notice to creditors is not posted or published by the personal representative within 3 years of the date of the death of the spouse.<sup>16</sup>

<sup>11</sup> See G.S. 28A-18-1; *Brown v. Brown*, 353 N.C. 220, 539 S.E.2d 621 (2000); *Tucker v. Miller*, 113 N.C. App. 785, 440 S.E.2d 315 (1994). Cf. *Swindell v. Lewis*, 82 N.C. App. 423, 346 S.E.2d 237 (1986) (holding that in addition to the personal representative of the deceased party, all heirs of the deceased are necessary parties to an equitable distribution proceeding involving title to real property).

<sup>12</sup> G.S. 1A-1, Rule 25(a).

<sup>13</sup> It is unclear whether a judge can order substitution on his or her own motion. The language of the rule is arguably ambiguous on this point.

<sup>14</sup> See G. Gray Wilson, *North Carolina Civil Procedure*, 2d edition (1995), sec. 25-3, p. 442, citing *Anderson v. Yungkau*, 329 U.S. 482, 67 S. Ct. 428, 91 L. Ed. 436 (1947).

<sup>15</sup> Wilson, *supra* note 13, at sec. 25-3, p. 442. See also *Liner v. DiCresce*, 905 F. Supp. 280 (M.D.N.C. 1994).

<sup>16</sup> This is because G.S. 28A-19-3(f) states that "all claims barrable by G.S. 28A-19-3(a) or (b)" will be barred if

However, a pending action does not necessarily have to remain pending in excess of 3 years before being subject to dismissal by the court for lack of an appropriate substitution. Upon motion of an "aggrieved party,"<sup>17</sup> Rule 25(c) allows the court to enter a conditional order of abatement providing that an action will abate if not continued by an appropriate party at a time set by the court, not less than six months or more than one year from the granting of the order. The order can be entered only after notice "to such person as [the court] directs."<sup>18</sup> According to the court of appeals, Rule 25(c) provides a method by which a party may place a time limitation on the right to substitution.<sup>19</sup> After the court issues appropriate notice, the burden falls upon persons interested in the estate of the decedent to take the steps necessary to open an estate and to arrange for substitution of the appropriate party.<sup>20</sup>

Because an order entered pursuant to Rule 25(c) is conditional, a further order of the court is necessary to dismiss the action on the ground of abatement if appropriate action is not taken within the time set out in the original order.<sup>21</sup>

### Claims filed after death

G.S. 50-20(1)(1), as amended by S.L. 2003-168, provides that a claim for equitable distribution will survive the death of a spouse regardless of whether the claim was filed before the death, as long as the parties are living separate and apart at the time of death.

However, claims for equitable distribution *by* the estate of a deceased spouse must be filed within one year of the death "or be forever barred," according to G.S. 50-20(1)(3). Although the statute contains no similar express limitation on the time within which a claim for equitable distribution must be filed by a surviving spouse *against* the estate of the deceased

the first publication or posting of the notice to creditors does not occur within three years of death.

<sup>17</sup> Unlike Rule 25(a), discussed *supra* note 13, the language of Rule 25(c) does seem to prohibit a court from entering such an order on its own motion.

<sup>18</sup> G.S. 1A-1, Rule 25(c); see *Silverthorne v. Coastal Land Co.*, 42 N.C. App. 134, 256 S.E.2d 397 (1979) (this section requires notice to those "who would reasonably be expected to represent most closely the interest of the deceased.")

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* (person seeking order of conditional abatement does not need to show that the failure to prosecute by the estate has been without excuse).

<sup>21</sup> Wilson, *supra*, sec. 25-5, p. 446, citing *Silverthorne v. Coastal Land Co.*, *supra*.

spouse, G.S. 50-20(l)(2) specifies that the claim of the surviving spouse is subject to the provisions of Article 19 of G.S. Chapter 28A, titled "Claims against the [decendent's] estate."<sup>22</sup> Therefore, G.S. 28A-19-3 provides the time limits applicable to equitable distribution claims filed against an estate. That statute states that claims not "presented" appropriately and within the required time frames are forever barred "against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent."

Once an estate is opened, G.S. 28A-19-3(a) will apply to limit the time within which a claim for equitable distribution by a surviving spouse must be presented to the estate.<sup>23</sup> As discussed above, cases and commentators refer to the limitation as one of "approximately six months" after an estate is opened.<sup>24</sup> However, application of G.S. 28A-19-3(f) imposes an ultimate bar on claims that will ensure that a surviving spouse's right to file a claim for equitable distribution will not survive indefinitely if an estate is not opened or is not opened in a timely manner. That statute specifies that all claims against an estate are barred forever if an estate is not opened and the required notice to creditors is not sent within three years of the date of the death of decedent.

A claim must be presented in a manner specified in G.S. 28A-19-1. Presentation may be accomplished by filing an action against the estate, but other methods also are available. However, if a claim is presented in a manner other than by the filing an action, the claimant must file an action on the claim within three months of receiving written notice of rejection of the claim from

<sup>22</sup> The statute provides that all provisions of G.S. 28A-19 apply to equitable distribution claims except G.S. 28A-19-5, relating to contingent claims, and G.S. 28A-19-17, dealing with the satisfaction of claims other than by payment.

<sup>23</sup> Whether G.S. 28A-19-3(a) or (b) applies to a claim depends on whether the claim is one that arose before the death of decedent or one that arose at or after the death of decedent. A claim for equitable distribution actually pending in court at the death of a party clearly is a claim that arose before death. Similarly, a claim for equitable distribution that was not filed before the death nevertheless arose at the time the parties began to live separate and apart. See G.S. 50-20(k) ("The rights of the parties to an equitable distribution of marital property and divisible property are a species of common ownership, the rights of the respective parties vesting at the time of the parties' separation.").

<sup>24</sup> Wilson, p. 442. See *supra* note 15. This is a generalization. Determination of the limitation applicable to a specific claim is ascertained by application of the provisions of G.S. 28A-14-1 and G.S. 28A-19-3.

the personal representative or "be forever barred from maintaining an action thereon."<sup>25</sup>

### Effect of death on distribution of the marital estate

The death of a spouse imposes time limits that may result in the loss of the right to pursue equitable distribution. In addition, the death of a spouse, or both spouses as was the case in *Bowen v. Mabry*,<sup>26</sup> will impact a trial court's determination of what division of marital and divisible property and debt constitutes an equitable distribution. To date, very little appellate case law exists to offer guidance to trial courts in addressing issues regarding distribution that arise when one or both spouses are deceased.<sup>27</sup>

At least indirectly, however, the court of appeals has held that the death of a spouse after entry of a divorce and the resulting property rights of heirs and devisees will not affect the trial court's authority to distribute marital and divisible property. In *Swindell v. Lewis*,<sup>28</sup> the court recognized that title to certain real property vested in decedent's heirs at the moment of death pursuant to G.S. 28A-15-2(b). The court held the heirs were necessary parties to the equitable distribution action because of the trial court's authority to divest them of their property rights by distributing the real property to the surviving spouse. The court assumed without discussion that the trial court retained the authority to distribute marital property even after title to the property had vested in the third parties.<sup>29</sup>

<sup>25</sup> G.S. 28A-19-16. This limitation does not apply if the parties agree to a reference pursuant to G.S. 28A-19-15, discussed *infra*.

<sup>26</sup> 154 N.C. App. 734, 572 S.E.2d 809(2002)(one spouse died before trial and the other died while the case was on appeal).

<sup>27</sup> While death should not impact directly the classification of marital property due to the fact that the parties must be separated at the time of death, see *Becker v. Becker*, 88 N.C. App. 606, 364 S.E.2d 175 (1988)(marital estate "freezes" for purposes of classification and valuation at the date of separation), death may impact the classification of divisible property. See G.S. 50-20(b)(4)(divisible property defined by postseparation occurrences). In addition, procedural issues resulting from death may have an impact on a party's ability to prove their case regarding classification. See *e.g.* G.S. 8C-601(c)(evidence rule referred to as "the dead man's statute").

<sup>28</sup> 82 N.C. App. 423, 346 S.E.2d 237 (1986).

<sup>29</sup> See also *Tucker v. Miller*, 113 N.C. App. 785, 440 S.E.2d 315 (1994)(upholding trial court's distribution of marital property following the death of wife; court of appeals

Interestingly, the court in *Swindell* did not mention G.S. 50-20(h), which specifies that “[a]ny person ... whose interest is obtained by descent, prior to the filing of a lis pendens [by a spouse claiming an interest in that property in an equitable distribution proceeding] shall take the real property free of any claim resulting from the equitable distribution proceeding.”

Apparently, this statute will prohibit a court from distributing real property in equitable distribution if a lis pendens has not been filed at the time of death, but it should not affect the court’s obligation to classify and value the property as well as account for it in the final distribution.<sup>30</sup>

*Swindell*<sup>31</sup> involved a situation where the parties were divorced at the time of death. Divorce, of course, destroys all of a spouse’s property rights that arise out of the marital relationship.<sup>32</sup> When death occurs before divorce, many of a spouse’s common law and statutory property rights continue to exist unless they otherwise have been waived or lost. The relationship between the property rights of a surviving spouse and the court’s authority to order an equitable distribution of marital and divisible property no doubt will require further clarification by the courts and the legislature.

Recognizing that a surviving spouse acquires some property interests as a direct result of the death of a spouse, S.L. 2001-364 amended G.S. 50-20(c) to require that such property interests be identified by the court and considered as distribution factors.<sup>33</sup> It might be argued that by identifying these property interests as distribution factors, the legislature indicated an intent to remove any listed property that otherwise would be marital or divisible property from the authority of the trial court to distribute in equitable distribution. For example, by identifying as a distribution factor property passing to the surviving spouse because it was held as tenants by the entirety, does the statute prohibit the trial court from identifying the property as marital and distributing it to the estate of the deceased spouse?

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did not mention a need to join heirs, but the opinion also did not indicate whether the case involved title to real property).

<sup>30</sup> See *Wornom v. Wornom*, 126 N.C. App. 461, 485 S.E.2d 856 (1997)(trial court properly classified and distributed assets that existed at the time of separation but not at the time of trial); *Lilly v. Lilly*, 107 N.C. App. 484, 420 S.E.2d 492 (1992)(same). See also G.S. 50-20(h)(in lieu of a lis pendens, the court can require a bond in an amount sufficient to satisfy the claim against the real property with money damages).

<sup>31</sup> *Tucker*, *supra* note 3, also involved a situation where the death occurred after entry of divorce.

<sup>32</sup> See G.S. 50-11(a); G.S. 31A-1(b); G.S. 31-5.4.

<sup>33</sup> See 50-20(c)(11b), discussed further *infra*.

It is doubtful that such a result was intended by the General Assembly, especially in light of the court’s recognition in *Swindell*, *supra*, of a trial court’s authority to divest third parties of property received as a result of the death of a spouse.

### Death as a distribution factor

It is clear that the death of a party should be a factor a trial court considers in determining an appropriate distribution of marital and divisible property and debts.<sup>34</sup> No appellate opinion to date, however, has addressed this issue directly. In *Tucker v. Miller*,<sup>35</sup> the court cited with approval the fact that the trial court considered defendant’s death in its’ findings pursuant to G.S. 50-20(c)(1), the distribution factor that requires the trial court to consider “the income, property and liabilities of each party at the time the division is to become effective.” However, the court did not address directly plaintiff’s argument that defendant’s death should have established that her estate had no needs and supported an unequal division in his favor.

G.S. 50-20(c)(1) is a distribution factor that has been interpreted by the court of appeals to require the court to consider the “future prospects of the parties,” as well as their financial status and needs at the time of hearing.<sup>36</sup> Therefore, this factor arguably requires the trial court to consider the death of a spouse as well as the property and liabilities of both the surviving spouse and the estate of the deceased spouse in determining an appropriate distribution.

Plaintiff in *Tucker v. Miller* also urged the court to consider defendant’s death pursuant to G.S. 50-20(c)(12), the distribution factor requiring the court to consider “any factor which the court finds to be just and proper.” This factor often is referred to as the “catch-all” distribution factor.<sup>37</sup> While the court in *Tucker* did not address plaintiff’s contention, G.S. 50-20(c)(12) has been limited by appellate courts to allow consideration only of factors “relevant to the marital economy.”<sup>38</sup> And, marital economy has been

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<sup>34</sup> See *Tucker v. Miller*, *supra* (trial court must identify and consider all distribution factors raised by the evidence, citing *Locklear v. Locklear*, 92 N.C. App. 299, 374 S.E.2d 401 (1988)).

<sup>35</sup> *Supra* note 31.

<sup>36</sup> See *Harris v. Harris*, 84 N.C. App. 353, 352 S.E.2d 869 (1987).

<sup>37</sup> See *Fountain v. Fountain*, 148 N.C. App. 329, 559 S.E.2d 25(2002).

<sup>38</sup> See *Smith v. Smith*, 314 N.C. 80, 331 S.E.2d 682 (1985).

interpreted to relate “to the source, availability and use by the wife and husband of economic resources during the course of the marriage.”<sup>39</sup> Accordingly, death following separation would not be an appropriate consideration under this factor.

As mentioned above, S.L. 2001-354 added new section 50-20(c)(11b) to provide that if the death of a party occurs before entry of an order for equitable distribution, the court shall consider the following as distribution factors:

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

A court’s obligation to consider these factors only arises if sufficient evidence is offered by a party to support appropriate findings.<sup>40</sup>

### **Estate’s authority to settle ED claim**

New section G.S. 28A-19-19 provides that a personal representative can enter into an agreement settling an equitable distribution claim. When such an agreement is filed with the clerk of court, it operates as a voucher for the personal representative, relieving the estate of further liability on the claim. In addition, G.S. 28A-19-15 allows a personal representative and a surviving spouse to enter into an agreement to refer a disputed claim to “one or more disinterested persons, not exceeding three, whose proceedings shall be the same in all respects as if such reference had been

<sup>39</sup> *Johnson v. Johnson*, 78 N.C. App. 787, 338 S.E.2d 567 (1986).

<sup>40</sup> *See Fox v. Fox*, 114 N.C. App. 125, 441 S.E.2d 613 (1994).

ordered in an action.”<sup>41</sup> The award issued by the referee is filed with the clerk of court and operates to relieve the estate of further liability on the claim.

### **Conclusion**

S.L. 2003-168 significantly expands the equitable distribution cases that can be litigated despite the death of a spouse. It also clarifies that important time limits must be met by those seeking to pursue equitable distribution following the death of a spouse. In addition, the General Assembly made a significant policy decision when it allowed equitable distribution claims to proceed even when the marital relationship has not been severed by divorce. As a result, the relationship between the statutory and common law rights of a party as a surviving spouse and the obligation of the court to provide for an equitable distribution of marital and divisible property most likely will be the subject of much appellate analysis in the near future.

<sup>41</sup> *See* G.S. 1A-1, Rule 53 (reference procedure).

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