

**Equitable Distribution  
Divisible Property**

- I. Divisible property: created by 1997 General Assembly.
  - A. Applicable to actions filed on or after October 1, 1997.
  - B. Created to address postseparation issues: perceived inequities resulting from fact that marital estate “freezes” on date of separation. *See Smith v. Smith*, 111 N.C. App. 460, 433 S.E.2d 196 (1993); *Chandler v. Chandler*, 108 N.C. App. 66, 422 S.E.2d 587 (1992); *Becker v. Becker*, 88 N.C. App. 606, 364 S.E.2d 175 (1988).
- II. Divisible property must be classified, valued and distributed.
  - A. G.S. 50-20(a): “Upon application of a party, the court shall determine what is marital property and what is *divisible property* and shall provide for an equitable distribution of the marital property and *divisible property* between the parties in accordance with the provisions of this section.” *See Edwards v. Edwards*, 152 NC App 185, 566 S.E.2d 847 (2002)(trial court erred in failing to identify whether divisible property resulted from the change in value of marital residence between the date of separation and the date of distribution.)
  - B. All property subject to distribution must be identified by trial court. *Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260 (1985). Classification is a legal conclusion that must be supported by adequate findings of fact. *Hunt v. Hunt*, 112 N.C. App. 722, 436 S.E.2d 856 (1993). However, when parties fail to produce evidence to support findings regarding classification, property is excluded from equitable distribution. *Grasty v. Grasty*, 125 N.C. App. 736, 482 S.E.2d 752 (1997); *Ikechukwu v. Ikechukwu*, unpublished opinion, 687 S.E.2d 710 (N.C. App. 2009)(debt that is not valued as of the date of separation also falls outside of ED).
  - C. After a trial judge classifies and values divisible property, the judge has discretion to determine how to equitably distribute the divisible property. *See Wirth v. Wirth*, unpublished opinion, 696 S.E.2d 202 (N.C. App. 2010)(trial court is not required to distribute postseparation passive decrease in value of marital property to party receiving the property); *See McNeely v. McNeely*, 195 N.C. App. 705, 673 SE2D 778 (2009)(trial court identified postseparation mortgage payments made by husband as divisible debt and distributed them to him, thereby reducing the net value of his share of the estate. No ‘credit’ for reduction of debt was required)

III. Classification: definition of divisible property: G.S. 50-20(b)(4).

A. Postseparation appreciation or depreciation of marital property.

1. G.S. 50-20(b)(4)(a). “All appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property.” *See Hay v. Hay*, 148 N.C. App. 649 (2002)(increase in net value of property resulting from the postseparation payment of the mortgage encumbering the property did not result in divisible property because the increase in value was due to the efforts of the spouse making the postseparation payments).
2. While appreciation or diminution caused by one spouse is not divisible property, increase or decrease in value caused by **both** spouses is divisible property. *Robertson v. Robertson*, 167 N.C. App. 567, 605 S.E.2d 667 (2004)(both parties neglected the residence and contributed to the decrease in it’s’ value).
3. “Under the plain language of the statute [GS 50-20(b)(4)], all appreciation and diminution in value of marital and divisible property is presumed to be divisible unless the court finds that the change in value is attributable to the postseparation actions of one spouse.” *Wirth v. Wirth*, 193 N.C. App. 657, 668 SE2d 603 (NC App. 2008).
4. “When the court is unable to determine whether the change in value of marital property is attributable to the actions of one spouse, this presumption is not rebutted and must control.” *Wirth*. *See also Plummer v Plummer*, 680 SE2d 746 (N.C. App. 2009)(dividing net value of marital property on date of distribution was sufficient to identify and distribute divisible property and debt). *But cf. Bass v. Bass, unpublished*, 683 SE2d 466 (NC App 2009)(where plaintiff was ‘high-level’ executive in company and company increased in value significantly during separation, trial court erred in classifying all appreciation as divisible even though plaintiff presented no evidence linking his actions to the increased value of the company; remanded to trial court to determine portion of increase due to plaintiff’s efforts).
5. Appreciation will be divisible unless actions of spouse during separation actually cause increased value to accrue. *Brackney v. Brackney*, 682 SE2d 401 (NC App 2009)(husband’s efforts to maintain property did not cause the postseparation appreciation of the marital property; all appreciation was divisible because it was caused by market forces).

6. “Passive appreciation” refers to enhancement of the value of property due solely to inflation, changing economic conditions, or market forces, or other such circumstances beyond the control of either spouse. “Active appreciation” refers to “financial or managerial contributions” of one of the spouses. *Brackney v. Brackney*, 682 S.E.2d 401 (NC App 2009).
7. Where parties had stipulated that appreciation of a home in the amount of \$181,000 between date of purchase and time of trial and distribution was the result of market forces alone, trial court properly classified the appreciation as divisible property. *Brackney v. Brackney*, 682 S.E.2d 401 (NC App 2009) (rejecting husband’s argument that his actions in acquiring and closing a loan in his name only, so that the parties would not forfeit their down payment, preserved marital property making the subsequent appreciation the result of his actions and thus active; rather court found husband’s preservation efforts provided the opportunity for market forces to increase the house’s value).]
8. 1997 amendments changes reasoning/analysis in following cases:
  - a. *Truesdale v. Truesdale*, 89 N.C. App. 445, 366 S.E.2d 512 (1988)(increase in value of marital home not subject to distribution).
  - b. *Gum v. Gum*, 107 N.C. App. 734, 421 S.E.2d 788 (1992)(appreciation of escrow account and building not subject to distribution).
  - c. *Edwards v. Edwards*, 110 N.C. App. 1, 428 S.E.2d 834 (1993) and *Nye v. Nye*, 110 N.C. App. 326, 396 S.E.2d 91 (1990)(increased value of stock of closely-held corporation not subject to distribution).
  - d. *Fox v. Fox*, 114 N.C. App. 125, 441 S.E.2d 613 (1994) and *Smith v. Smith*, 111 N.C. App. 460, 433 S.E.2d 196 (1993)(rejection of “adjustive credits” to offset postseparation appreciation of marital property).

B. Postseparation property resulting from marital effort.

1. G.S. 50-20(b)(4)(b): “All property, property rights, or any portion thereof received after the date of separation but before the date of distribution that was acquired as the result of the efforts of either spouse during the marriage and before the date of separation, including, but not limited to, commissions, bonuses, and contractual rights.”

2. *See Ubertaccio v. Ubertaccio*, 359 N.C. 175, 604 S.E.2d 912 (2004)(adopting concurrent opinion of Levinson, J., in 161 N.C. App. 352, 588 S.E.2d 905 (2003)(proceeds received by wife before the date of distribution from sale of stock grants were properly classified as divisible property where the stock grants were acquired as the result of the efforts of the wife during the marriage and before the date of separation; classification depended on source of the proceeds and not on whether benefit was vested on date of separation).
3. 1997 amendment changes reasoning/analysis in following cases:
  - a. *Edwards v. Edwards*, 110 N.C. App. 1, 428 S.E.2d 834 (1993)(employment bonus not subject to distribution because the right to receive the bonus was not vested on the date of separation).
  - b. *Godley v. Godley*, 110 N.C. App. 99, 429 S.E.2d 382 (1993)(commissions not subject to distribution because the right to receive the commission was not vested on the date of separation).

C. Passive postseparation income from marital property.

1. G.S. 50-20(b)(4)(c): “Passive income from marital property received after the date of separation, including, but not limited to, interest and dividends.”
2. Where trial court determined that corporation was 88.5% separate property and 11.5% marital property, and then determined that all income generated by the corporation after the date of separation was passive income, the trial court correctly classified 11.5% of the property purchased after the date of separation with the passive income as divisible property. *Hodges v. Hodges*, unpublished opinion, 687 S.E.2d 710 (N.C. App. 2009).
3. 1997 amendment changes reasoning/analysis in following cases:
  - a. *Chandler v. Chandler*, 108 N.C. App. 66, 422 S.E.2d 587 (1992)(rental income not subject to distribution because it was earned after the date of separation. There still is no case law addressing whether rental income is considered active or passive).
  - b. *Smith v. Smith*, 111 N.C. App. 460, 433 S.E.2d 196 (1994)(stock dividends not subject to distribution).

- c. *Leighow v. Leighow*, 120 N.C. App. 619, 463 S.E.2d 290 (1996)(interest payments on mortgages that were marital property not subject to distribution).

D. Divisible debt.

1. GS 50-20(b)(4)(d): “[Postseparation] increases and decreases in marital debt and financing charges and interest related to marital debt.”
2. Postseparation payments that reduce the principle of marital debt, or that decrease finance charges or interest related to marital debt, constitute divisible property. *Warren v. Warren*, 175 N.C. App. 509 (2006).
3. Only payments made after October 11, 2002 can be divisible debt, regardless of when case is filed. *Warren v. Warren*, 175 N.C. App. 509 (2006); *Cooke v. Cooke*, 185 NC App 101 (2007);
4. New debt incurred after separation is not divisible debt. *Warren v. Warren*, 175 NC App 509 (2006)(new draw on equity line during separation was wife’s separate debt, not divisible debt).
5. Marital debt is debt owed on the date of separation. *See Fox v. Fox*, 114 N.C. App. 125 (1994). Therefore divisible debt is an increase or a decrease in the value of debt owed on the date of separation. If a debt paid during separation was not owed on the date of separation, it follows that the payment would not create divisible debt. *Accord Fox v. Fox*, 103 N.C. App. 13, 404 S.E.2d 354 (1991)(payment of property taxes and homeowner’s premiums was not payment of marital debt but was a distribution factor pursuant to GS 50-20(c)(11) and (12)). However, at least two appellate opinions decided before the creation of the divisible debt category indicated that insurance and taxes associated with real property accruing after the date of separation is marital debt. *See Smith v. Smith*, 111 NC App 460 (1994)(postseparation payments towards marital debts or obligations flowing from marital property, including mortgage payments and payment of property taxes, have been treated as payments on marital debt); *Bowman v. Bowman*, 96 NC App 253 (1989)(taxes on jointly owned property coming due after separation classified as marital debt).
6. There is no requirement that divisible debt be divided equally between the parties or that the party responsible for decreasing marital debt receives a ‘dollar-for-dollar credit’ for the payment. *See McNeely v. McNeely*, 195 N.C. App. 705, 673 SE2D 778 (N.C. App., 2009)(trial court identified postseparation mortgage payments made by husband as divisible debt and distributed them to him, thereby reducing the net value of his share of the estate. No ‘credit’ was required); *Jones v. Jones*, (unpublished), 193 N.C.

App. 610, 670 SE2d 644 (NC App 2008)(equal division of divisible debt is not required); *Plummer v. Plummer*, 680 SE2d 746 (NC App 2008)(trial court properly classified and distributed marital and divisible property and debt when it found date of separation net value, date of trial net value, and made findings showing that plaintiff paid all mortgage payments. No further division or ‘credit’ required).

7. Debt payments made after separation as the result of a postseparation support, alimony or child support order should not be ‘credited’ to paying spouse. GS 50-20(f)(equitable distribution should be made without regard to alimony or child support); *Wilkins v. Wilkins*, 111 NC App 541 (1993)(no credit for postseparation payments made pursuant to support order); *Wirth v. Wirth*, 193 N.C. App. 657, 668 S.E.2d 603 (NC App 2008) (payments credited to postseparation support not given further credit in equitable distribution).

#### E. Burden of Proof on Classification

1. Because of the marital property presumption found in G.S. 50-20(b)(1), appreciation earned during the marriage and before the date of separate is presumed active and therefore marital. *Smith v. Smith*, 111 N.C. App. 460, 433 S.E.2d 196 (1993). Party seeking to classify pre-separation appreciation as separate property bears burden of proving the appreciation passive. *O’Brien v. O’Brien*, 131 NC App 411 (1998).
2. The marital property presumption does not apply to assets received after separation. *Freeman v. Freeman*, 107 N.C. App. 644, 421 S.E.2d 623 (1992).
3. Under the plain language of the statute [GS 50-20(b)(4)], all appreciation and diminution in value of marital and divisible property is presumed to be divisible unless the court finds that the change in value is attributable to the postseparation actions of one spouse.” *Wirth v. Wirth*, 193 N.C. App. 657, 668 S.E.2d 603 (NC App 2008)(examining only language of GS 50-20(b)(4) dealing with postseparation appreciation and depreciation; does not address the other categories of divisible property).
4. No cases yet on presumptions relating to other categories of divisible property and debt.

#### IV. Divisible property and divisible debt is subject to interim distribution.

- A. G.S. 50-20(i1): “Unless good cause is shown that there should not be an interim distribution, the court may, at any time after an action for equitable distribution has been filed and prior to the final judgment of equitable distribution, enter orders declaring what is separate property and may also enter orders dividing part

of the marital property, *divisible property or debt*, or marital debt between the parties. The partial distribution may provide for a distributive award and may also provide for a distribution of marital property, marital debt, *divisible property, or divisible debt*.”

- B. Classification made for purposes of an interim distribution probably is not binding on trial judge. *See Wells v. Wells*, 132 N.C. App. 401, 512 S.E.2d 468 (1999)(holding that legal conclusion made at postseparation support hearing was not binding on trial court at permanent alimony hearing).
  - C. Where consent order making an interim distribution of property provided that the distribution of a condominium to wife was “final” for purposes of equitable distribution and set out the amount at which the condominium should be valued, the consent order precluded further valuation of the condominium at the ED trial and precluded consideration of the appreciation of the condominium as divisible property. *Wirth v. Wirth*, 193 N.C. App. 657, 668 S.E.2d 603 (NC App 2008).
  - D. Where a consent order making an interim distribution of property provided for the sale of the marital residence with the net proceeds thereof to be distributed to the wife, and provided that a sale before the ED trial would establish its net fair market value for purposes of ED and would constitute a final distribution of the residence, the proceeds upon distribution to the wife became her separate property. Interest earned on the proceeds was wife’s separate property and could not be considered divisible property. *Wirth v. Wirth*, 193 N.C. App. 657, 668 S.E.2d 603 (NC App 2008).
- V. Divisible property is valued as of the date of distribution.
- A. G.S. 50-21(b): “Divisible property and divisible debt shall be valued as of the date of distribution.”
  - B. G.S. 50-20(c): “There shall be an equal division by using ... net value of divisible property.” Net value has been defined as “market value, if any, less the amount of any encumbrance serving to offset or reduce market value.” *Alexander v. Alexander*, 68 N.C. App. 548, 315 S.E.2d 772 (1984).
- VI. Equal distribution is presumed equitable.
- A. G.S. 50-20(c): “There shall be an equal division by using net value of marital property and *net value of divisible property* unless the court determines that an equal division is not equitable. If the court determines that an equal division is not

equitable, the court shall divide the marital property *and the divisible property* equitably.”

1. Equal division is mandatory unless court determines that an equal division is not equitable. *White v. White*, 312 N.C. 770, 324 S.E.2d 829 (1985). Party seeking unequal division has burden of proof. *White*.
  2. Court to use 14 factors set forth in GS 50-20(c) to determine whether is unequal is equitable. GS 50-20(c). Court must make findings concerning every factor for which evidence is presented. *Brown v. Brown*, 72 N.C. App. 332, 324 S.E.2d 287 (1985); *Chandler v. Chandler*, 108 N.C. App. 66, 422 S.E.2d 587 (1992).
  3. Equal distribution is required if parties stipulate in pretrial order that equal is equitable. *Stovall v. Stovall*, N.C. App. (July 20, 2010).
- B. G.S. 50-20(e): “Subject to the presumption of subsection (c) of this section that an equal division is equitable, it shall be presumed in every action that an in-kind distribution of marital and *divisible* property is equitable. This presumption may be rebutted by the greater weight of evidence, or by evidence that the property is a closely held business entity or is otherwise not susceptible of division in-kind.” If presumption is rebutted, court “may provide for a distributive award to facilitate, effectuate or supplement a distribution of marital or *divisible* property.”