

## Equitable Distribution

### Introduction (1/54)

This session is intended to be an introduction to North Carolina law relating to equitable distribution. *Equitable distribution* is the legal system adopted in North Carolina to govern the distribution of property between separated and divorced spouses.

### Navigating the Course (2/54)

This course will play itself, however, you can navigate by using the arrows at the bottom of the screen to pause, go forward and go back. The menu to the right of your screen also allows you to move through the course.

### Course Objectives (3/54)

It is my hope that at the end of this program you will be able to do each of the following:

- Identify the key principles underlying the equitable distribution laws in North Carolina
- State the tasks judges must complete to enter a legally correct distribution judgment
- Define the key terms governing the classification of property
- Recognize the importance of valuing every asset and debt identified as marital or divisible; and finally
- Define the role of distribution factors in determining the final division of assets and debt between parties

### Equitable Distribution (4/54)

North Carolina adopted equitable distribution as the method for distributing property between divorcing spouses in 1981. Our equitable distribution statutes are found in North Carolina General Statutes Chapter 50-20, 50-20.1, 50-21. These statutes have been amended numerous times since first adopted in 1981.

### Equitable Distribution (5/54)

Unlike community property systems found in a few other states, equitable distribution has no impact on property rights *during* a marriage. Marital property, as that term is defined in equitable distribution, does not exist until a married couple separates and one or both request that the court make an equitable distribution of marital property.

### Equitable Distribution (6/54)

Equitable distribution replaced the common law *title system* that distributed property between divorcing spouses based solely on legal title or common law ownership principles. Under the title system, the non-owning spouse generally had no right to any interest in the property. This system resulted in great hardship to spouses who had not worked outside of the home and

who had not acquired assets in his or her own name during the marriage.

#### Key Principles (7/54)

The first key principle of NC equitable distribution is that **marriage is viewed as an economic partnership** for purposes of property division upon divorce. Each spouse is conclusively presumed to have contributed to the acquisition of all property which meets the definition of marital property.

#### Key Principles (8/54)

The second key principle of equitable distribution is that **property acquired during the marriage should be divided equitably upon divorce**, not necessarily equally. While an equal distribution is presumed to be equitable, the judge makes the final decision as to the equity in individual cases based upon numerous factors listed in GS 50-20.

#### Key Principles (9/54)

Property is distributed based upon the court's consideration of these distribution factors listed in the statute, and **the legal title and/or ownership of the particular piece of property is not controlling** on the court. Equitable distribution gives the court the authority to transfer title and ownership as necessary to achieve the appropriate equitable distribution.

#### Key Principles (10/54)

North Carolina has adopted an expansive definition of marital property and the presumption that all property acquired during the marriage is subject to the court's distribution authority. However, **North Carolina law also retains very strong protections for what is defined as separate property**. If property meets the definition of separate, North Carolina law requires that the property be returned to the owner unless return is impossible. If return is impossible, the owner must be compensated fully for any separate property not returned in kind.

#### North Carolina Equitable Distribution (11/54)

So in review, the key principles under North Carolina equitable distribution are:

1. Marriage is an economic partnership for the purposes of distribution of property and debt upon divorce
2. All property and debt acquired during the marriage must be divided equitably between the parties
3. Title and ownership principles are not binding or controlling upon the court
4. And finally, separate property must be returned to the owner if at all possible.

## Tasks of a Judge (12/54)

The judge in an equitable distribution case has three basic tasks:

1. *Classify* the property and debt subject to distribution
2. *Value* that property and debt
3. And *distribute* that property and debt.

***Classify, Value and Distribute: Remember “CVD” - just like the court file***

## Overview of the 3 Steps (13/54)

Step 1 is Classification. Classification is the most legally technical and complicated part of the process. The appropriate classification of each asset and debt is a legal conclusion that must be supported by specific findings of fact. Classification is not the stage of the process for a judge to try to do equity. The law supplies the right answer based on the particular facts. Equity is accomplished later through the distribution process. Classification is the process through which the court creates the estate or *the pie* to be divided between the parties. The pie must be created in accordance with the strict statutory and case law requirements; however, once the pie is created, the court has tremendous discretion in determining how to ultimately divide it between the parties.

### Step 2 (14/54)

Step 2 is valuation. GS 50-20(c) provides that property must be divided between the parties using net value. Each asset and each debt subject to distribution must be valued *as of the date of the separation* in order to appropriately create the marital pie.

### Step 3 (15/54)

Step 3 is distribution. Once the court classifies and values the property and debt that make up the marital estate, the court then distributes that property and debt in the way the court determines to be equitable.

## Classification Definition (16/54)

We'll start with step 1 - classification. The definitions of *marital property*, *separate property* and *marital debt* are the fundamental components of classification. It is best to commit these three definitions to memory. Except for the very narrow category of property called *divisible property*,

which we will discuss in more depth later on, a trial court has no authority to distribute any property that does not meet the definition of marital property. The same is true for debt: a debt must meet the definition of marital debt before the court can distribute it. Technically, separate property is not distributed, it is returned to the owner. Early on in the life of equitable distribution in this state, the North Carolina appellate courts established a very strict reading of the statute: if property does not meet the definition of marital, it cannot be distributed by the court.

Marital Property: GS 50-20 (b)(1) (17/54)

GS 50-20 (b)(1) defines marital property as **all real and personal property acquired by either or both spouses, during the marriage and before the date of separation that is presently owned.** The North Carolina appellate courts have interpreted the phrase “*presently owned*” to mean owned on the date of separation. In addition, the statute specifically states that the definition of marital property *includes retirement and deferred compensation rights* earned during the marriage. These assets must be identified and valued as of the date of separation and they will be included in the marital estate even when the actual benefits may not be received by either party until sometime in the future. GS 50-20.1 contains all of the statutory provisions relating to the classification, valuation and distribution of retirement accounts **and other forms of deferred compensation.**

Because of the importance of the definition of marital property, we will briefly review each element of the definition.

Marital Property Definition(18/54)

First: **all real and personal property.** It is critical to always identify the specific property interest at issue. Land, furniture and cars are obvious examples. But property rights also include interests such as contract rights, intellectual property rights, frequent flyer miles and perhaps even accumulated sick leave. If it is a *property interest* acquired during a marriage and owned on the date of separation, it must be identified and valued.

Marital Property Definition(19/54)

**Acquired by either or both.** As I said earlier, common law title and ownership principles do not control classification. Marital property can be property that is titled in the name of one spouse alone and property paid for completely with money earned by one spouse alone. It also can include property owned jointly by both parties.

Marital Property Definition(20/54)

**After marriage:** *The marital partnership does not begin until the wedding day*, so even property acquired in anticipation of marriage is not included in the definition of marital property.

**Before the date of separation:** *The marital partnership ends on the date of separation*, not the date of divorce. The property interest being considered must actually be owned on the date of separation by one or both parties. We don't care about anything bought and sold during the marriage. *The goal of equitable distribution is to divide the estate of divorcing parties as that estate exists when the marriage partnership ends.* If property is not owned on the date of separation, there is no need for the court to divide it.

#### Marital Property (21/54)

So in review, marital property is all real and personal property acquired by either or both spouses, after the date of marriage and before the date of separation, that is owned on the date of separation.

#### Marital Property Example (22/54)

For example: A grand piano purchased during the marriage is marital property, even if wife paid for the piano from funds she earned entirely by giving piano lessons. This is because marital property includes property acquired by either or both spouses during the marriage. However, the piano will not be marital property if the wife gave the piano to her daughter a year before the parties separated. This is true because in order to be marital property, the property must be owned by either or both spouses on the day of separation.

#### Marital Property (23/54)

Significantly, 50-20(b)(1) states that it is *presumed* that property acquired after the date of marriage and before the date of separation is marital property. This presumption may be rebutted by the greater weight of the evidence. This presumption plays an important role in the allocation of the *burden of proof* during the classification and the valuation stage of the equitable distribution proceeding. We will discuss burdens of proof in detail a little bit later in this presentation.

#### Separate Property (24/54)

Let's turn to the definition of Separate property. Separate property also has a specific statutory definition and it is found in GS 50-20(b)(2). **Separate property is not simply anything that is not marital.** To be classified as separate, the property must fall into one of the categories listed in the statute. The first category of separated property is ***all property acquired before marriage***. If a spouse brings an asset into the marriage, that spouse is entitled to take that property at the end of the marriage if it is still owned. While all property acquired before marriage is separate property, some property actually acquired during the marriage is defined as separate property as well.

### Separate Property (25/54)

In addition to all property acquired before marriage, the following property also is separate property:

1. ***Property acquired during the marriage by gift or bequest by a spouse.*** If the gift or bequest is to both spouses, it is marital property. However, if a conveyance is truly a gift and the donor intends it to be a gift to one spouse alone, that gifted or bequeathed property is separate property.
2. ***All property received during the marriage in exchange for separate property.*** The owner of the separate property can trade his/her separate property during the marriage and the property acquired as a result of the exchange will retain the separate property classification. As long as it is an even trade, the new property will not be marital.
3. ***All passive income earned from separate property during the marriage and all passive increases in the value of separate property during the marriage.*** The owner of separate property is entitled to keep as separate property any income or any increased value that accumulates from the separate property during the marriage, as long as the income or increased value is not earned through the efforts of either spouse during the marriage. Only that income and value which accumulates *passively*, meaning without the help of either party, will be considered separate property.
4. Finally, the statute defines ***nontransferable professional licenses*** as separate property. This means the court cannot distribute a spouse's license to practice medicine or to practice law even if the license was acquired during the marriage.

### Separate Property (26/54)

So returning to our previous example, if the wife bought the grand piano a week before the marriage, the piano will be her separate property. This is true because all property acquired before the date of marriage is separate property, even if the wife knew she would be getting married at the time she purchased the piano.

### Separate Property (27/54)

Similarly, if wife sold her piano after getting married and she used the proceeds to buy a boat, the boat will be the wife's separate property even though it was purchased during the marriage. This is true because property acquired during the marriage in exchange for separate property also will be separate property.

### Separate Property (28/54)

Let's consider another example. If husband owns stock in his father's company before marriage, that stock is separate property. And if the stock earned dividends because the company is profitable and the husband owns those dividends on the date of separation, the dividends also will be husband's separate property. That is true because *passive income earned from separate property during the marriage is separate property*. However, only that income earned passively from separate property, meaning without the effort of either spouse, will be separate property.

### Separate Property (29/54)

So if the company is profitable because of husband's work during the marriage, the dividends will be marital property to the extent they are earned as a result of his effort. This is true even though GS 50-20(b)(2) states that "income derived from separate property shall be considered separate property." The North Carolina courts decided early in the life of equitable distribution in this state that income earned through marital efforts – meaning the effort of either or both spouses - should be marital rather than separate. Only that income earned passively, meaning that without the effort of either spouse, will be separate property.

### Gifts (30/54)

Gifts are an important category of separate property. As I stated earlier, gifts or bequests received by one spouse during marriage are separate property. However, gifts to both spouses are marital property.

### Gifts Between Spouses (31/54)

GS 50-20(b)(2) provides that property acquired by gift *from the other spouse* during marriage shall be considered separate property *only* if such intention is *specifically expressed* in the conveyance. According to appellate decisions, this means that gifts between spouses during the marriage are presumed to be marital property. A spouse wishing to make a separate gift must be very careful to state that intention expressly when the transfer is made.

### Gifts Between Spouses (32/54)

This *interspousal gift rule* has one particularly important and common application in North Carolina. If one spouse causes his or her separate *real* property to become titled as a *tenancy by the entirety* during the marriage, the law presumes this conveyance to be a gift between spouses. The result is that the separate real property becomes completely marital property. Theoretically, this presumption can be rebutted when, by the greater weight of the evidence, the conveying spouse shows no gift was intended. However, to date, no litigant has been

successful in having the North Carolina appellate court agree that evidence presented at trial was sufficient to rebut the presumption that the conveyance was a gift to the marriage.

Quiz 33/54

Burden of Proof (34/54)

You will not try many equitable distribution cases before you realize that rules regarding the burdens of proof in classification are a trial judge's best friend. Classification often is complicated and difficult to prove. It is not uncommon for lawyers and litigants to have great difficulty giving the judge all of the evidence needed to make the findings of fact necessary to support the required conclusions of law. The rules regarding the burden of proof determine who wins and who loses when the evidence is less than sufficient to show exactly when and how an asset was acquired.

Burden of Proof (35/54)

The person seeking a marital classification of an asset goes first but has a significant advantage in the form of the *marital property presumption* I mentioned earlier. If the party seeking the marital classification can prove that the property at issue was **acquired by either or both spouses during the marriage and before the date of separation and that it was owned on the date of separation, the entire value of the property on the date of separation is presumed to be marital.**

Burden of Proof (36/54)

The burden then shifts to the party claiming the property to be separate. That party has the burden of proving by the greater weight of the evidence that the property, or at least a portion of the value of the property, falls into one of the categories of separate property.

Let's return to our piano example. Suppose wife buys the piano before the marriage but sells the piano during the marriage and uses the proceeds to buy a boat. We know that one category of separate property is property acquired during the marriage in exchange for separate property. That should mean that the boat in this example is separate property, because it was purchased with funds obtained directly from the sale of separate property. However, if the boat is still owned by wife on the date of separation, the boat will be presumed to be marital property because it was acquired during the marriage. Husband can meet his burden of proof that the property is marital simply by showing the boat was acquired during the marriage by a spouse and was owned on the date of separation. The burden of proof then shifts to the wife to prove that the boat actually is separate property by proving that the entire value of the boat was acquired with her funds from the sale of the piano. It is obvious in our example that the



boat was acquired with separate funds and therefore is separate property. However, in many cases, identifying the funds actually used to acquire an asset during the marriage can be difficult, especially for assets acquired years before the spouse actually separate.

#### Burden of Proof (37/54)

If both parties meet their burdens, the property will be separate property. However, if neither party meets their burden, *the property simply falls out of the case*. The court does not distribute the property, and the parties are left with other common law remedies such as partitioning or accounting to determine ownership after divorce. We will discuss this further a little later when we discuss valuation.

#### Mixed Assets (38/54)

In addition to understanding the statutory definitions of marital and separate property, it also is important to understand that classification in North Carolina is based primarily upon *the source of funds doctrine*. The source of funds doctrine provides that to the extent possible, **classification is determined by tracing the source of the funds used to acquire the total value of the asset on the date of separation**. In other words, we are interested in *identifying the source of the equity in an asset and distributing that equity between the parties*. Recognizing that equity often is acquired over time and that the source of equity can be both marital and separate in some circumstances, the law in North Carolina allows a single asset to be classified as *both* marital and separate property. Unlike some other equitable distribution states, where separate property mixed with marital property will “transmute” and be classified as entirely marital, North Carolina has a strong public policy in favor of protecting the separateness of separate property. Because North Carolina does not allow separate property to transmute into marital property, a single piece of property can be “*mixed*”, meaning it is properly classified as partially marital and partially separate property.

Property can become mixed in one of two ways. One way is by *acquisition*. Equity in property frequently is acquired over time. North Carolina does not classify an asset simply based on the moment in time title is acquired by either or both spouses. Instead, the source of funds doctrine requires that an asset be classified according **to when and how the equity in existence on the date of separation was acquired**.

#### Missed Assets-Example (39/54)

For example, if a house is purchased and entirely paid for during the marriage with wages earned by the spouses during the marriage, the entire value of the house on the date of separation will be marital property. That is because all of the equity, or value, in the house was acquired by the direct payment of marital funds together with any appreciation on the

investment of marital funds that often occurs due to market forces. However, if the house is purchased before the marriage with a down payment and a mortgage, the house will be separate property to the extent of the equity brought into the marriage by the purchasing spouse, but the house will be marital property to the extent the mortgage is paid and equity in the house is thus acquired during the marriage. *Classification of the date of separation value of the house must reflect both the separate and the marital contributions to the acquisition of that value.*

#### Mixed Assets (40/54)

The second way an asset can become mixed is when an item of *separate property increases in value during the marriage as a result of marital effort*. Marital effort means the effort of either or both spouses during the marriage. Remember we said that the definition of separate property includes increases in value of separate property during the marriage, but only if that increase in value is *passive* – meaning it is the result of market forces or other influences and not the result of the efforts of one or both spouses. If marital effort causes some or all of the increased value, the marital estate will receive an interest in the resulting equity. The asset will be classified as separate property to the extent the value is traced to the original separate property, or to passive increases in the value of that separate property. But it will be classified as marital property to the extent the equity on the date of separation is the result of marital effort.

So let's return to the example of a house. If the house was purchased by husband completely before marriage and was brought into the marriage with no mortgage, the house and any passive increase in the value of that house will remain husband's separate property. However, if the spouses add a bathroom or upgrade the kitchen after the marriage, any increase in the value of the house resulting from this marital effort will be marital property. The end result will be that the house is a mixed asset. The date of separation value of the house will be separate to the extent it reflects the date of marriage value of the house and any passive appreciation of that date of marriage value, and it will be marital to the extent it reflects the value added by the actions of the spouses during the marriage.

#### Mixed Assets – Burden of Proof

The *marital property presumption* can have a significant impact on the classification analysis of a mixed asset. This is true because "*tracing out*" the marital and separate components of a date of separation value of an asset can be extremely difficult as a practical matter in the context of a court proceeding. In our house example, let's say husband bought and paid for the house before he married wife. On the date of marriage, the house was worth \$200,000. By the date of

separation, the house is worth \$300,000. The only evidence offered by either spouse is that the couple spent \$40,000 of marital funds during the marriage to remodel the kitchen and bathrooms.

We know there is separate property valued at \$200,000 because that is the amount husband brought into the marriage. But how do we classify the remaining \$100,000 in equity? Because it is probable that the new kitchen and bathrooms increased the market value of the house, we know that some part of the \$100,000 probably is marital property. We also know that market forces also likely contributed to the fact that the house is worth more on the date of separation than it was on the date of marriage. Market forces are passive, therefore any appreciation of separate property resulting from market forces is separate property. So how do we divide the equity between the marital and separate estates?

Due to the marital property presumption, wife simply needs to show the house increased in value by \$100,000 during the marriage – by doing so she is showing that \$100,000 in property/equity was acquired during the marriage and owned on the date of separation. *Therefore, the \$100,000 is presumed to be entirely marital.* The burden then shifts to husband to “trace out” the part of that \$100,000 increase that is *not* directly attributable to the improvements made during the marriage with marital funds, thereby identifying that part of the appreciation caused by passive market forces. This means husband must produce evidence at trial to show exactly how much the new kitchen and bathrooms added to the date of separation value of the house, or to show exactly how much market forces caused the house to appreciate. As a practical matter, such evidence often is difficult to produce. If husband cannot meet his burden, the entire \$100,000 in appreciation must be classified as marital.

Another common example involves bank accounts. Suppose wife has a bank account containing \$50,000 on the date of marriage. That \$50,000 is separate property if it is still owned on the date of separation. Over the years of the marriage, her account grows through the accumulation of interest. In addition, she adds gifts and bequests from family members (also separate property). However, the spouses also add marital funds to the account and on the date of separation, the account has a balance of \$200,000. The \$150,000 increase in value during the marriage is presumed to be entirely marital because it is value acquired during the marriage. The wife has the burden of proving exactly how much of the value of the account on the date of separation is her separate property. As I am sure you can imagine, such specific tracing in an account is extremely difficult, if not impossible, to do. If wife cannot do the tracing, the entire \$150,000 increase must be classified as marital property.

## Classification of Debt (43/55)

The original version of the equitable distribution statute did not even mention debt. However, our appellate courts quickly held that liabilities as well as assets must be identified and distributed at the conclusion of a marriage. Marital debt must be distributed even when there are no assets. To be marital, a debt must have been incurred during the marriage and before the date of separation. However, the debt also must be owed on the date of separation. Like property, the court has no interest in debts which no longer need to be paid when the parties end their partnership. Also like property, the name attached to the debt is not controlling with regard to classification. The debt simply must be owed by one spouse or by both spouses on the date of separation. However, there is an additional element in the definition of marital debt that is not contained in the definition of marital property. In addition to having been incurred during the marriage and owed by either or both spouses on the date of separation, to be classified as a marital debt, the debt must have been incurred for the *joint benefit* of the parties. Also unlike property, there is *no presumption* that a debt acquired during the marriage is marital. Instead, a court needs affirmative proof that the debt was incurred for the joint benefit of the spouses, proof sufficient to allow the court to make a finding of fact identifying that joint benefit. Once joint benefit is proven, the value of the marital debt will be a *negative asset* added to the marital pie.

**So the definition of “marital” debt is that debt incurred during the marriage for the joint benefit of the parties which is owed by either or both spouses on the date of separation.**

## Test Yourself (44/55)

## Divisible Property, G.S. 50-20(b)(4) (45/55)

Hopefully by now you understand that as a general premise, the goal of the classification stage of an equitable distribution proceeding is to identify and value the marital property and debt in existence on the date of separation when the marital partnership came to an end. If property, debt or value does not exist on the date of separation, **it cannot be classified as marital**. However, there often is a significant period of time between the date of separation and the date the court actually distributes property and debt. *Divisible property* is a category of property created by statute in 1997 primarily to address changes in the value of marital property which frequently occurs *between the date of separation and date of the equitable distribution trial*. Before 1997, appellate courts in North Carolina had applied the statutory definition of marital property and debt *very strictly* to include only that value actually in existence on the date of separation. Therefore, the inevitable postseparation changes to the marital estate could not be strictly accounted for by the trial court in the final distribution of

the estate. The category of divisible property was created to allow the court to specifically include and divide certain *postseparation changes to the marital pie*.

### Postseparation Changes (46/55)

Divisible property is defined in GS 50-20(b)(4). This category of property includes *changes in the value of marital property after separation as long as that change is not caused solely by the actions of a single spouse following separation*. The court of appeals has held that this statute *presumes* that increase and decreases in the value of marital property will be divisible. This means that the party arguing that it is *not* divisible bears the burden of proving that the change was the result of the actions of a single spouse. In addition to appreciation and depreciation of marital property after the date of separation not caused by the efforts of a spouse, the category of divisible property also includes:

- **Income earned from marital property after separation**, as long as the income is not generated by the work of a single spouse after the separation.
- **Assets received by either spouse after separation but earned during the marriage**. And,
- **Passive increases and decreases in marital debt**, including interest and finance charges related to marital debt.

All divisible property and debt must be identified, valued and distributed with the marital property.

### Divisible Property – Examples

So, for example, a commission earned by one spouse for work that was completed before separation can be divided by the court as divisible property, even if it is not actually paid to the earning spouse until several weeks or months following the date of separation. Appellate courts had ruled that such commissions did not fit the definition of marital property because the commission itself was not owned by either party on the date of separation. Until the creation of divisible property, the equitable distribution statute would not allow the court to distribute the commission even though it clearly was earned as the result of *marital* effort.

Similarly, interest earned on a marital savings account after the date of separation is not marital property because it is value that did not exist on the date of separation. However, such interest income is divisible property, as long as it was earned *passively*, meaning without the effort of either spouse.

The divisible property statute also allows the court to account for and distribute postseparation **passive** changes in marital debt. So if a marital credit card debt increases in amount after the

date of separation due to the accumulation of interest and finance charges, the court can distribute and account for that increase as it meets the definition of divisible debt.

## Task 2 Valuation (48/54)

There is much more to be said about classification, but this presentation is intended to be an overview only. So we must briefly turn to Tasks 2 and 3 of the process, valuation and distribution of the marital and divisible estates. Valuation often is described as step two in the process of trying an equitable distribution case. In reality however, it is often impossible to separate valuation from classification. This is because, as I have said repeatedly during this presentation, classification involves identifying and tracing the source of the value or equity of a particular piece of property. This means, as a practical matter, it often is impossible to classify without knowing the value of the asset at issue.

Every judgment of equitable distribution must identify the date of separation value of every asset identified as marital property, and the date of separation value of every debt identified as marital debt. **If property or debt is not valued, a court has no authority to distribute the asset or debt.** Assets such as retirement plans and closely held corporations frequently require expert testimony to establish the date of separation value.

Unfortunately, when an asset or debt clearly was acquired completely during the marriage and there is no contention by either spouse that the property is “mixed” property, it is not uncommon for a court to reach the end of an equitable distribution trial and realize that neither party actually offered proof of the value of an asset or debt on the date of separation. This leaves a trial judge in a very bad position. Our appellate courts have been very strict; if there is no finding of fact regarding the date of separation value of an asset or debt, the court cannot distribute the asset or debt – even if it is very clear that the property or debt is marital.

So, as a judge, you will need to decide if you are willing to ask the parties for this critical piece of evidence. Some judges feel it is not their role to ask for evidence because it is the responsibility of the parties to meet their respective burdens of proof. Other judges share that philosophy in most civil cases but feel differently about family related cases. These judges prefer to ask for the evidence instead of allowing the property to pass by legal title alone. You will need to decide your individual philosophy and try hard to apply it *consistently* to the cases you hear.

In 2019, GS 50-20.1 was amended to create a limited exception to the rule that property cannot be distributed if not valued as of the date of separation. GS 50-20.1(d) now provides that if the plan to be divided is a defined benefit plan that is to be distributed by the deferred distribution method [meaning by QDRO to be divided in the future when and if the employee spouse begins to receive benefits] and the court determines that the marital portion of the plan is to be

divided equally between the parties, the court is not required to establish the date of separation value of the marital portion of the plan.

Common examples of defined benefit plans are the North Carolina state employee retirement plan and the federal military retirement plan. If the marital portion of the pension is to be divided in the future and the court determines that the marital portion should be divided equally, the court is not required to value the marital portion of either of these pensions as of the date of separation.

### Task 3: Distribution (49/54)

Distribution is the final step in the equitable distribution process. Once the marital and divisible pie is created, the court has significant discretion in deciding how the pie should be divided between parties. The court determines the appropriate distribution and division of assets based on a consideration of factors found in GS 50-20(c). These statutory factors often are referred to as *distribution factors*.

### Distribution (50/54)

**The law presumes that an equal distribution of the value of the total estate is equitable.**

However, a court needs **only one** of these statutory distribution factors to justify an unequal division. Once an unequal division is supported by a factor, the judge can order a split of any percentage the judge deems equitable, including a distribution of 100% of the marital and divisible estate to one party.

So, for example, one distribution factor is the separate estates of each spouse and another is the health of each spouse. In a situation where one spouse has a significant separate estate and good health while the other spouse has no separate estate and bad health, a trial judge *may* decide it is equitable to give the spouse with no estate and bad health a larger share of the marital and divisible estates.

### Distribution (51/54)

Because of this discretion, distribution is the stage where the court has the ability to do equity and make a division based on the judge's determination of fairness in a particular case as opposed to making a decision based on rigid rules. The appellate courts have told us that the presumption in favor of an equal distribution is extremely strong, but the equitable distribution statute recognizes that in these personal, family- related matters, courts must have flexibility to address the myriad of circumstances which arise. Appellate courts very seldom, if ever, overrule a trial judge's decision in regard to the percentage of the estate awarded to either party. As long as the court classifies all assets in accordance with the law and properly values

the property interest based on evidence, the appellate courts will not second guess the discretion of the trial judge on distribution.

#### Distribution (52/54)

It is important to remember however, that the statutory distribution factors relate *only* to the marital economy and economic factors. **Trial judges are prohibited from considering non-economic marital fault issues when considering the appropriate division of assets.**

#### Distribution (53/54)

The law also presumes that assets will be divided *in kind*. This means that the court generally should divide the marital estate by assigning specific assets to each spouse. However, under appropriate circumstances and with specific findings of fact, the court can use what is called a *distributive award* to effectuate a distribution. A *distributive award* is a payment of money by one party to the other to offset a distribution of actual assets to the paying party. For example, if the major marital asset in a case is a closely held corporation, there seldom are sufficient other assets to allow a court to make an equal in-kind division without requiring that the corporation be sold. So instead, the court can award the corporation entirely to one spouse and order that spouse to pay the other's share of the value of the marital property in cash. This type of award will preserve the value of the closely held corporation while still allowing both spouses their share of the marital estate.

#### Questions (54/54)

This session was intended to *briefly* introduce you to equitable distribution in North Carolina and to familiarize you with key principles and definitions that form the heart of the law in this area. Further study definitely is required to be fully informed concerning this complex and constantly evolving area of the law. If you have any questions, please contact me at the phone number and email address shown on your screen.