

Procedural Issues in ED

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Various Procedural Rules

- Need *in personum* jurisdiction over defendant
Service of Process and Minimum Contacts
- District court has exclusive subject matter jurisdiction over ED claims
- Claim can be filed and adjudicated “at any time after the husband and wife begin to live separate and apart.”
GS 50-21(a)
- Claim must be asserted before entry of absolute divorce
“Reserving” in divorce judgment doesn’t work

More procedural rules

- No jury trials allowed for any issue within ED
- No right to an attorney
- No attorney fees
(except for contempt)
- ED is not an exclusive remedy
No such thing as 'marital property' until parties separate and one requests ED
All common law remedies remain available for property not addressed through ED

Procedural Stuff

- Claim can be filed, or can proceed if already filed, after death of one party
- ED must be determined without regard to alimony and child support
Alimony can be tried before or after ED
- ED judgment enforced by contempt
Except distributive award also can be enforced through execution
- ED judgments cannot be modified
Only remedy is Rule 59 or 60

Judgments

- Delay in entry of judgment is huge problem
- If party can show prejudice from delay, court of appeals will order new trial
 - 19 month delay required new trial
Wall v. Wall, 140 NC App 303 (2000)
 - 2-year delay admonished
Sisk v. Sisk, 729 SE2d 68 (2012)
- *Nunc pro tunc* not available to 'fix' delay
 - *Whitworth v. Whitworth*, 731 SE 2d 707 (2012)
 - *Dabbondanza v. Hansley*, 791 S.E.2d 116 (2016)
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Inventory Affidavits

- First party to file ED must file affidavit within 90 days
- Other party must respond within 30 days
- Does your district have a different schedule?

Inventory Affidavits

- “Deemed in the nature of Interrogatories”
 - *See Helms v. Helms*, 191 NC App 19 (2008)
- Subject to Rule 11
- Failure to supply required information subject to:
 - Rule 26: General Discovery Rules
 - Rule 33: Interrogatories
 - Rule 37: Motions to Compel and Sanctions
 - See Ward v. Ward, unpublished*, 736 NC App 647 (2013)

Inventory Affidavits

- Can be amended at any time by parties
- Nonbinding at trial as to completeness and as to values
- Unless local rules provide otherwise
 - Young v. Young*, 133 NC App 332 (1999)

Pretrial conferences generally

- Rule 16 of Rules of Civil Procedure
Court may conduct a pretrial conference in any case
- Rule 7 of General Rules of Practice for Superior and District Courts
There shall be a pretrial conference in every case, unless parties waive requirement in writing with signature of judge

Goals of Pretrial conference

- Rule 16 of Rules of Civil Procedure :
 - Simplification and formulation of issues**
 - Determining need for amendment of pleadings**
 - Obtaining admissions of facts and of documents**
 - Limit number of expert witnesses**
 - Consider reference**
 - Matters of which court can take judicial notice**
 - Any other matters to aid in disposition of case**

ED Pretrial Conferences

Three required by GS 50-21:

Scheduling and discovery conference to be requested by party
first filing ED within 120 days of filing

At scheduling and discovery conference, must set date for
initial pretrial conference

At initial pretrial conference, must set final pretrial conference

In addition, must have Mediated Settlement Conference in every case
GS 7A-348.4A

- Different Local Rules?

Pretrial order = stipulations

- Binding on Court and on Parties
- Can be set aside in the interest of justice

On request of a party or on court's own motion

Only upon proper notice and opportunity for parties to
present evidence not presented due to stipulation

See Plomaritis v. Plomaritis, 730 SE2d 784 (NC App 2012)

Cases to consider.....

- *White v. Davis*, 163 NC App 21 (2004)
Values “TBD” by specific date
- *Brackney v. Brackney*, 199 NC App 375 (2009)
Postseparation appreciation of house
resulted from market forces alone

Cases to consider.....

- *Ubertaccio v. Ubertaccio*, 359 NC 175, *adopting concurring opinion* in 161 NC App 352 (2003)
Stock received after DOS earned as result of
wife’s efforts during marriage
- *Miller v. Miller*, 97 NC App 77 (1990)
Equal division is equitable