Excerpts from Trial Judges' Bench Book, Family Law, Volume 1 pages 43-55 (2012 version, updated as of May 2013)

B. Pretrial procedures.

1. Inventory affidavit. [G.S. § 50-21(a)]

a) The party who first asserts a claim for equitable distribution must file and serve upon the opposing party an inventory affidavit listing all property claimed to be marital and separate property, as well as an estimated date-of-separation fair market value of each item, within 90 days of filing the claim.

b) The opposing party must serve a responding inventory within 30 days after service of the filing party's inventory.

c) The inventory affidavits are subject to amendment and are nonbinding at trial as to completeness or value.

(1) This is in contrast to stipulations, which once made and of record, are binding on the parties absent fraud or mutual mistake. [*Lawing v. Lawing,* 81 N.C.App. 159, 344 S.E.2d 100 (1986); *see* section V of this Part, page 50, on stipulations.]

(2) Where wife listed husband's painting business with an unknown value at the date of separation, wife was free to present expert testimony at trial when husband had received appropriate notice of the expert opinion. [*Franks v. Franks,* 153 N.C.App. 793, 571 S.E.2d 276 (2002) (rejecting husband's argument that wife was required to amend her inventory affidavit before trial).] *But cf.* stipulations entered in a pretrial order, discussed in section A.4. below.

(3) But when a husband presented no evidence to show the number of years his 401(k) account existed prior to the marriage and stated in the inventory affidavit that the account was marital property and listed the word "none" under separate property, trial court did not abuse its discretion when it awarded wife one-half of the account. [*Helms v. Helms,* 191 N.C.App. 19, 661 S.E.2d 906, *review denied,* 362 N.C. 681, 670 S.E.2d 233 (2008), *appeal withdrawn,* 363 N.C. 258, 676 S.E.2d 469 (2009).]

(4) Local rules can make an inventory affidavit binding. [*See Young v. Young,* 133 N.C.App. 332, 515 S.E.2d 478 (1999) (where husband who did not dispute wife's classification of credit card debt as marital on local forms required by local discovery rules deemed to have stipulated that wife's listing was undisputed and therefore credit card debt was marital).]

d) The court may extend the time for filing the inventories upon good cause shown.

e) The inventory affidavits are in the nature of answers to interrogatories propounded to the parties and are subject to the requirements of Rule 11.

f) Any party failing to provide the required affidavits is subject to sanctions pursuant to Rules 26, 33, and 37 of the Rules of Civil Procedure.

g) Trial court can dismiss an equitable distribution action when a party fails to comply with a court order requiring submission of inventory affidavit by a date certain. *See Ward v. Ward, unpublished opinion,* 736 SE2d 647 (N.C. App., January 2013).

h) Property shown by the evidence at trial to be subject to distribution must be included in the equitable distribution order, even if a party failed to include the property in the affidavit.

(1) Trial court erred in failing to classify, value and distribute the wife's profit-sharing plan even though she had not listed the plan in her affidavit filed with the court and it was not included in the pretrial order. [*Fitzgerald v. Fitzgerald,* 161 N.C.App. 414, 588 S.E.2d 517 (2003) (existence of the plan disclosed during the ED hearing).]

2. Scheduling and discovery conferences. [G.S. § 50-21(d)]

a) Within 120 days after filing, the party first requesting equitable distribution must request that the court conduct a scheduling and discovery conference. If that party fails to request a conference, the other party may do so.

b) At the conference the court must adopt a discovery schedule, rule on any motions for appointment of expert witnesses, or other applications, including applications to determine the date of separation, and must set a date for the initial pretrial conference.

c) At the initial pretrial conference, the court must determine the status of the case, set a date for completion of discovery and the filing and service of all motions, and set a date for a final pretrial conference and for trial.

d) A final pretrial conference must be conducted in accordance with the Rules of Civil Procedure and the General Rules of Practice applicable to district and superior court. At the final pretrial conference, the court must rule on any matter reasonably necessary to effect a fair and prompt disposition of the case in the interests of justice.

e) Rule 16 of the Rules of Civil Procedure states that at the pretrial conference the court should consider:

a. The simplification and formulation of issues;

b. The necessity and desirability of amendments of the pleadings;

c. The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

d. The limitation of the number of expert witnesses;

e. The advisability or necessity of a reference of the case, either in whole or in party;

f. Matters of which the court is to be asked to take judicial notice, and

g. Such other matters as may aid in the disposition of the matter.

3. Pretrial mediated settlement conference. [G.S. § 7A-38.4A]

a) Prior to March 1, 2006, a chief district court judge was authorized but not required to mandate settlement procedures in his or her district. [*See* G.S. § 7A-38.4A(c)]

b) Effective March 1, 2006, in all equitable distribution actions in all districts, a mediated settlement conference or other settlement procedure is required.

(2) At the scheduling conference mandated by G.S. § 50-21(d) in all equitable distribution actions in all judicial districts, or at such earlier time as specified by local rule, the court shall include in its scheduling order a requirement that the parties and their counsel attend a mediated settlement conference or, if the parties agree, other settlement procedure conducted pursuant to the Family Financial Settlement Rules, unless excused by the court pursuant to Rule 1.C(6) or by the court or mediator pursuant to Rule 4.A(2). [RULES IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES (FFS RULES), RULE 1.C(1)]

(3) The court shall dispense with the requirement to attend a mediated settlement conference or other settlement procedure only for good cause shown. [FFS Rule 1.C(1)]

c) The complete text of the Family Financial Settlement Rules implementing G.S. § 7A-38.4A may be found in N.C.G.S. ANNOTATED RULES OF NORTH CAROLINA and also is available at http://www.nccourts.org/Courts/CRS/Councils/DRC/FFS/Rules.asp.

4. Sanctions for delay of an equitable distribution proceeding. [G.S. § 50-21(e)]

a) Upon motion of either party or upon the court's own initiative, the court **shall** impose an appropriate sanction on a party when the court finds both that:

(1) The party has willfully obstructed or unreasonably delayed, or attempted to obstruct or unreasonably delay, discovery proceedings or any pending equitable distribution proceeding; and

(2) The willful obstruction or unreasonable delay of the proceedings is or would be prejudicial to the interests of the opposing party.

b) Sanctions for delay of the proceedings may include an order:

(1) To pay the other party the amount of the reasonable expenses and damages incurred because of the willful obstruction or unreasonable delay, including a reasonable attorneys' fee; and

(2) To appoint, at the offending party's expense, an accountant, appraiser, or other expert whose services the court finds necessary in order for discovery or other equitable distribution proceeding to be timely conducted. [G.S. § 50-21(e)]

c) Delay consented to by the parties is not grounds for sanctions. [G.S. § 50-21(e)]

d) Whether to impose sanctions under G.S. § 50-21(e) and which sanctions to impose are decisions vested in the trial court and are reviewable on appeal for abuse of discretion. [*Wirth v. Wirth,* 193 N.C.App. 657, 668 S.E.2d 603 (2008); *Zaliagiris v. Zaliagiris,* 164 N.C.App. 602, 596 S.E.2d 285 (2004), *review on additional issues denied,* 359 N.C. 643, 617 S.E.2d 662, *appeal withdrawn,* 360 N.C. 180, 625 S.E.2d 114 (2005); *Crutchfield v. Crutchfield,* 132 N.C.App. 193, 511 S.E.2d 31 (1999).]

(1) A finding of contempt is not required before a court can impose sanctions under G.S. § 50-21(e). [*Wirth v. Wirth,* 193 N.C.App. 657, 668 S.E.2d 603 (2008).]

(2) Trial court did not abuse its discretion in awarding wife a portion of her attorney fees as a sanction where husband unreasonably delayed ED proceedings by refusing to produce documents for a period of at least nineteen months. [*Wirth v. Wirth,* 193 N.C.App. 657, 668 S.E.2d 603 (2008).]

(3) Trial court did not err when it awarded wife attorney fees for husband's failure to appear at any hearing in the matter, including court-ordered mediation. [*Dalgewicz (Hearten) v. Dalgewicz,* 167 N.C.App. 412, 606 S.E.2d 164 (2004).]

(4) Trial court did not abuse its discretion when it awarded plaintiff attorney fees as a sanction for the defendant's willful delay or attempted delay of discovery and ED proceedings. [*Crutchfield v. Crutchfield*, 132 N.C.App. 193, 511 S.E.2d 31 (1999) (defendant and her counsel failed to attend hearings).]

e) Notice of sanctions required.

(1) G.S. § 50-21(e) is silent as to what type of notice is required under the statute and how far in advance notice must be given to a party facing sanctions. [*Wirth v. Wirth*, 193 N.C.App. 657, 668 S.E.2d 603 (2008); *Megremis v. Megremis*, 179 N.C.App. 174, 633 S.E.2d 117 (2006).]

(2) A party has a due process right to notice in advance of the hearing both of the fact that sanctions may be imposed and the alleged grounds for the imposition of sanctions. [*Zaliagiris v. Zaliagiris*, 164 N.C.App. 602, 596 S.E.2d 285 (2004), *review on additional issues denied*, 359 N.C. 643, 617 S.E.2d 662, *appeal withdrawn*, 360 N.C. 180, 625 S.E.2d 114 (2005) (it was error under G.S. § 50-21(e) for the trial court to summarily assess expert witness costs as a sanction against defendant, where defendant was given no notice that he was subject to such a sanction or the grounds upon which such sanction would be imposed).]

f) Notice sufficient.

(1) Where husband had notice of and submitted an argument against wife's request for sanctions over two months before the court imposed sanctions, husband had sufficient notice of the possibility of sanctions. [*Wirth v. Wirth* 193 N.C.App. 657, 668 S.E.2d 603 (2008) (wife's counsel filed a written closing argument with the trial court, in which she requested fees pursuant to § 5021(e), set out the amount thereof, and stated that requested fees related to additional time, effort and cost to wife and her attorneys in obtaining necessary documentation that husband had failed to provide, to which husband's counsel submitted a written closing argument in which he argued against wife's request for sanctions).]

g) Notice not sufficient.

(1) Defendant's due process rights were violated when there was no written request for sanctions, no separate hearing on sanctions, and defendant received no notice regarding sanctions prior to the ED trial at which sanctions were imposed. [*Megremis v. Megremis*, 179 N.C.App. 174, 633 S.E.2d 117 (2006); *see Wirth v. Wirth*, 193 N.C.App. 657, 668 S.E.2d 603 (2008) (stating that *Megremis* stands for the proposition that a party must have notice

regarding the imposition of sanctions before the date on which sanctions are imposed).]

h) Notice has been found not to have been provided by:

(1) The fact that a party against whom sanctions were imposed took part in the hearing and did the best he could do without knowing in advance the sanctions that might be imposed. [*Zaliagiris v. Zaliagiris*, 164 N.C.App. 602, 596 S.E.2d 285 (2004), *review on additional issues denied*, 359 N.C. 643, 617 S.E.2d 662, *appeal withdrawn*, 360 N.C. 180, 625 S.E.2d 114 (2005); *Megremis v. Megremis*, 179 N.C.App. 174, 633 S.E.2d 117 (2006), *quoting Zaliagiris*.]

(2) Language in an ED pretrial order that recited the operative language of G.S. § 50-21(e) as a distributional factor and not as a ground for sanctions and did not specify sanctions or cite the sanctions statute. [*Megremis v. Megremis*, 179 N.C.App. 174, 633 S.E.2d 117 (2006).]

(3) A statement by opposing counsel:

(a) At a hearing on a motion to withdraw as wife's counsel and her motion to continue that wife's conduct "amount[ed] to an effort to postpone" the trial, when counsel did not mention sanctions, the statute, or any operative language of the statute. [*Megremis v. Megremis*, 179 N.C.App. 174, 633 S.E.2d 117 (2006).]

(b) During his opening statement at trial that forecast evidence of wife's conduct that he contended was "a willful obstruction and delay of the equitable distribution trial and which should subject [defendant] to sanctions" and asked the trial court "to consider the delay and obstruction of [defendant] . . . under 50-21(e)" when there was no separate hearing on the issue of sanctions but issue of sanctions was decided as part of the larger equitable distribution trial.
[*Megremis v. Megremis*, 179 N.C.App. 174, 633 S.E.2d 117 (2006).]

V. Stipulations

A. Generally.

1. Stipulations are different from consent judgments.

a) For a stipulation to be effective, it must either be signed by the parties or the requirements of *McIntosh v. McIntosh*, 74 N.C.App. 554, 328 S.E.2d 600 (1985), must be met.

b) There can be no entry of a consent judgment unless the terms of the judgment are reduced to writing, signed by the judge and filed with the clerk of court. [N.C.R. CIV. P. 58] For more on consent judgments, *see* section III.L.3 of this Part, page 37.

2. Stipulations are judicial admissions which, unless limited as to time or application, continue in full force for the duration of the controversy. [*Fox v. Fox*, 114 N.C.App. 125, 441 S.E.2d 613 (1994); *see Sharp v. Sharp*, 116 N.C.App. 513, 449 S.E.2d 39, *review denied*, 338 N.C. 669, 453 S.E.2d 181 (1994) (stipulation of value of real property at hearing before referee still in force when ED judgment entered 2 years later, despite defendant's argument that value had changed).]

3. Effect of a stipulation.

a) A stipulation, once made and of record, is binding on the parties in the absence of fraud or mutual mistake. [*Lawing v. Lawing*, 81 N.C.App. 159, 344 S.E.2d 100 (1986).] It also is binding on the trial court unless the trial court sets aside the stipulation. [*Plomaritis v. Plomaritis*, 730 SE2d 784 (NC App 2012)(judge had authority to set aside stipulation on his own motion but only after giving notice and an opportunity to heard to the parties].

b) Although a stipulation is not itself evidence, it removes the admitted fact from the field of evidence by formally conceding its existence. *Fox v. Fox*, 114 NC App 125, 441 SE2d 613 (1994).

c) A stipulation is binding in every sense, preventing the parties from introducing evidence to dispute it and relieving them from the necessity of producing evidence to establish the admitted fact. [*Young v. Young*, 133 N.C.App. 332, 515 S.E.2d 478 (1999).]

(1) A stipulation 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 resulted in the classification of appreciation as divisible property. [*Brackney v. Brackney*, 199 N.C.App. 375, 682 S.E.2d 401 (2009), *review withdrawn*, 363 N.C. 853, 694 S.E.2d 200 (2010).]

(2) A party's failure to object to the other party's classification of debt as marital deemed by local rule a stipulation that the party's listing is undisputed. [*Young v. Young*, 133 N.C.App. 332, 515 S.E.2d 478 (1999) (where husband failed to object to wife's classification of credit card debt as marital, classification deemed a stipulation per local rule and trial court need not hear evidence either to prove or disprove it).]

(3) Stipulation in a pretrial order, that property acquired subsequent to a reconciliation was included in wife's ED claim, prevented husband from arguing that a separation agreement and

property settlement barred wife's ED claim. [*Inman v. Inman*, 136 NC.App. 707, 525 S.E.2d 820, *cert. denied*, 351 N.C. 641, 543 S.E.2d 870 (2000).]

(4) Where the parties stipulate that an equal division of the marital property is equitable, it is not only unnecessary but improper for the trial court to consider, in making that distribution, any of the distributional factors set forth in G.S. § 50-20(c). [*Miller v. Miller*, 97 N.C.App. 77, 387 S.E.2d 181 (1990) (because of stipulation, trial court correctly refused to give the husband credit for mortgage payments he made after separation or to consider payments as a distributional factor).]

(5) Similarly, the parties can stipulate that certain distribution factors will not be considered by the trial court in determining whether an equal division is equitable. *See Quick v. Quick, unpublished opinion*, 152 NC App 477, 567 SE2d 841 (2002).

4. Pretrial orders.

a) The court may enter a pretrial order reciting, among other things, the agreements made by the parties as to any of the matters considered at the pretrial conference. When entered, the pretrial order controls the subsequent course of the action, unless modified at trial to prevent manifest injustice. [G.S. § 1A-1, Rule 16(a); *see Inman v. Inman*, 136 NC.App. 707, 525 S.E.2d 820, *cert. denied*, 351 N.C. 641, 543 S.E.2d 870 (2000).] For an overview of Rule 16, *see* Bench Book, Vol. 2, *Pretrial Conference*, Chapter 26.

b) While Rule 16 of the Rules of Civil Procedure states that a court *may* conduct a pretrial conference, Rule 7 of the General Rules of Practice for the Superior and District Courts states there *shall* be a pre-trial conference in every civil case – although the rule allows the requirement to be waived if the parties stipulate in writing and the court approves the stipulation. The rule also allows the court on its own motion to dispense with the conference or limit its scope. Rule 7 requires that a pre-trial order be prepared at the conclusion of the conference and provides a form pre-trial order.

c) For a stipulation in a pretrial order to be binding, the parties must use unequivocal and mandatory language that definitively expresses their intent. [*Despathy v. Despathy*, 149 N.C.App. 660, 562 S.E.2d 289 (2002) (where parties in a pretrial order provided how vehicles "should" be distributed between the parties, the court was free to disregard the stipulation and to distribute the vehicles differently than the stipulation provided).]

d) Stipulation in the pretrial order, that the issue of whether certain property was separate or marital by virtue of the prenuptial agreement was

an issue to be decided by the trial court, served as the basis for allowing husband to amend his answer to include the prenuptial agreement, even though court had determined that husband should have pled the agreement in his answer as an affirmative defense. [*Weaver-Sobel v Sobel*, 175 N.C.App. 596, 624 S.E.2d 432 (2006) **(unpublished**) (prenuptial agreement could have affected whether certain assets were separate or marital property, thus it constituted a matter in "avoidance or affirmative defense" and was required to be pled in defendant's answer).]

e) Where husband stipulated in his pretrial order that his deferred compensation plans were marital property, he could not argue on appeal that his stipulation was based on a mistake of law regarding classification. *Hamby v. Hamby,* 143 NC App 635, 547 SE2d 110 (2001)(court of appeals held husband "waived his right to dispute classification on appeal by signing the pretrial order.").

f) Where pretrial listed parties' contentions as to value but some values were listed "TBD" and order required those values to be supplied by a date certain, party who failed to supply values by required date could not offer evidence of value at trial. *White v. Davis*, 163 N.C.App. 21, 592 S.E.2d 265, *review denied,* 358 N.C. 739, 603 S.E.2d 127 (2004).

g) Local rules can result in binding stipulations. [*See Young v. Young*, 133 N.C.App. 332, 515 S.E.2d 478 (1999) (where husband who did not dispute wife's classification of credit card debt as marital on local forms required by local discovery rules deemed to have stipulated that wife's listing was undisputed and therefore credit card debt was marital).]

h) Even though it denied a request to modify a pretrial order, a court has considered an alleged misclassification as a distributional factor. [*See White v. Davis*, 163 N.C.App. 21, 592 S.E.2d 265, *review denied,* 358 N.C. 739, 603 S.E.2d 127 (2004) (where a trial court, citing fairness considerations and in the spirit of *Inman*, allowed the misclassification of husband's medical practice in a pretrial order to be considered as a distributional factor in his favor under G.S. § 50-20(c)(12)).]

5. Where a stipulation provides for less than a complete distribution, ED may proceed as to assets not covered by the stipulation.

a) A trial court properly classified a tax refund as marital property even though the parties had not included the refund in their stipulated list of marital property. [*Allen v. Allen*, 168 N.C.App. 368, 607 S.E.2d 331 (2005) (court holding that there was no waiver of equitable distribution of property not listed in the stipulation).]

b) Trial court erred in failing to classify, value and distribute a profit sharing plan even though the wife had not listed the plan in her affidavit

filed with the court and it was not included in the pretrial order. [*Fitzgerald v. Fitzgerald*, 161 N.C.App. 414, 588 S.E.2d 517 (2003) (existence of the plan disclosed during the ED hearing).]

6. In equitable distribution actions, parties' agreement regarding distribution of their property generally must be in writing, duly executed and acknowledged. [*McIntosh v. McIntosh,* 74 N.C.App. 554, 328 S.E.2d 600 (1985).]

a) North Carolina courts favor written stipulations that are duly executed and acknowledged by the parties. [*Heath v. Heath*, 132 N.C.App. 36, 509 S.E.2d 804 (1999); *Fox v. Fox,* 114 N.C.App. 125, 441 S.E.2d 613 (1994); *see also Robinson v. Robinson,* __ N.C.App. __, 707 S.E.2d 785 (2011) (trial court erred in relying on statements of counsel regarding stipulations when stipulations had not been reduced to writing).]

b) But written stipulations have been upheld even though not acknowledged and executed by the parties. [*Eubanks v. Eubanks,* 109 N.C.App. 127, 425 S.E.2d 742 (1993) (written stipulation signed by attorneys for both parties and read into the record in the presence of the parties without objection was binding on the parties, even though neither actually signed the document); *Hodges v. Hodges,* 200 N.C.App. 617, 687 S.E.2d 710 (2009) (**unpublished**) (undated, handwritten factual stipulations that were not acknowledged but were signed by the parties and admitted into the record by the trial court in the presence of both parties and without objection, competent evidence to support classification of property as a mixed asset).]

B. If stipulations are not written, requirements set out in *McIntosh v. McIntosh,* 74 N.C.App. 554, 328 S.E.2d 600 (1985), must be met.

1. Oral stipulations are binding if the record affirmatively demonstrates that the court made contemporaneous inquiries of the parties at the time the stipulations were entered into. [*McIntosh v. McIntosh,* 74 N.C.App. 554, 328 S.E.2d 600 (1985).] It should appear that:

a) The trial court read the terms of the stipulations to the parties as dictated to the clerk of court;

b) The parties understood the legal effects of their agreement and the terms of the agreement; and

c) The parties agree to abide by the terms of the stipulation of their own free will. [*Id.; see also Heath v. Heath*, 132 N.C.App. 36, 509 S.E.2d 804 (1999) and *Fox v. Fox,* 114 N.C.App. 125, 441 S.E.2d 613 (1994) (requiring record to show that the trial court read the stipulated terms to the parties and that the parties understood the effects of their agreement).]

2. Some decisions have not construed *McIntosh* to require that the trial court read the stipulations to the parties. [*Chance v. Henderson,* 134 N.C.App. 657, 518

S.E.2d 780 (1999).]

a) *McIntosh* construed to require **either** that the trial court read the agreement in open court **or** that it be reasonably apparent from the record that both parties either read or understood the stipulated terms. [*Chance v. Henderson*, 134 N.C.App. 657, 518 S.E.2d 780 (1999) (*McIntosh* not violated when counsel for one of the parties recited the stipulated terms).]

b) When the parties were present in court, represented by counsel, and indicated that they either read or understood the terms of the proposed distribution, subsequent ED order affirmed even though trial judge did not read to the parties the terms of the proposed distribution of marital property. [*Watson v. Watson*, 118 N.C.App. 534, 455 S.E.2d 866 (1995) (*McIntosh* does not require the trial judge to read terms to the parties in open court under these circumstances).]

3. But if the parties themselves are not present in court, oral stipulations made on their behalf are not valid. [*Hurley v. Hurley*, 123 N.C.App. 781, 474 S.E.2d 796 (1996) (stipulations entered in open court by parties' attorneys not valid).]

4. Trial court's finding of fact, that parties stipulated as to the division of certain retirement accounts, must be affirmatively reflected in the record for the ED judgment to be upheld on appeal. [*Heath v. Heath*, 132 N.C.App. 36, 509 S.E.2d 804 (1999) (where close review of the transcript reflected no oral stipulation as to the division of certain retirement accounts, appellate court concluded that no stipulation authorized the trial court's distributive award of the accounts, despite the trial court's finding of fact to that effect).]

C. Procedure to set aside a stipulation.

1. A party to a stipulation who desires to have it set aside should seek to do so by some direct proceeding, and ordinarily, such relief may or should be sought by a motion to set aside the stipulation in the court in which the action is pending, on notice to the opposite party. [*Sharp v. Sharp*, 116 N.C.App. 513, 449 S.E.2d 39, *review denied*, 338 N.C. 669, 453 S.E.2d 181 (1994), *citing Moore v. Richard West Farms, Inc.*, 113 N.C.App. 137, 437 S.E.2d 529 (1993).]

2. Trial court can set aside a stipulation on its own motion but must give parties notice and an opportunity to be heard before doing so. [*Plomaritis v. Plomarits*, 730 SE2d 784 (NC App 2012)(judge decided to set aside stipulations entered in an ED case after concluding that application of the stipulations would result in an unjust ED judgment)]