"subject to Defendant's [wife's] rights to an equitable distribution of property, both as marital and divisible property" and further stated that "Defendant's rights and claims to said property are preserved until an equitable distribution of marital and divisible property," the interim order preserved wife's claim for equitable distribution of marital and divisible property related to that house. [*Brackney v. Brackney,* 199 N.C. App. 375, 378, 682 S.E.2d 401, 403 (2009), *review withdrawn,* 363 N.C. 853, 694 S.E.2d 200 (2010).]

## B. Pretrial Procedures

1. Inventory affidavit. [G.S. 50-21(a).]
    a. The party who first asserts a claim for equitable distribution (ED) must prepare 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 ninety days of filing the claim. [G.S. 50-21(a).]
    b. The opposing party must serve a responding inventory within thirty days after service of the inventory affidavit. [G.S. 50-21(a).]
    c. The inventory affidavits are subject to amendment and are nonbinding at trial as to completeness or value. [G.S. 50-21(a).]
        i. 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, below, and *Valuation*, Part 3 of this Chapter, Section III.A for more on stipulations.
        ii. Where wife listed husband's painting business in her inventory affidavit as having an unknown value at the date of separation, wife was free to present expert testimony on value 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).]
        iii. Where husband presented no evidence to establish 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 put "none" under the affidavit section on 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 (wife's testimony at earlier ED proceeding that she and her attorney had determined that she was entitled to a lesser percentage of the account was not binding, given husband's failure to meet burden of showing what portion of the account was separate property), *review denied,* 362 N.C. 681, 670 S.E.2d 233 (2008).]
        iv. Local rules can make an inventory affidavit binding. [*See Young v. Young*, 133 N.C. App. 332, 515 S.E.2d 478 (1999) (husband who failed to object to wife's classification of credit card debt as marital on local forms required by local discovery rules was deemed to have stipulated that debt was marital; trial court need not hear evidence either to prove or disprove issue).]

d. The court may extend the time for filing the inventories upon good cause shown. [G.S. 50-21(a).] Otherwise, the requirements in G.S. 50-21(a) cannot be waived. [*Ward v. Ward,* 225 N.C. App. 268, 736 S.E.2d 647 (**unpublished**), *review denied,* 366 N.C. 580, 739 S.E.2d 846, 366 N.C. 580, 739 S.E.2d 852 (2013).]

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. [G.S. 50-21(a).]

f. Any party failing to provide the required affidavits is subject to sanctions pursuant to G.S. 1A-1, Rules 26, 33, and 37. [G.S. 50-21(a). *See Ward v. Ward,* 225 N.C. App. 268, 736 S.E.2d 647 (**unpublished**) (wife's ED claim dismissed some four years after her noncompliance with 2007 order requiring her to file an inventory affidavit and attend a pretrial conference; dismissal not as a sanction under above cited rules but pursuant to a stipulation in the 2007order that noncompliance of either party would result in dismissal), *review denied,* 366 N.C. 580, 739 S.E.2d 846, 366 N.C. 580, 739 S.E.2d 852 (2013). *But cf. Green v. Green*, 236 N.C. App. 526, 763 S.E.2d 540 (2014) (trial court erred in sanctioning defendant for failure to file inventory affidavit where plaintiff filed no motion requesting sanctions and where court never had ordered defendant to file the affidavits by a particular date).]

g. Property subject to distribution must be included in the ED order, even if a party failed to include the property in the affidavit.

i. Trial court erred in failing to classify, value, and distribute 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 conference. [G.S. 50-21(d).]

a. Within 120 days after filing, the party first requesting ED 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. [G.S. 50-21(d).]

b. At the conference, the court must adopt a discovery schedule, rule on any motions for appointment of expert witnesses or on other applications, including applications to determine the date of separation, and set a date for the initial pretrial conference. [G.S. 50-21(d).]

c. At the initial pretrial conference, the court must determine the status of the case, set a date for completion of discovery and a mediated settlement conference, if applicable, and a date for the filing and service of all motions, and set a date for a final pretrial conference and a date after which the case shall proceed to trial. [G.S. 50-21(d).]

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 or 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. [G.S. 50-21(d).]

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

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

b. Effective Mar. 1, 2006, in all ED actions in all districts, a mediated settlement conference or other settlement procedure is required.

i. At the scheduling conference mandated by G.S. 50-21(d) in all ED 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 Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases (FFS Rules), unless excused by the court pursuant to FFS Rule 1.C(6) or by the court or mediator pursuant to FFS Rule 4.A(2). [FFS Rule 1.C(1).]

ii. 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).]

iii. In the mediated settlement conference or other settlement procedure, all other financial issues between the parties, including alimony, postseparation support, or claims arising out of contracts between the parties under G.S. 52-10, 52-10.1, or Chapter 52B, as well as child support, may be discussed, negotiated, or decided at the settlement proceeding. [FFS Rule 1.C(2).]

c. The FFS Rules (Apr. 1, 2014) implementing G.S. 7A-38.4A may be found in N.C.G.S. Annotated Rules of North Carolina and at N.C. Court System, *Courts*, "Program Rules," www.nccourts.org/Courts/CRS/Councils/DRC/FFS/Rules.asp.

4. Sanctions for delay of an ED 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 it finds both that:

i. The party has willfully obstructed or unreasonably delayed, or attempted to obstruct or unreasonably delay, discovery proceedings or any pending ED proceeding and

ii. The willful obstruction or unreasonable delay of the proceedings is or would be prejudicial to the interests of the opposing party. [G.S. 50-21(e).]

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

i. 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 attorney fee, and

ii. 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 ED proceeding to be timely conducted. [G.S. 50-21(e); *Liberatore v. Liberatore*, 230 N.C. App. 410, 753 S.E.2d 397 (2013) (**unpublished**) (appointment under G.S. 50-21(a) and (e) of an agent to oversee and monitor the accounts of defendant's podiatry practice upheld based on defendant's past dissipation of marital property and withdrawal of funds in excess of $25,000 from the practice's business accounts).]

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 (2005); *Crutchfield v. Crutchfield*, 132 N.C. App. 193, 511 S.E.2d 31 (1999).]

   i. 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).]

   ii. 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).]

   iii. 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).]

   iv. Trial court did not abuse its discretion when it awarded plaintiff attorney fees as a sanction for 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).]

   v. Plaintiff's failure to negotiate a settlement with defendant's counsel was not a basis for awarding attorney fees to defendant in an equitable distribution case. [*Eason v. Taylor*, 784 S.E.2d 200, 205 (N.C. Ct. App. 2016) ("Even if defendant made a generous offer, plaintiff was not obliged to accept it, nor would their negotiations, if they occurred, been a proper matter for the court to consider".]

e. Notice of sanctions required.

   i. 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).]

   ii. A party has a due process right to notice in advance of the hearing, both of the fact that sanctions may be imposed and of the alleged grounds for the imposition of sanctions. [*Zaliagiris v. Zaliagiris,* 164 N.C. App. 602, 596 S.E.2d 285 (2004) (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), *review on additional issues denied,* 359 N.C. 643, 617 S.E.2d 662 (2005). *See also Green v. Green*, 236 N.C. App. 526, 763 S.E.2d 540 (2014) (trial court erred in sanctioning defendant for failure to file inventory affidavit where plaintiff filed no motion requesting sanctions and where court never had ordered defendant to file the affidavits by a particular date).]

f. Notice sufficient.

   i. Where husband had notice of and submitted an argument against wife's request for sanctions more than 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 G.S. 50-21(e), set out the amount thereof, and stated that the 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.

   i. 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); *see also Green v. Green*, 236 N.C. App. 526, 763 S.E.2d 540 (2014) (trial court erred in sanctioning defendant for failure to file inventory affidavit where plaintiff filed no motion requesting sanctions and where court never had ordered defendant to file the affidavits by a particular date).]

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

   i. 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 (2005); *Megremis v. Megremis,* 179 N.C. App. 174, 633 S.E.2d 117 (2006) (citing *Zaliagiris*).]

   ii. 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).]

   iii. Statements by plaintiff's counsel,

      (a) At a hearing on motions by defendant and her counsel unrelated to the issue of sanctions against defendant, that defendant's conduct "amount[ed] to an effort to postpone" the trial, when plaintiff's counsel did not mention sanctions, the statute, or any operative language of the statute. [*Megremis v. Megremis,* 179 N.C. App. 174, 180, 633 S.E.2d 117, 122 (2006).]

      (b) During plaintiff's counsel's opening statement at trial that forecast evidence of defendant's conduct that plaintiff's counsel contended was "a willful obstruction and delay of the equitable distribution trial and which should subject [defendant] to sanctions," and that asked the trial court "to consider the delay and obstruction of [defendant] . . . under [G.S.] 50-21(e)," when there was no written motion for sanctions and no separate hearing on the issue of sanctions but the issue of sanctions was decided as part of the

larger ED trial. [*Megremis v. Megremis,* 179 N.C. App. 174, 180, 633 S.E.2d 117, 122 (2006).]

5. Temporary orders pursuant to G.S. 50-21(a).
   a. During the pendency of the ED action, discovery may proceed and the trial court shall enter temporary orders as appropriate and necessary for the purpose of preventing the disappearance, waste, or destruction of marital or separate property, or to secure the possession thereof. [G.S. 50-21(a). *See Liberatore v. Liberatore*, 230 N.C. App. 410, 753 S.E.2d 397 (2013) (**unpublished**) (appointment under G.S. 50-21(a) and (e) of an agent to oversee and monitor the accounts of defendant's podiatry practice upheld based on defendant's past dissipation of marital property and withdrawal of funds in excess of $25,000 from the practice's business accounts).]

# 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 meet the requirements of *McIntosh v. McIntosh,* 74 N.C. App. 554, 328 S.E.2d 600 (1985). The requirements in *McIntosh* are set out in Section V.B, below.
   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. [G.S. 1A-1, Rule 58.] For more on consent judgments, see Section III.N.4, above.
2. Stipulations are judicial admissions which, unless limited as to time or application, continue in full force for the duration of the controversy. [*Smith v. Smith*, 786 S.E.2d 12 (N.C. Ct. App. 2016); *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 (stipulation of value of real property at hearing before referee still in force when equitable distribution (ED) judgment entered two years later, despite defendant's argument that value had changed; defendant had not sought to set aside the stipulation and had not presented evidence to trial court as to the value of the property at the date of distribution), *review denied*, 338 N.C. 669, 453 S.E.2d 181 (1994).] For more on stipulations, see *Valuation*, Part 3 of this Chapter, Section III.A.
   a. In equitable distribution actions, "our courts favor *written stipulations* which are duly executed and acknowledged by the parties." [*Smith v. Smith*, 786 S.E.2d 12, 33 (N.C. Ct. App. 2016) (emphasis in original) (quoting *Fox v. Fox*, 114 N.C. App. 125, 132, 441 S.E.2d 613, 617 (1994)).] See Section V.A.6, below, for more discussion on preference for a written stipulation.
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).]
   b. 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); *Quesinberry v. Quesinberry,* 210 N.C. App. 578, 709 S.E.2d 367 (2011) (stipulation is a judicial admission recognized and enforced as a substitute for legal proof).]

i. 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 the 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).]

ii. When husband had stated in his inventory affidavit that his 401(k) account was marital property and put "none" under the affidavit section on separate property, trial court did not abuse its discretion when it awarded wife one-half of the account, even though wife had testified in earlier ED proceeding that she and her attorney had determined that she was entitled to a lesser percentage of the account. [*Helms v. Helms,* 191 N.C. App. 19, 661 S.E.2d 906 (wife's testimony at earlier proceeding was not binding, given husband's failure to meet burden of showing what portion of the account was separate property), *review denied,* 362 N.C. 681, 670 S.E.2d 233 (2008).]

iii. A party's failure to object to the other party's classification of debt as marital was deemed by local rule to be a stipulation that the party's listing was undisputed. [*Young v. Young*, 133 N.C. App. 332, 515 S.E.2d 478 (1999) (husband who failed to object to wife's classification of credit card debt as marital on local forms required by local discovery rules was deemed to have stipulated that debt was marital; trial court need not hear evidence either to prove or disprove issue).]

iv. Stipulation in a pretrial order that all assets on a lengthy itemized list were marital assets precluded husband from asserting for the first time on appeal that eleven of the listed assets were owned by marital corporation. [*Quesinberry v. Quesinberry,* 210 N.C. App. 578, 709 S.E.2d 367 (2011).]

v. Stipulation in a pretrial order that property acquired subsequent to 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 N.C. App. 707, 525 S.E.2d 820, *cert. denied,* 351 N.C. 641, 543 S.E.2d 870 (2000).]

vi. 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 of marital property, any of the distributional factors 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 husband credit for mortgage payments he made after separation or to consider payments as a distributional factor). *Cf. Stovall v. Stovall,* 205 N.C. App. 405, 409, 698 S.E.2d 680, 684 (2010) (filed after category of divisible property was created) (where parties stipulated in pretrial order that "an equal division would be equitable" but further stipulated that trial court was to decide which party should receive credit for post-separation payment of certain listed debts, which trial court considered contradictory, there was no abuse of discretion when trial court, by giving husband

credit for his postseparation mortgage payments of $160,000 on one of the listed debts, a warehouse, distributed the divisible property related to the warehouse unequally).]

vii. Trial court did not err in failing to classify and distribute divisible debt associated with the marital residence where parties stipulated that, upon the sale of the residence, all net proceeds would be shared equally by the parties, meaning that there was no divisible interest to be divided. [*Smith v. Smith*, 786 S.E.2d 12 (N.C. Ct. App. 2016).]

c. A trial judge is to follow a stipulation unless the trial judge sets it aside after giving the parties notice and an opportunity to be heard. [*Plomaritis v. Plomaritis*, 222 N.C. App. 94, 730 S.E.2d 784 (2012) (trial court erred when it set aside a pretrial order containing the parties' stipulations regarding many items of marital and divisible property, on its own motion and some eighteen months after the ED case had been tried in reliance upon the pretrial order, without giving the parties notice and an opportunity to be heard).]

d. A stipulation binding at trial is binding on appeal. [*Wall v. Wall,* 140 N.C. App. 303, 310–11, 536 S.E.2d 647, 652 (2000) (citing *Inman v. Inman*, 136 N.C. App. 707, 525 S.E.2d 820, *cert. denied,* 351 N.C. 641, 543 S.E.2d 870 (2000)) (parties are not free to enter into stipulations for trial purposes, "then abandon those agreements and chart a different course when they sail into appellate waters").]

4. Pretrial orders.

a. If a pretrial conference is held, the judge must 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 N.C. App. 707, 525 S.E.2d 820 (pretrial order, freely consented to by plaintiff while represented by counsel, set out the issues before the trial court; plaintiff could not take an inconsistent position on appeal), *cert. denied,* 351 N.C. 641, 543 S.E.2d 870 (2000); *Stovall v. Stovall,* 205 N.C. App. 405, 698 S.E.2d 680 (2010) (construing stipulations in pretrial orders in the same manner as a contract between the parties).]

b. 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 trial court was free to disregard the stipulation and to distribute the vehicles differently than the stipulation provided; the appellate court noted, however, that the better practice would have been for the trial judge to notify the parties of his intent to deviate from their stipulation, allowing the parties an opportunity to reevaluate and agree on a final award).] When the intent of the parties is clear, if the trial court deviates from the stipulation without setting out its rationale for doing so, the appellate court will presume the trial court made a mistake. [*See Schweizer v. Patterson,* 220 N.C. App. 416, 725 S.E.2d 474 (2012) (**unpublished**) (citing *Despathy*) (parties had stipulated in pretrial order that a vehicle was plaintiff's separate property but trial court classified

and treated it in distribution decision as marital property; while recognizing that a trial court may deviate from a stipulation if it provides a rationale for doing so, when rationale was lacking, mistake was assumed by appellate court and trial court's treatment of the vehicle was reversed).] See Section V.C, below, on setting aside a stipulation.

c. Where parties stipulated in a pretrial order that a refund resulting from a 2009 joint tax return was divisible property, the trial court erred in concluding that the tax refund was not marital or divisible property; on remand, the trial court was instructed to classify the refund in accordance with the stipulation. [*Zurosky v. Shaffer*, 236 N.C. App. 219, 763 S.E.2d 755 (2014).]

d. Stipulation in pretrial order, that the issue of whether certain property was separate or marital by virtue of a 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**) (not paginated on Westlaw) (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. Local rules can result in binding stipulations. [*See Young v. Young*, 133 N.C. App. 332, 515 S.E.2d 478 (1999) (husband who failed to object to wife's classification of credit card debt as marital on local forms required by local discovery rules was deemed to have stipulated that debt was marital; trial court need not hear evidence either to prove or disprove issue).]

f. Even though it denied a request to modify a pretrial order, one court has considered an alleged misclassification as a distributional factor. [*See White v. Davis,* 163 N.C. App. 21, 592 S.E.2d 265 (trial court, citing fairness considerations and acting in the spirit of *Inman v. Inman*, 136 N.C. App. 707, 525 S.E.2d 820, *cert. denied,* 351 N.C. 641, 543 S.E.2d 870 (2000), 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)), *review denied,* 358 N.C. 739, 603 S.E.2d 127 (2004).]

g. Trial court erred in failing to classify, value, and distribute 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).]

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).]

6. In ED actions, parties' agreement regarding distribution of their property should be in writing, duly executed, and acknowledged. [*McIntosh v. McIntosh,* 74 N.C. App. 554, 328

S.E.2d 600 (1985); *Quesinberry v. Quesinberry,* 210 N.C. App. 578, 709 S.E.2d 367 (2011) (citing *McIntosh*).]

a. North Carolina courts "favor *written stipulations* which are duly executed and acknowledged by the parties." [*Smith v. Smith*, 786 S.E.2d 12, 33 (N.C. Ct. App. 2016) (emphasis in original) (quoting *Fox v. Fox*, 114 N.C. App. 125, 132, 441 S.E.2d 613, 617 (1994)); *Heath v. Heath*, 132 N.C. App. 36, 509 S.E.2d 804 (1999); *Fox*. *See also Robinson v. Robinson,* 210 N.C. App. 319, 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 were competent evidence to support classification of property as a mixed asset).]

c. An evidentiary stipulation that did not "directly deal with the actual distribution of marital property" of the parties, made during trial, was not subject to the requirements in *McIntosh v. McIntosh,* 74 N.C. App. 554, 328 S.E.2d 600 (1985), and was binding even though not in writing. [*Lane v. Lane*, 218 N.C. App. 455, 721 S.E.2d 762 (**unpublished**) (at trial conference with judge and attorneys, parties orally stipulated that testimony from each spouse as to the fair market value of a tract of land would be considered as both date of separation and date of trial values; appellate court distinguished an evidentiary stipulation during trial from an agreement to distribute property governed by G.S. 50-20(d), which requires a writing), *review denied*, 366 N.C. 234, 731 S.E.2d 154 (2012).]

## 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); *Quesinberry v. Quesinberry,* 210 N.C. App. 578, 709 S.E.2d 367 (2011) (citing *McIntosh*).] 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 stipulations of their own free will. [*McIntosh v. McIntosh,* 74 N.C. App. 554, 328 S.E.2d 600 (1985). *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 trial court read stipulated terms to parties and that parties understood effects of their agreement).]

2. Some decisions have not construed *McIntosh v. McIntosh,* 74 N.C. App. 554, 328 S.E.2d 600 (1985), 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 v. McIntosh,* 74 N.C. App. 554, 328 S.E.2d 600 (1985), has been 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 was 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 v. McIntosh,* 74 N.C. App. 554, 328 S.E.2d 600 (1985), does not require the trial judge to read terms to the parties in open court under these circumstances).]
3. 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 in equitable distribution (ED) case 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) (citing *Fox v. Fox*, 114 N.C. App. 125, 441 S.E.2d 613 (1994)) (where close review of the transcript reflected no written stipulation as to the division of certain retirement accounts and no oral stipulation meeting the requirements to be binding, 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). *See also Robinson v. Robinson,* 210 N.C. App. 319, 707 S.E.2d 785 (2011) (citing *McIntosh v. McIntosh,* 74 N.C. App. 554, 328 S.E.2d 600 (1985)) (finding based on oral representation of wife's counsel that the parties had agreed that each should keep the household furniture and vehicles in his/her possession and had agreed to divide their three checking accounts was not supported by the evidence when there was no stipulation in the record on appeal and the trial court made no inquiry of the parties as to their understanding; it was noted earlier in the opinion that neither husband nor his counsel were present at the ED trial, but that fact was not mentioned in the review of this challenge to the ED order).]

## 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. 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 opposing party. [*Sharp v. Sharp*, 116 N.C. App. 513, 449 S.E.2d 39 (citing *Moore v. Richard West Farms, Inc.,* 113 N.C. App. 137, 437 S.E.2d 529 (1993)), *review denied*, 338 N.C. 669, 453 S.E.2d 181 (1994).]

2. A trial court erred when it set aside a pretrial order, containing the parties' stipulations regarding many items of marital and divisible property, on its own motion and some eighteen months after the equitable distribution (ED) case had been tried in reliance upon the pretrial order, without giving the parties notice and an opportunity to be heard. [*Plomaritis v. Plomaritis*, 222 N.C. App. 94, 105, 730 S.E.2d 784, 791 (2012) (trial judge set aside the pretrial order some eighteen months after trial of ED issues and before entry of an ED judgment, based on judge's determination that "strictly following the Pretrial Order distributions will require Defendant to pay a distributive award far in excess of his ability to do so" and because implementation would require parties to agree on certain issues and parties had demonstrated an "inability to agree on major issues").]

## VI. Agreements in Bar of Equitable Distribution (ED)

### A. Parties May Provide for the Distribution of Marital and/or Divisible Property by Written Agreement Executed Before, During, or After Marriage [G.S. 50-20(d).]

1. An agreement to distribute marital or divisible property must be duly executed and acknowledged in accordance with G.S. 52-10 and 52-10.1 or be valid in the jurisdiction where executed. [G.S. 50-20(d). *See Prevatte v. Prevatte,* 104 N.C. App. 777, 411 S.E.2d 386 (1991) (antenuptial agreement executed in Virginia operated as a bar to wife's claim for ED); *cf. Atassi v. Atassi*, 117 N.C. App. 506, 451 S.E.2d 371 (Syrian marriage contract not sufficient to bar wife's right to ED because agreement did not comply with the Uniform Premarital Agreement Act), *review denied,* 340 N.C. 109, 456 S.E.2d 310 (1995).]
   a. G.S. 52-10. This statute validates contracts between husbands and wives that are not inconsistent with public policy. It allows married persons, or persons of "full age" about to be married, to agree to release all property rights arising from the marriage, with or without consideration. Contracts affecting real estate, or income therefrom for more than three years, made during the marriage must be in writing and acknowledged by both parties before a certifying officer.
   b. G.S. 52-10.1. This statute authorizes the execution of a separation agreement by married persons that is not inconsistent with public policy, provided that the agreement is in writing and acknowledged by both parties before a certifying officer.
   c. Agreements not acknowledged in accordance with the provisions of G.S. 52-10 and -10.1 are not binding upon the court. [*McLean v. McLean*, 88 N.C. App. 285, 363 S.E.2d 95 (1987) (trial court did not err in distributing property in a manner different than provided in a handwritten memorandum signed by the parties where the agreement was not acknowledged in front of a certifying officer), *aff'd,* 323 N.C. 543, 374 S.E.2d 376 (1988). *But cf. Moore v. Moore*, 108 N.C. App. 656, 424 S.E.2d 673 (party estopped from asserting invalidity of notarization of a separation agreement where party treated the agreement as valid for more than two years and enjoyed the benefits of the agreement), *aff'd per curiam*, 334 N.C. 684, 435 S.E.2d 71 (1993).]
   d. A conveyance is not an agreement between the parties to distribute real property. [*Beroth v. Beroth,* 87 N.C. App. 93, 359 S.E.2d 512 (quitclaim deed conveying wife's

interest in entirety property to husband before separation did not remove property from equitable distribution), *review denied*, 321 N.C. 296, 362 S.E.2d 778 (1987), *disapproved of on other grounds by Armstrong v. Armstrong*, 322 N.C. 396, 368 S.E.2d 595 (1988).]

2. Agreement can be executed at any time before, during, or after marriage.
   a. Property settlements may be executed at any time before, during, or after marriage. [G.S. 50-20(d); *Stegall v. Stegall*, 100 N.C. App. 398, 397 S.E.2d 306 (1990), *review denied,* 328 N.C. 274, 400 S.E.2d 461 (1991).]
   b. However, "pure" separation agreements are void as against public policy unless the parties are living apart at the time of execution or they plan to separate shortly thereafter. [*Stegall v. Stegall,* 100 N.C. App. 398, 397 S.E.2d 306 (1990), *review denied,* 328 N.C. 274, 400 S.E.2d 461 (1991).] See *Spousal Agreements,* Bench Book, Vol. 1, Chapter 1 for distinction between property settlements and "pure" separation agreements.
   c. Premarital agreements executed on or after July 1, 1987, must comply with the Uniform Premarital Agreement Act, G.S. 52B-1 *et seq*. [*Huntley v. Huntley*, 140 N.C. App. 749, 538 S.E.2d 239 (2000); *Atassi v. Atassi,* 117 N.C. App. 506, 451 S.E.2d 371, *review denied,* 340 N.C. 109, 456 S.E.2d 310 (1995). *See Howell v. Landry*, 96 N.C. App. 516, 386 S.E.2d 610 (1989) (holding that the Uniform Premarital Agreement Act does not require acknowledgment of premarital agreements), *review denied*, 326 N.C. 482, 392 S.E.2d 90 (1990).]
3. Agreements must be in writing.
   a. Oral agreements concerning the distribution of property are not binding on the parties. [*Wiencek-Adams v. Adams*, 331 N.C. 688, 417 S.E.2d 449 (1992); *Holder v. Holder,* 87 N.C. App. 578, 361 S.E.2d 891 (1987); *Weaver v. Weaver*, 72 N.C. App. 409, 324 S.E.2d 915 (1985), *disapproved of on other grounds by Armstrong v. Armstrong*, 322 N.C. 396, 368 S.E.2d 595 (1988). But see Section V, above, on stipulations for discussion of *McIntosh v. McIntosh*, 74 N.C. App. 554, 328 S.E.2d 600 (1985) (oral stipulations during court hearing may be binding if court makes proper inquiries before accepting agreement).]
   b. Written agreements must be signed by both parties. [*Collar v. Collar*, 86 N.C. App. 105, 356 S.E.2d 407 (1987) (refusal of defendant to sign agreement that had been properly acknowledged prevented the agreement from being "duly executed" as required by G.S. 50-20(d)).]
4. See *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1 for discussion of the choice of law governing the interpretation and enforceability of agreements, the effect of reconciliation of the parties, and grounds for rescission of agreements.

## B. Terms of the Agreement Will Control the Distribution of Property

1. Agreement controls property distribution. [*See, e.g., Torres v. McClain,* 140 N.C. App. 238, 535 S.E.2d 623 (2000) (trial court properly divided military benefits in accordance with terms of written agreement between the parties); *Stewart v. Stewart,* 141 N.C. App. 236, 541 S.E.2d 209 (2000) (court properly applied definition of separate property contained in agreement); *Franzen v. Franzen*, 135 N.C. App. 369, 520 S.E.2d 74 (1999) (court bound by definitions of marital and separate property contained in the agreement).]