

DISTRIBUTION¹

A. Philosophy

Marriage is an economic partnership. Each spouse should receive a return based on his or her contributions to the marriage and his or her economic status.

Smith v Smith
111 NC App 460, 433 SE2D 196 (1993)

“An equal division is made mandatory unless the court determines that an equal division is not equitable.” G.S. 50-20(c).

White v White
312 NC 770 (1985)

Smith v Smith
111 NC App 460,
433 SE2d 196, 220 (1993)

It is not sufficient for a trial court to conclude that “an unequal distribution is equitable.” Rather, the judgment must state that the trial court concluded that “an equal distribution is not equitable” to show trial court gave adequate weight to the presumption in favor of an equal division.

Lucas v. Lucas
706 SE2d 270 (N.C. App. 2011)

Carpenter v. Carpenter
781 SE2d 828 (NC App 2016)

When making an unequal award, the better practice is for the judgment to set out the specific percentage each spouse is to receive but failure to do so is not reversible error if amount distributed to each party is otherwise ascertainable from the judgment.

Barlowe v. Barlowe
113 NC App 797 (1994)

¹ Original manuscript written by Judge L. Stanley Brown (retired) and Chief District Court Judge Beth Keever in 2003. Updated by Cheryl Howell, April 2017.

B. Burden of Proof

“A party desiring an unequal division of marital property bears the burden of producing evidence concerning one or more of the twelve factors in the statute and the burden of proving by a preponderance of the evidence that an equal division would not be equitable.”

White v White
312 NC 770 (1985)

Brackney v. Brackney
199 NC App 375 (2009)

Although the issue has not been addressed directly, there appears to be no requirement that a party request an unequal division in a pleading before the court can consider an unequal distribution. A number of reported cases hold that the trial court must consider all factors established by the evidence, see cases listed in section C. below, but none of these cases indicate there is no such requirement if neither party has expressly pled a request for an unequal distribution.

C. Weight of Factors

“Court must exercise its discretion in assigning the weight each factor should receive in any given case”

White v White
312 NC 770 (1985)

“A finding that a single factor supported an unequal distribution.....would be within the court’s discretion”

Andrews v Andrews
79 NC App 228(1986)

Godley v Godley
110 NC App 99, 429 SE2d 382 (1993)

Surette v Surette
114 NC App 268, 442 SE2d 123 (1994)

Finkle v. Finkle
162 NC App 344 (2004)

Edwards v. Edwards
152 NC App 185 (2002)

Shope v. Pennington, *unpublished*, 791 S.E.2d 664(2016)(99% of estate to one party upheld as an appropriate exercise of discretion).

The trial court has discretion to divide an estate equally despite the presence of distribution factors.

Freeman v. Freeman
107 NCAApp 644 (1992)

“It is not required that the trial court make findings revealing the exact weight assigned to any given factor”

Daetwyler v Daetwyler
130 NC App 246 (1998)

Fox v Fox
114 NC App 125, 441 SE2d 613 (1994)

“The trial court could choose to give no weight to a distributional factor”

Wall v Wall
140 NC App 303 (2000)

Smith v. Smith
111 NC App 460 (1993)

“There is no language within [GS 50-20(c)] which would indicate that the trial court is required to place a monetary value on any distributional factor”

Gum v Gum
107 NC App 734 (1992)

Conway v. Conway
131 NC App 609 (1998)

Peltzer v. Peltzer
732 SE2d 357 (NC App 2012)

D. Appellate Review

“It is well established that, where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion”

White v White
312 NC 770 (1985)

Munn v. Munn
112 App 15, 435 SE2d 74 (1993)

Decision that equal is not equitable will not be disturbed unless appellate court determines that the division resulted in an obvious miscarriage of justice.

Troutman v. Troutman
193 NC App 395 (1998)

The trial court's division of specific assets and debts will not be disturbed on appeal unless the division is shown to be manifestly unsupported by reason.

Khajanchi v. Khajanchi
140 NC App 552 (2000)

If a case is remanded after an appeal and a new distribution is required, the trial court should consider new evidence as to any distribution factor if "the existence, non-existence, or quantum thereof is likely to have changed by the time of the new hearing."

Fox v. Fox
114 NC App 125 (1994)

Wall v. Wall
140 NC App 303 (2000)

E. Findings of Fact

In any order for the distribution of property made pursuant to this section, the court shall make written findings of fact that support the determination that marital property and divisible property has been equitably divided. GS 50-20(j)

"Written findings of fact are required in every case in which a distribution of marital property is ordered under the Equitable Distribution Act. We expressly disapprove cases which have held that a trial court need not make findings of fact when marital property is equally divided"

Armstrong v Armstrong
322 NC 396 (1988)

Wade v Wade
72 NC App 372, 376,
325 SE2d 260 (1985)

“If there is evidence concerning a certain factor, there should be a finding of fact relating to that factor,” even if the court decides an equal distribution is equitable

Little v Little
74 NC App 12, 327 SE2d 283 (1985)

Alexander v Alexander
68 NC App 548, 315 SE2d 772 (1984)

Smith v Smith
71 NC App 242 (1984)

Greer v Greer
84 NC App 471, 353, SE2d 427 (1987)

Taylor v Taylor
92 NC App 413, 374 SE2d 644 (1988)

Fox v Fox
103 NC App 13, 404 SE2d 354 (1991)

Haywood v Haywood
106 NC App 91, 95, 418 SE2d 269
(1992)

Freeman v Freeman
107 NC App 644, 421 SE2d 623 (1992)

Surette v Surette
114 NC App 368, 442 SE2d 123 (1994)

Burnett v Burnett
122 NC App 712, 471 SE2d 649 (1996)

Collins v. Collins
479 SE2d 240 (1997)

Plummer v. Plummer
198 NC App 538 (2009)

Warren v. Warren
175 NC App 509 (2006)

“However, 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 NCGS 50-20(c)”

Miller v Miller
97 NC App 77 (1990)

Workman v Workman
106 NC App 562, 418 SE2d 269 (1992)

Trial court has authority to set aside stipulations when justice requires, upon motion of either party or upon court's own motion, but only after parties are given notice and an opportunity to be heard.

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

“Even if the trial court did not find defendant’s testimony to be credible, the court still should have made findings of fact to indicate that the court had considered the testimony but rejected it or gave it a little weight.”

Wall v Wall
140 NC App 303(2000)

General findings about distribution factors are not sufficient for appellate review and case will be remanded for more detail. Judgment should identify the factor and the evidence relating to it. For example, trial court’s finding that “due regard” was given to contentions of the parties in statutory distributional factors was inadequate as a finding of fact regarding evidence introduced on the relative health and incomes of each spouse and that finding of fact therefore could not be the basis for an unequal distribution of marital property.

Collins v. Collins
125 NC App 113 (1997)

Embler v. Embler
159 NC App 186 (2003)

Mrozek v. Mrozek
129 NC App 43 (1998)

Plummer v. Plummer
198 NC App 538 (2009)

F. Factors

For a listing of cases decided with regard to each factor listed in GS 50-20(c), see District Court Bench Book, Volume 1, Family Law, p. 6-162 through 6-180.

Factors **not** to be considered include:

1. Marital misconduct, unless it is financial misconduct or waste adversely affecting the value of marital property occurring substantially contemporaneously with separation. So, for example, trial court cannot consider domestic violence or abandonment but can consider any financial impact of either on assets or debts in the marital estate on the date of separation.

Fountain v. Fountain
148 NC App 329 (2002)

Conway v. Conway
131 NC App 609 (1998)

Hinton v. Hinton
70 NC App 665 (1984)

Troutman v. Troutman
193 NC App 395 (2008)

Coleman v. Coleman
89 NC App 107 (1988)

2. Litigation misconduct, unless it causes additional expense for other party.

Wade v. Wade
72 NC App 372 ((1985)

Shoffner v. Shoffner
91 NC App 399 (1988)

Albritton v. Albritton
109 NC App 36 (1993)

3. Custody of children alone when not being considered with regard to distribution of marital residence. GS 50-20(c)(4) allow consideration of the need of a custodial parent to occupy the marital residence but this factor does not allow the court to consider custody in general.

Gum v. Gum
107 NC App 734 (1992)

Pott v. Pott
126 NC App 285 (1997)

Godley v. Godley
110 NC App 99 (1993)

4. Payment or nonpayment of child support or alimony cannot be considered. GS 50-20(f). The statute specifies that the court may reconsider an existing order for alimony or child support after an equitable distribution judgment is entered, if requested to do so by either party.

Weincek-Adams v. Adams
331 NC 688 (1992)

Smith v. Smith
71 NC App 242 (1984)

Bowman v. Bowman
96 NC App 253 (1989)

5. Hypothetical tax consequences. Appellate courts have consistently held that the trial court cannot consider tax consequences unless the tax consequences will result from the distribution the court actually orders. This appears to be true even though GS 50-20(c)(11) was amended in 2005 to state that the court “should consider the tax consequences to each party, including federal and state consequences that would have been incurred if the marital and divisible property had been sold or liquidated on the date of separation.” The court cannot consider tax consequences under any circumstances if no evidence of the actual consequence is produced.

Pellom v. Pellom
194 NC App 57 (2009)

Cochran v. Cochran
198 NC App 224 (2010)

Plummer v. Plummer
198 App 538 (2009)

Dolan v. Dolan
148 NC App 256 (2002)

“As for the evidence that [wife] would not be taxed on any gain received upon a sale of the marital home, since there is no evidence that such a sale would be necessary or is imminent, the evidence presents merely a speculative tax consequence as to which the court *may not* make a finding of fact.” (emphasis in opinion)

Cochran v. Cochran
198 NC App 224 (2010)

Trial court was not required to consider evidence offered about tax consequences husband would incur if he sold his interest in business where trial court made findings of fact that such a sale was unlikely to occur. Court of appeals notes that present version of GS 50-20(c)(11) gives trial court the *discretion* not to consider tax consequences if court determines the consequences are not likely to be incurred.

Peltzer v. Peltzer
732 SE2d 357 (2012)

Postseparation Factors. GS 50-20c (11a) and (12)

1. Change in value of marital property. Before October 1, 1997, all postseparation increases and decreases in the value of marital property were distribution factors. Following the creation of divisible property in 1997, postseparation changes in value are presumed to be divisible property. G.S. 50-20(b)(4)(1); Wirth v. Wirth, 193 NC App 657 (2008). However, if shown to be the result of the postseparation actions of one spouse, the changes will not be divisible property and will remain a distribution factor.

Allen v. Allen
168 NC App 368 (2005)

Larkin v. Larkin
165 NC App 390 (2005)

Where postseparation decrease in value of marital home was caused by failure of *both* spouses to maintain the home, the decrease was divisible property rather than a distribution factor.

Robertson v. Robertson
167 NC App 567 (2004)

2. Income earned from marital property during separation. Before the creation of divisible property in 1997, income earned from marital property during separation was a distribution factor only; the trial court could not distribute the income because it is not marital property. See Leighow v. Leighow, 120 NC App 619 (1995). After 1997, GS 50-20(b)(4)(c) provides that “passive” income from marital property received during separation is divisible property. So, for example, interest and dividends earned without effort on the part of a spouse will be divisible property rather than a distribution factor. Income earned through efforts of one party will remain a distribution factor.

3. Exclusive use of marital property by one spouse should be considered as a distribution factor but court may not award “fair rental value” of marital property to the other spouse.

Black v. Black
94 NC App 220 (1988)

Wilkins v. Wilkins
111 NC App 541 (1993)
(marital home)

Bodie v. Bodie
727 SE2d 11 (NC App 2012)

Walter v. Walter
149 NC App 723 (2002)
(marital home)

Davis v. Sineath (Davis)
129 NC App 353 (1998)

Edwards v. Edwards
110 NC App 1 (1993)
(use of rental house)

Plummer v. Plummer
198 NC App 538 (2009)
(use of retirement funds)

4. Decreases in marital debt caused by postseparation payments made by either party between October 11, 2002 and September 30, 2013 are classified as divisible property and are not considered as a distribution factor. *But see* allocation of divisible debt discussed in section G. below.
5. However, postseparation payments made during that time period to maintain the marital estate or to assist the other spouse that do not meet the definition of divisible debt may be considered as a distribution factor.

Peltzer v. Peltzer
732 SE2d 357 (2012)
(payment of other party’s
education expenses)

Jones v. Jones
unpublished
193 NC App 610 (2008)
(homeowners' insurance and
property taxes on marital
home)

6. No postseparation payment of marital debt made after October 1, 2013 will be classified as divisible debt, see S.L. 2013-103 (amending G.S. 50-20(b)(4)(d) to limit the definition of divisible debt to only *passive* decreases in marital debt). Therefore, the trial court now has discretion to either “credit” a spouse in distribution for making payments on marital debt during separation or consider the payments as a distribution factor. *See Smith v. Smith*, 111 N.C. App. 460, 510 (1993). For more thorough discussion of the consideration of postseparation payment of marital debt after the 2013 amendment to the definition of divisible property, *see Equitable Distribution Update: Tenancy by the Entirety, Postseparation Payment of Debt, and Defined Contribution Retirement Accounts*, Family Law Bulletin #26, February 2014, School of Government, UNC Chapel Hill.

G. Allocation of Specific Property and Debt

Once property and debt has been classified and valued and the court has decided in what proportions its value should be divided, there is no guidance other than the discretion and good conscience of the judge in determining which party receives which specific property or debt.

Khajamchi v. Khajanchi
140 NC App 552 (2000)

The trial court can distribute all assets to one spouse and all debt to the other.

Conway v. Conway
131 NC App 609 (1998)

Similarly, the judgment can classify and value all property separate and apart from the debt.

Hay v. Hay
148 NC App 649 (2002)

The allocation of divisible debt between the parties is within the discretion of the court. There is no requirement that the paying party receive ‘dollar-for-dollar credit’ for

postseparation payment of marital debt, although trial court can do so if the trial court determines it is appropriate to do so.

McNeely v. McNeely
195 NC App 705 (2009)

Plummer v. Plummer
198 NC App 538 (2009)

Jones v. Jones
Unpublished
193 NC App 610 (2009)

Bodie v. Bodie
727 SE2d 11 (NC App 2012)

Giving ‘credit’ for postseparation payments generally is the way divisible debt is distributed between the parties.

Stovall v. Stovall
205 NC App 405 (2010)

H. Manner of Distribution

1. In Kind

Since 1997, GS 50-20(e) has provided that, “subject to the presumption of subsection (c) of this section that an equal division is equitable, it shall be presumed in every action that an in-kind distribution of marital or divisible property is equitable. This presumption may be rebutted by the greater weight of the evidence, or by evidence that the property is a closely held business entity or is otherwise not susceptible of division in-kind distribution. In any action in which the presumption is rebutted, the court in lieu of an in-kind division shall provide for a distributive award in order to achieve equity between the parties. The court may provide for a distributive award to facilitate, effectuate or supplement a distribution of marital or divisible property.” GS 50-20(e)

Trial court has authority to order marital property sold and the proceeds divided between the parties as long as the court classifies and values the property as of the date of separation.

Wall v Wall
140 NC App 303 (2000)

Troutman v. Troutman
193 NC App 395 (2008)

Rather than ordering a sale, the court also can divide real property between the parties in-kind, even when evidence shows the land is more valuable as one tract than as two separate tracts.

Edwards v. Edwards
152 NC App 185 (2002)

Troutman v. Troutman
193 NC App 395

Copeland v. Copeland
Unpublished
NC App (Dec. 18, 2012)

One unpublished opinion has held that the trial court can divide a tract of real property even when evidence shows that one spouse has ability to ‘buy-out’ the interest in the land in order to keep the tract intact. Court of appeals held that no existing case law requires that court find neither party has ability to ‘buy-out’ in order to support a judgment dividing a tract of land.

Copeland v. Copeland
Unpublished
NC App (Dec. 18, 2012)

If the court orders the transfer of real or personal property or an interest therein, the court may also enter an order which shall transfer title as provided in NCGS 1A-1, Rule 70 and NCGS 1-228. GS 50-20(g).

Dabbondanza v. Hansley, _N.C. App._,
S.E.2d (August 16, 2016).

“It is essential to a transfer of land that the land be described with sufficient definitiveness and certainty to be located and distinguished from other land.”

Wade v Wade
72 NC App 372 (1985)

An ED judgment is not effective to transfer title, even if it contains an appropriate legal description, unless it is filed with the Register of Deeds.

Dabbondanza v. Hansley, _N.C.
App._, _S.E.2d_ (August 16, 2016).

“if it is necessary in order to achieve an equitable distribution of the marital property that the court award that part of the asset which is separate in character.....the court

has it within its power in equity to do so to the extent necessary so long as plaintiff is reimbursed or given credit for the value of his separate property contribution”

Wade v Wade
72 NC App 372 (1985)

2. Distributive Awards

“Distributive Award” means payments that are payable either in lump sum or over a period of time in fixed amounts, but shall not include alimony payments or other similar payments for support and maintenance which are treated as ordinary income to the recipient under the Internal Revenue Code. GS 50-20(b)(3)

A distributive award is allowed only after trial court concludes presumption in favor of an in-kind division has been rebutted. “This presumption may be rebutted by the greater weight of the evidence, or by evidence that the property is a closely held business entity or is otherwise not susceptible of division in-kind distribution shall provide for a distributive award in order to achieve equity between the parties. The court may provide for a distributive award to facilitate, effectuate or supplement a distribution of marital or divisible property. The court may provide that any distributive award payable over a period of time be secured by a lien on specific property.” GS 50-20(e)

Judgment must contain specific conclusion that the presumption has been rebutted and must contain findings of fact supporting that conclusion.

Urciolo v. Urciolo
166 NC App 504 (2004)

Allen v. Allen
168 NC App 368 (2005)

Wirth v. Wirth
193 NC App 657 (2008)
(in-kind impractical)

“GS 50 – 20 (e) directs the court to make a distributive award “in order to achieve equity between the parties’ in those cases where a distribution in kind would be impractical, and otherwise permits a distributive award in order “to facilitate, effectuate, or supplement a distribution of marital property”

Harris v Harris
84 NC App 353 (1987)

Warren v. Warren
175 NC App 509 (2006)

Pellom v. Pellom
194 NC App 57 (2009)

When there are no obvious liquid assets, the trial court must identify assets from which a distributive award would be made and if none, the court must identify the means by which the party will pay the distributive award and adjust the ED award to offset any adverse financial consequences of using nonliquid assets.

Embler v. Embler
159 NC App 186 (2003)

Robertson v. Robertson
167 NC App 567 (2004)

Williams v. Williams
Unpublished
NC App (July 2011)

The ability to refinance a mortgage attached to real property is a liquid asset for the purpose of determining whether spouse has assets from which to pay a distributive award, as is a spouse's monthly income.

Peltzer v. Peltzer
732 NC App 357 (2012)

“It is within the trial court's sound discretion to determine whether the distributive award is to be made payable as a lump sum or over a fixed period of time.”

Atkins v Atkins
102 NC App 199 (1991)

Chafin v. Chafin
791 SE2d 693 (NC App 2016)

“we interpret the language of GS 50 – 20 (b)(3) as authorizing the court to make distributive awards for periods of “not more than six years after the date on which the marriage ceases”, except upon a showing by the payor spouse that legal or business impediments, or some overriding social policy, prevent completion of the distribution within the six-year period.....Awards for periods longer than six years, if necessary, should be crafted to assure completion of payment as promptly as possible”

Lawing v Lawing
81 NC App 159 (1986)

Harris v. Harris

84 NC App 353 (1987)

Smith v Smith
111 NC App 460, (1993)

The reason for this time limitation is that transfers that occur more than 6 years after the date of divorce will be treated as ordinary income for income tax purposes unless these findings are made.

26 C.F.R. sec. 1.1041-IT

6 years is from date of divorce and not the date of separation or ED judgment

Smith v Smith
111 NC App 460,
433 SE2d 196, 220 (1993)

Award must be crafted to assure completion of payment as promptly as possible.

Smith v Smith
111 NC App 460,
433 SE2d 196, 220 (1993)

Becker v. Becker
127NC App 409 (1997)

“The decision of whether to order the payment of interest on a distributive award is one that lies within the discretion of the trial judge”

Mrozek v Mrozek
129 NC App 43 (1998)

Cooper v Cooper
143 NC App 322, 545 SE2d 775 (2001)

Ice v. Ice
136 NC App 787 (2000)

Court can award only postjudgment interest on a distributive award and interest will run from the date the judgment is entered.

Appelbe v. Appelbe
76 NC App 391 (1985)

Loye v. Loye
93 NC App 328 (1989)

Ice v. Ice
136 NC App 787 (2000)

Distributive award is enforceable through execution as any other money judgment. However, if award is payable over time, only that part of award presently due and payable is subject to execution at any given point in time.

Romulus v. Romulus
715 SE2d 889 (NC App 2011)

3. Domestic Relations Order (DRO)

For detailed discussion regarding distribution of pension and retirement benefits, see Family Law volume of District Court Bench Book, beginning on page 6-210.

A DRO is an order requiring the administrator of a pension or retirement plan to divide a retirement account as provided by the ED judgment and to pay the appropriate portion directly to the non-employee spouse. An order effectuating the fixed percentage method of distribution of the marital portion of the retirement account, a method also referred to as ‘deferred distribution.’ Only ERISA-qualified plans (which include most private, nongovernmental plans) must meet the definition of a Qualified Domestic Relation Order (QDRO) found in 29 USC sec. 206(d)(3).

Patterson v. Patterson
137 NC App 653 (2000)
(NC state retirement)

A QDRO cannot order a plan administrator to do anything not authorized by the plan.

29 USC sec. 1056(d)(3)(D)

A DRO and QDRO can include provisions requiring the distribution of pre-retirement survivor benefits and post-retirement joint and survivor benefits if such benefits are available pursuant to the retirement plan.

Workman v. Workman
106 NC App 562 (1992)

Stock options. While the court of appeals stated in *Fountain v. Fountain*, 148 NC App 329 (2002) that stock options should be classified and distributed as are pensions, subject to the provisions and limitations of GS 50-20.1, the supreme court specifically rejected the suggestion in *Fountain* that all forms of compensation the receipt of which is deferred to a time in the future is subject to GS 50-20.1.

Ubertaino v. Ubertaino
359 NC 175 (2004), adopting dissent by
Levinson in 161 NC App 352 (2004)

Issue: Can trial court enter a QDRO or other order dividing a retirement or deferred compensation plan when no action for equitable distribution has been filed?

A “domestic relations order” is defined by federal law as “any judgment, decree, or order (including approval of a property settlement agreement) which relates to the provision of child support, alimony payments, or marital property rights of a spouse, former spouse, child, or other dependent of a participant, and is made *pursuant to a State domestic relations law*”. 29 USC sec. 1056(d)(3)(B)(ii). This seems to say the order must be entered pursuant to authority granted to the trial court by a state ‘domestic relations law.’ NC domestic relations law recognizes a trial court’s authority to enter an order on a properly pled ED claim (generally means one filed before entry of absolute divorce) and NC law allows incorporation of or enforcement of a separation or property settlement agreement, even when no ED claim has been filed. In *Gilmore v. Garner*, 157 NC App 664 (2003), the court of appeals affirmed the trial court’s entry of a QDRO as a form of specific performance ordered in breach of separation agreement claim, rejecting former husband’s claim that the remedy amounted to an equitable distribution, the right to which had been waived by the parties in the agreement.

It seems clear, therefore, that a trial court has jurisdiction to enter a QDRO or other order dividing a retirement account when a party has filed an action pursuant to the equitable distribution statute (claim for ED can be limited in scope to just entry of the order dividing the pension) or when the party has filed an action seeking to incorporate or enforce a contract between the parties. However, a trial court does not have jurisdiction to enter an order pursuant to the equitable distribution statute unless that claim is filed before entry of absolute divorce. The contract action is not so limited and can be filed either before or after absolute divorce. While most agreements are incorporated into a judgment of absolute divorce, there is no case law indicating incorporation is limited to divorce actions or indicating that the ability to ask the court to incorporate an agreement is affected by the entry of divorce.

Some attorneys however, have established the practice of filing a motion in the cause for entry of a QDRO in an action where the original complaint stated a claim for absolute

divorce only and the final judgment of divorce has been entered. This practice is problematic because it is not clear that such a motion in the cause is sufficient to give the trial court jurisdiction to enter the order. First, there is no statute or rule of procedure authorizing the filing either a claim for ED or a claim for enforcement/incorporation of a separation agreement or property settlement in a case following the final adjudication of all claims raised by the pleadings. See *Whitworth v. Whitworth*, 731 SE2d 707 (2012)(trial court has no subject matter jurisdiction to enter any orders in a case following the final disposition of all pending claims except orders that are necessary to correct or enforce the judgment. In that case, trial court had no subject matter jurisdiction to grant a motion to intervene after entry of the final ED judgment). Second, these motions in the cause generally do not attempt to state a claim “pursuant to a state domestic relations law”. Rather, the motions generally simply state that the parties consent to entry of an order dividing the retirement account. It is unclear what cause of action would support this remedy if not ED or contract.

I. Interim Distribution

G.S. 50-20(i1) states “Unless good cause is shown that there should not be an interim distribution, the court may, at any time after an action for equitable distribution is filed and prior to the final judgment of equitable distribution, enter orders declaring what is separate property and also may enter orders dividing part of the marital property, divisible property or debt, or marital debt, between the parties. The partial distribution may provide for a distributive award and may also provide for a distribution of marital property, marital debt, divisible property, or divisible debt. Any such orders entered shall be taken into consideration at trial and proper credit given.”

Interim ED orders are by nature preliminary to entry of a final ED judgment and thus are interlocutory.

Wirth v. Wirth
193 NC App 657 (2008)

A consent order making an interim distribution of marital property, specifically providing that the distribution was ‘final’ for purposes of ED and providing a value agreed by the parties to be used for purposes of the final ED order, precluded the trial court from valuing the property or considering any change in value in the property after the interim distribution order was entered.

Wirth v. Wirth
193 NC App 657 (2008)

However, an interim order stating that it was being made “subject to defendant’s rights to an equitable distribution of property, both as marital and divisible property” and further that “defendant’s rights and claims to such property are preserved until an equitable distribution of marital and divisible property” preserved defendant’s claim for equitable distribution of that particular property.

Brackney v. Brackney
199NC App 375 (2009)

ATTACHMENT A
SALE OF REAL PROPERTY

Issues to consider when ordering the sale of real property:

1. How shall the real estate agent be selected? If necessary, how should subsequent agents be selected?
2. Should a commissioner or commissioners be appointed to effectuate the sale and should the attorneys in the case serve?
3. Is there concern as to the condition of the property now and should an evaluation be made to ensure that any subsequent damage is charged to the appropriate party?
4. How shall repairs or other necessary expenses of sale be paid?
5. Who will be responsible for mortgage, tax and insurance payments pending sale? Will those be reimbursed wholly or partially from sale proceeds?
6. How will sale price be determined?
7. How will proceeds be divided? Be sure to indicate if net or gross proceeds are to be divided. If sale ordered prior to trial, who will hold proceeds from sale?
8. Will both parties sign necessary documents or will someone be designated to sign?
9. Have you included language that the party in possession of the property will ensure that the property is available and in an appropriate condition for showing?

ATTACHMENT B

TRANSFER OF PROPERTY

In most equitable distribution orders, the parties are directed to sign all necessary documents to effectuate the transfer of property. A time limit, usually 60 to 90 days after the judgment is filed, should be indicated in the order for such documents to be signed. An alternative method of transferring title should then be provided. In cases where one of the parties fails to participate in the action, an alternative method should always be included.

Vehicles

The Defendant is directed to sign the title to the 20xx Brand Automobile to the Plaintiff within 60 days of the filing of this judgment. If he fails to do so, the North Carolina Division of Motor Vehicles is directed to issue a new title solely in the Plaintiff's name for the 20xx Brand Automobile, Vehicle Identification Number 99999999999999. (Remember in issuing orders of this nature that there may be issues related to liens on vehicle titles.)

Real Property

The title to the real property located at 4726 Greensboro Way, Fayetteville, NC and more particularly described as:

Beginning at a point and other language that sets out a legal description of said property

Is transferred to Defendant husband. Plaintiff wife is ordered to transfer her interest in said property to the defendant husband through the execution of a quit claim deed within 60 days of the filing of this judgment. Should plaintiff wife fail to comply with such order, Plaintiff wife shall be divested of title to said real property pursuant to North Carolina General Statute 1A, Rule 70 and title to that property vested in Defendant husband.

Or should plaintiff wife fail to sign such quit claim deed within 60 days of the filing of this judgment, then pursuant to North Carolina General Statute 1A, Rule 70, the Cumberland County Clerk of Superior Court is directed to sign in her stead.

ATTACHMENT C

MILITARY PENSIONS

Language that can be used when dividing military pensions. A QDRO is not necessary to divide a pension. Certified copies of the orders must be provided to DFAS (Defense Finance and Accounting Service) with Department of Defense Form 2293.

1. The Plaintiff husband is hereby awarded that percentage of the Defendant wife's military retirement pay calculated by using the formula: $113 \text{ months over } x$ (where x is the total number of months the Defendant wife served active duty military) divided by 2. Said sum shall be paid beginning the first month after the Defendant wife's retirement.

OR

The Plaintiff husband is hereby awarded 45% of the Defendant wife's military retirement pay. Said sum shall be paid beginning (the first month after Defendant wife's retirement) or (May 1, 2003)

2. If the parties were married (date of marriage to date of divorce) at least 10 years during service in the military, the non- military spouse is entitled to be paid directly by the military.

Said sum shall be made by direct payment from the United States Department of the Army, Defense Finance and Accounting Center, to the Plaintiff husband. Plaintiff husband shall submit the request for direct payment to DFAS indicating his current mailing address. Plaintiff shall be responsible for the taxes owed on his portion of the retirement pay and the United States Department of the Army, Defense Finance and Accounting Center is hereby ordered to calculate said taxes on Plaintiff's share of the retirement pay and deduct that amount prior to disbursement. Plaintiff's social security number is 000-00-0000.

The Defendant wife is hereby awarded the remainder of her retirement pay after the Plaintiff's percentage has been deducted as set forth herein. She shall be responsible for the taxes owed on her portion of the pension and the United States Department of the Army is hereby ordered to calculate said taxes on Defendant's share and deduct that amount prior to disbursement. Defendant's social security number is 999-99-9999.

Until such time as the United States Army automatically deducts and pays to the Plaintiff his share of the retirement pay, the Defendant is ordered to pay directly to the Plaintiff the sum equal to Plaintiff's percentage of her gross disposable retirement income, with the first payment being paid on or before the first day of the first month Defendant begins receiving her retirement (or on May 1, 2003) and continuing each month thereafter until the direct payment begins.

ATTACHMENT C (page 2)

3. Survivor Benefits (SBP) are available to the spouse and the cost is deducted directly from the pension prior to any division of the pension. Survivor benefits must be elected at the time of retirement and if the parties are still married, the spouse must sign a document rejecting the benefit or it is automatically included. If the service member remarries prior to retirement, it is the responsibility of the former spouse to insure that a copy of the judgment has been provided to the military prior to the retirement or the military may allow the service member to elect the new spouse as the beneficiary. If there is direct pay of the retirement benefit, the military will deduct the cost of the survivor benefit prior to dividing the pension between the parties. If there is no direct pay, the court will need to make clear if the pension percentage payment is determined before or after the payment of the SBP. There are several different levels of SBP and you should include the level requested in the order.

Defendant wife is ordered to maintain the highest possible survivors benefit on her pension naming the Plaintiff as beneficiary. Defendant shall execute any forms or make necessary arrangements to insure the Plaintiff is listed as the beneficiary and shall not change such designation without the consent of the Plaintiff. Cost of the survivor benefit plan shall be paid by the Defendant wife and the Plaintiff husband in the same proportion as each's share of the military retirement pay.

4. When a military member retires, they are given an exit physical and an initial rate of disability may be established. Subsequently, the military member may be given the option of electing to receive additional portions of his military retirement as disability. Unlike retirement, disability pay is not taxable. Any disability pay is deducted from the retirement pay dollar for dollar. Congress has now provided for concurrent and combat related pay for some disability ratings. Concurrent pay and combat related pay provide for a payment of disability pay without reducing the retirement pay. Concurrent pay is treated as regular retirement and the spouse will receive his/her proportionate share as if there was no disability pay. If the service member receives combat related pay, it is treated the same as disability pay and the spouse does not receive any share of it. Because concurrent pay is simply another form of retirement, it is not necessary to specifically include it in the judgment although many attorneys like to include it in the language.

The defendant husband shall receive 50% of the plaintiff wife's military retirement (concurrent) pay.

The Court of Appeals has held that disability benefits are not divisible under the ED statute because of federal law (*Halstead v Halstead*, 164 NC App 543 (2004)). The Court

ATTACHMENT C (page 3)

however has also held that it may be appropriate to reconfigure the percentage of retirement pay if the military retiree reduces his retirement pay by electing disability pay after the judgment is entered. (White v White 152 NC App 588 (2002)) Such reconfiguration would generally be done as in White pursuant to a motion to enforce the judgment or under Civil Procedure Rule 60 (b) (6).

If the spouse is receiving alimony and the court would find that she/he was no longer in need of assistance because of the receipt of a share of the retirement and the service member has not yet received a disability rating or it appears there may be a change in the rating in the future, the court may elect to enter some provision to insure that the spouse continues to receive his/her proportionate share of the retirement in some manner.

Upon receipt of her share of the defendant husband's military retirement pay, the plaintiff wife's alimony shall be reduced dollar for dollar.

EQUITABLE DISTRIBUTION

Furniture:

- a. Who has been using it?
- b. Before transferring from one spouse to the other
Does it still exist?
What condition is it in?
Where is it?
- c. Who had it last?
- d. Use numbered list so are talking about same item

Unequal Division

Just do it – don't get hung up in trying to get particular %

Judgment

Set specific dates for transfer of property/payment of moneys
Provide for alternate method of signing documents – Clerk of Superior Court or
Division of Motor Vehicles
Set responsibility for paying all debts and include language about holding the
other spouse harmless
In distributive awards – if possible, order secured lien

Child Support/ Alimony orders

When entering such orders that include possession of property, include a
provision that possession continues until the Equitable Distribution order

Make logical distributions – don't move property around just to make the numbers come
out even

Don't forget that you can solve classification issues (such as McLeod issues) at
distribution

MONTHLY PAYMENT

Necessary to amortize a loan

8%

TERM	1	2	3	4	5	6	7
AMOUNT	YEARS	YEARS	YEARS	YEARS	YEARS	YEARS	YEARS
\$50	4.35	2.27	1.57	1.23	1.02	.88	.78
100	8.70	4.53	3.14	2.45	2.03	1.76	1.56
200	17.40	9.05	6.27	4.89	4.06	3.51	3.12
300	26.10	13.57	9.41	7.33	6.09	5.26	4.68
400	34.80	18.10	12.54	9.77	8.12	7.02	6.24
500	43.50	22.62	15.67	12.21	10.14	8.77	7.80
1000	86.99	45.23	31.34	24.42	20.28	17.54	15.59
2000	173.98	90.46	62.68	48.83	40.56	35.07	31.18
3000	260.97	135.69	94.01	73.24	60.83	52.60	46.76
4000	347.96	180.91	125.35	97.66	81.11	70.14	62.35
5000	434.95	226.14	156.69	122.07	101.39	87.67	77.94
10000	869.89	452.28	313.37	244.13	202.77	175.34	155.87
15000	1304.83	678.41	470.05	366.20	304.15	263.00	233.80
20000	1739.77	904.55	626.73	488.26	405.53	350.67	311.73
25000	2174.72	1130.69	783.41	610.33	506.91	438.34	389.66
30000	2609.66	1356.82	940.10	732.38	608.30	526.00	467.59
35000	3044.60	1582.96	1096.78	854.48	709.68	613.67	545.52
40000	3479.54	1809.10	1253.46	976.52	811.06	701.33	623.45
45000	3914.48	2035.23	1410.14	1098.59	912.44	789.00	701.38
50000	4349.43	2261.37	1566.82	1220.85	1013.82	876.67	779.32
55000	4784.37	2487.51	1723.51	1342.72	1115.21	964.33	857.26
60000	5219.31	2713.64	1880.18	1464.78	1216.59	1052.00	935.18
65000	5654.25	2938.78	2036.87	1586.84	1317.97	1139.67	1013.11
70000	6089.20	3163.92	2193.55	1708.91	1419.35	1227.33	1091.04
75000	6524.14	3389.06	2350.23	1830.97	1520.73	1315.00	1168.97
80000	6959.08	3614.20	2506.91	1953.04	1622.12	1402.66	1246.90
85000	7394.02	3839.34	2663.60	2075.10	1723.50	1490.33	1324.83
90000	7828.96	4064.48	2820.28	2197.17	1824.88	1578.00	1402.76
95000	8263.91	4289.62	2976.98	2319.23	1926.26	1665.66	1480.70
100000	8698.85	4522.73	3133.64	2441.30	2027.64	1753.33	1558.63
105000	9133.79	4748.87	3290.32	2563.36	2128.03	1841.00	1636.56
110000	9568.73	4975.01	3447.01	2685.43	2230.41	1928.66	1714.49
115000	10003.67	5201.14	3603.69	2807.49	2331.79	2016.33	1792.42
120000	10438.61	5427.27	3762.37	2929.55	2433.17	2104.00	1870.35
125000	10873.55	5653.40	3917.05	3051.62	2534.55	2191.66	1948.28
130000	11308.49	5879.53	4071.73	3173.69	2635.93	2279.33	2026.21
135000	11743.43	6105.66	4226.80	3295.76	2737.31	2367.00	2104.14
140000	12178.37	6331.79	4381.87	3417.83	2838.69	2454.66	2182.07
145000	12613.31	6557.92	4536.94	3539.90	2939.61	2542.33	2260.00
150000	13048.25	6784.05	4692.01	3662.07	3040.53	2639.99	2337.93
155000	13483.19	7010.18	4847.08	3784.24	3141.45	2737.66	2415.86
160000	13918.13	7236.31	5002.15	3906.41	3242.37	2835.33	2493.79
165000	14353.07	7462.44	5157.22	4028.58	3343.29	2933.00	2571.72
170000	14788.01	7688.57	5312.29	4150.75	3444.21	3030.66	2649.65
175000	15222.95	7914.70	5467.36	4272.92	3545.13	3128.33	2727.58
180000	15657.89	8140.83	5622.43	4395.09	3646.05	3226.00	2805.51
185000	16092.83	8366.96	5777.50	4517.26	3746.97	3323.66	2883.44
190000	16527.77	8593.09	5932.57	4639.43	3847.89	3421.33	2961.37
195000	16962.71	8819.22	6087.64	4761.60	3948.81	3519.00	3039.30
200000	17397.65	9045.35	6242.71	4883.77	4049.73	3616.66	3117.23

MONTHLY PAYMENT

Necessary to amortize a loan

8%

TERM	8	9	10	11	12	13	14
AMOUNT	YEARS	YEARS	YEARS	YEARS	YEARS	YEARS	YEARS
\$50	.71	.66	.61	.58	.55	.52	.50
100	1.42	1.31	1.22	1.15	1.09	1.04	1.00
200	2.83	2.61	2.43	2.29	2.17	2.07	1.99
300	4.25	3.91	3.64	3.43	3.25	3.10	2.98
400	5.66	5.21	4.86	4.57	4.33	4.14	3.97
500	7.07	6.51	6.07	5.71	5.42	5.17	4.96
1000	14.14	13.02	12.14	11.42	10.83	10.34	9.92
2000	28.28	26.04	24.27	22.84	21.65	20.67	19.83
3000	42.42	39.06	36.40	34.25	32.48	31.00	29.74
4000	56.55	52.08	48.54	45.67	43.30	41.33	39.68
5000	70.69	65.10	60.67	57.08	54.13	51.66	49.57
10000	141.37	130.19	121.33	114.16	108.25	103.31	99.14
15000	212.06	195.29	182.00	171.24	162.37	154.97	148.70
20000	282.74	260.38	242.66	228.31	216.60	206.62	198.27
25000	353.42	325.47	303.32	285.39	270.62	258.27	247.83
30000	424.11	390.57	363.98	342.47	324.74	309.93	297.40
35000	494.79	455.66	424.65	399.55	378.86	361.58	346.97
40000	565.47	520.75	485.32	456.62	432.99	413.23	396.63
45000	636.16	585.85	545.98	513.70	487.11	464.89	446.10
50000	706.84	650.94	608.64	571.73	541.23	516.54	495.66
55000	777.52	716.03	667.31	627.85	595.35	568.20	545.23
60000	848.21	781.13	727.97	684.93	649.48	618.85	594.80
65000	918.90	846.22	788.63	742.01	703.60	661.17	634.45
70000	989.59	911.32	849.30	799.09	757.72	723.16	693.93
75000	1060.28	976.41	909.96	856.16	811.84	774.81	743.49
80000	1130.97	1041.50	970.43	913.24	865.97	826.46	793.06
85000	1201.66	1106.60	1031.28	970.32	920.09	878.12	842.63
90000	1272.35	1171.69	1091.95	1027.40	974.21	929.77	892.19
95000	1343.04	1236.78	1152.62	1084.47	1028.33	981.43	941.76
100000	1413.73	1301.88	1213.28	1141.55	1082.46	1033.08	991.32
105000	1484.42	1366.97	1273.94	1198.63	1136.58	1084.73	1040.89
110000	1555.11	1432.06	1334.61	1255.70	1190.70	1136.39	1090.46
115000	1625.80	1497.15	1395.27	1312.78	1244.83	1188.04	1140.02
120000	1696.49	1562.24	1456.94	1370.85	1298.96	1239.35	1189.58
125000	1767.18	1627.33	1518.61	1428.92	1353.09	1283.86	1239.14
130000	1837.87	1692.42	1580.28	1486.99	1407.22	1328.37	1288.71
135000	1908.56	1757.51	1641.95	1545.06	1461.35	1372.88	1338.28
140000	1979.25	1822.60	1703.62	1603.13	1515.48	1417.39	1387.85
145000	2049.94	1887.69	1765.29	1664.90	1569.61	1461.90	1437.42
150000	2120.63	1952.78	1826.96	1726.67	1623.74	1506.41	1486.99
155000	2191.32	2017.87	1888.63	1788.44	1677.87	1550.92	1536.56
160000	2262.01	2082.96	1950.30	1849.21	1731.00	1595.43	1586.13
165000	2332.70	2148.05	2011.97	1909.98	1783.13	1639.94	1635.70
170000	2403.39	2213.14	2073.64	1970.75	1835.26	1684.45	1685.27
175000	2474.08	2278.23	2135.31	2031.52	1887.39	1728.96	1734.84
180000	2544.77	2343.32	2196.98	2092.29	1939.52	1773.47	1784.41
185000	2615.46	2408.41	2258.65	2153.06	1991.65	1817.98	1833.98
190000	2686.15	2473.50	2320.32	2213.83	2043.78	1862.49	1883.55
195000	2756.84	2538.59	2381.99	2274.60	2095.91	1907.00	1933.12
200000	2827.53	2603.68	2443.66	2335.37	2148.04	1951.51	1982.69