

LEGAL ISSUES IN DISTRIBUTION

JANUARY 2024

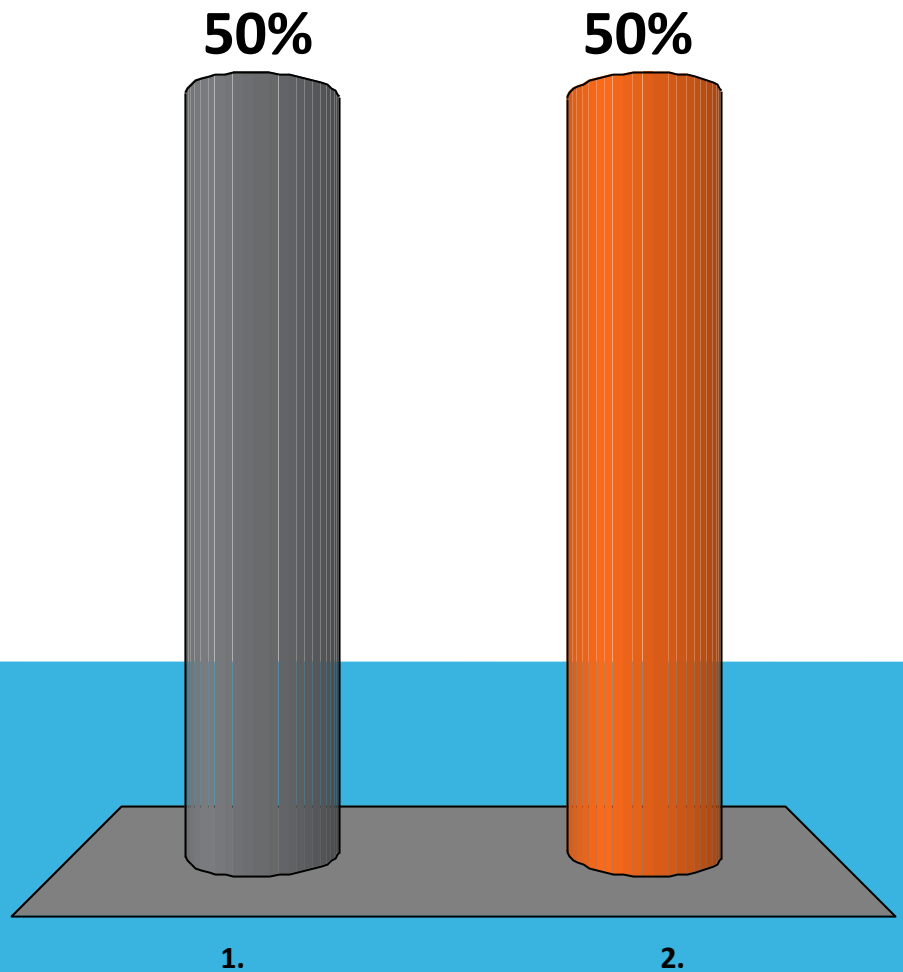
TRUE OR FALSE?

Trial court can order an unequal distribution of marital and divisible property if the court concludes that an unequal distribution is equitable



WHAT IS YOUR OPINION?

1. True
2. False




FALSE

Lucas v. Lucas, 706 SE2d 270 (2011)

It is not sufficient for a trial court to conclude an *unequal division is equitable*

Must conclude that *equal is not equitable* to show due consideration to strong public policy in favor of equal distributions



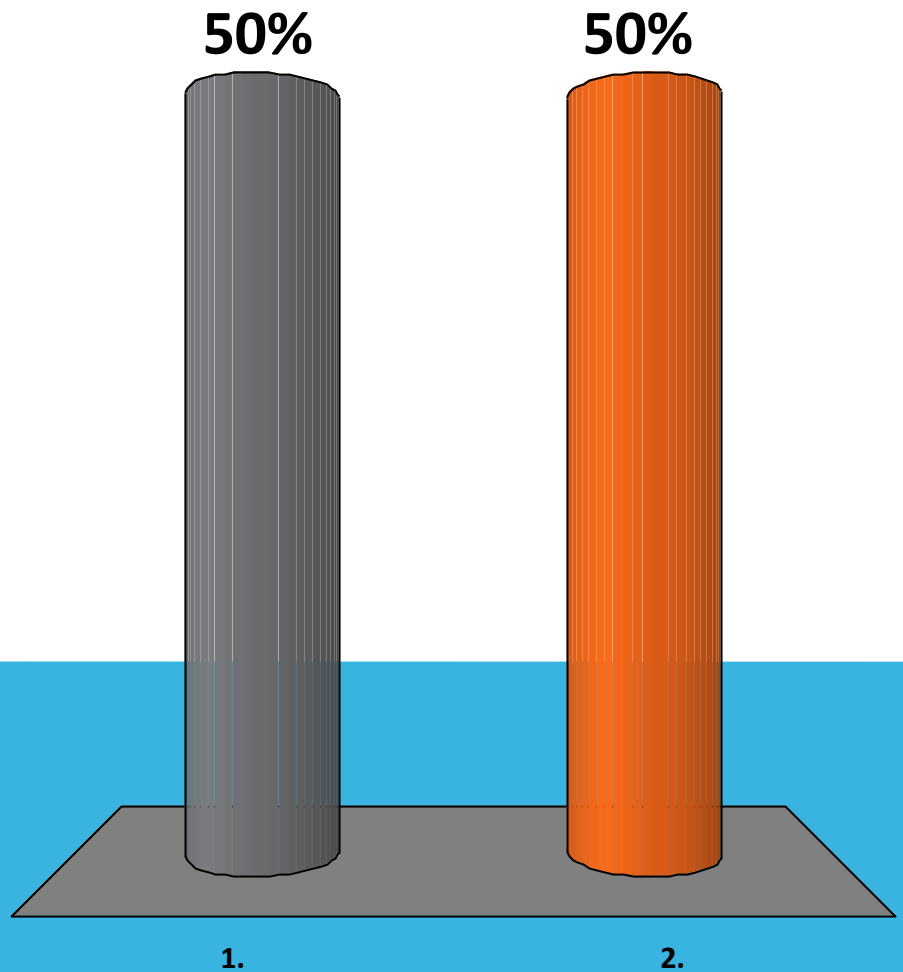
TRUE OR FALSE?

Trial court may not order an unequal distribution unless one party has requested an unequal division in a pleading



WHAT IS YOUR OPINION?

1. True
2. False



REQUEST UNEQUAL IN PLEADING???

Answer is not certain but I think it is *False*

Many cases hold trial court is obligated to consider every distribution factor supported by the evidence

No case has indicated this obligation is limited to cases where an unequal division has been requested in a pleading



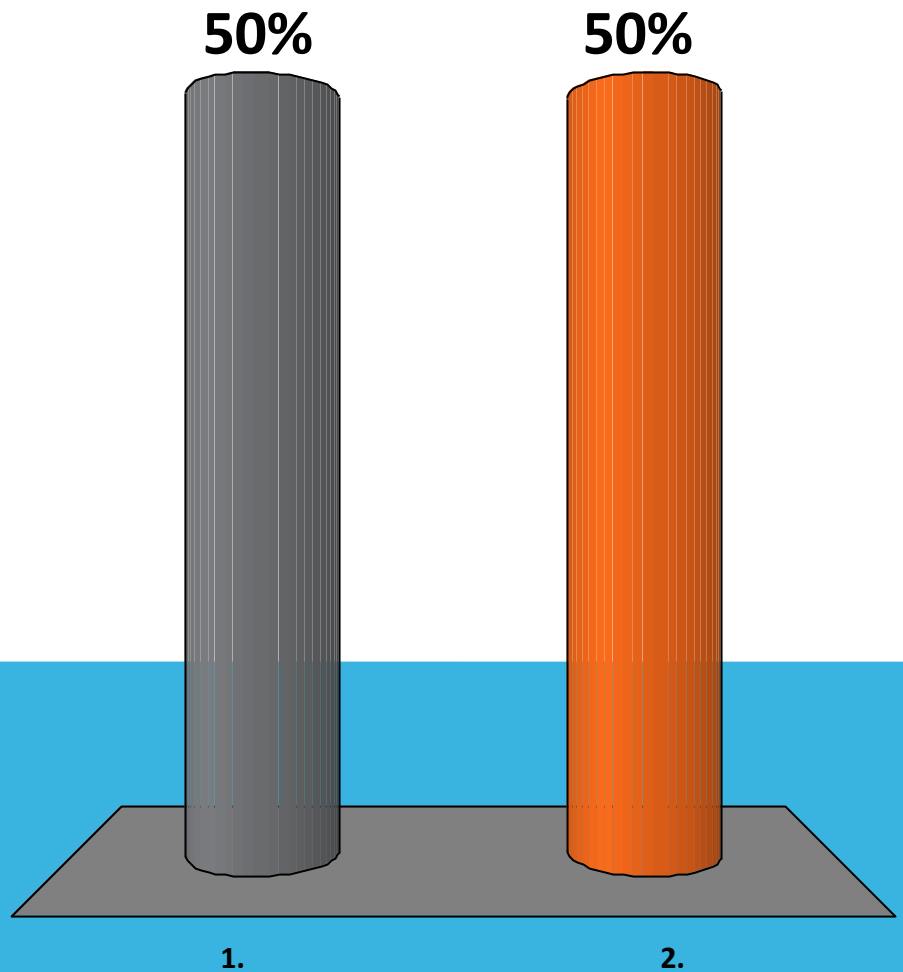
TRUE OR FALSE?

**The side with the most distribution factors
in his/her ‘favor’ generally should
receive the most marital and divisible
property**




WHAT IS YOUR OPINION?

1. True
2. False



WEIGHT OF FACTORS

- Answer is *False*
 - Weight assigned any factor is completely up to judge
 - One factor can outweigh all others
 - One factor can support awarding 100% of marital property to one party
 - Even when there are numerous factors, trial court can award an equal division
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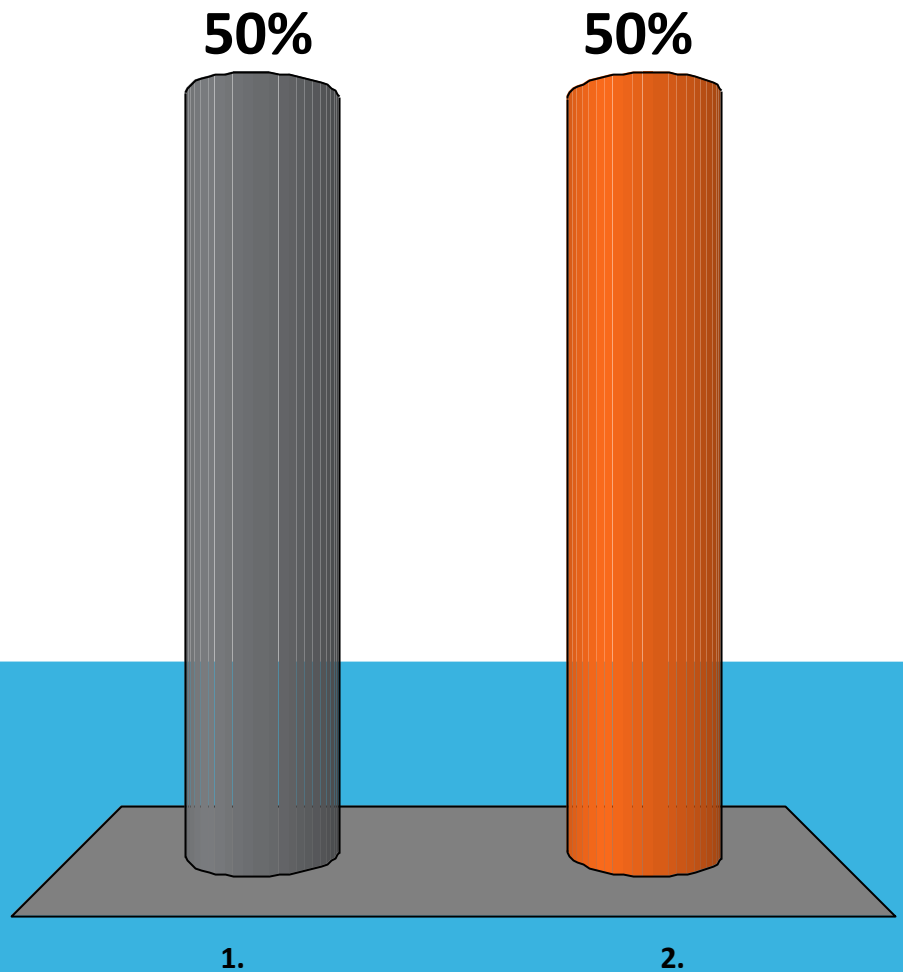
TRUE OR FALSE?

The trial court is not required to find the value of separate property before considering it as a distribution factor



WHAT IS YOUR OPINION?

1. True
2. False



TRUE

The fact that a party owns separate property is a distribution factor

Trial court is not required to assign a value to any distribution factor

Trial court is not required to assign weight to any distribution factor



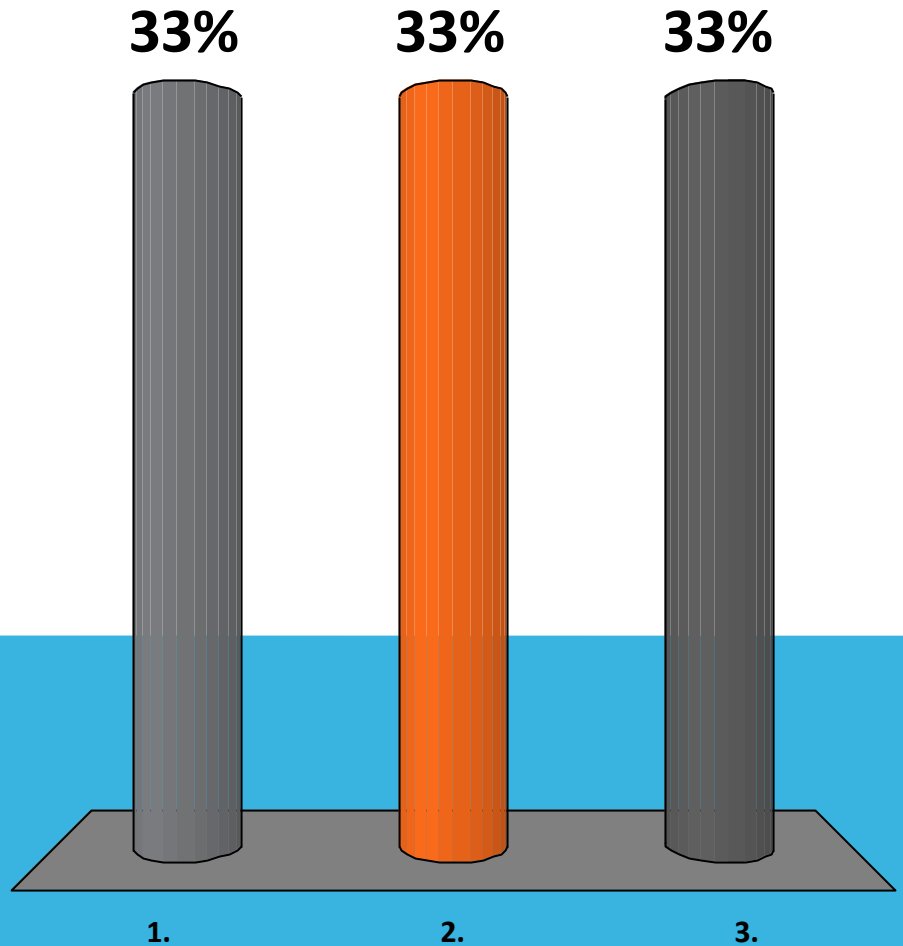
WHAT DO YOU THINK?

Parties owned a very successful business during the marriage and enjoyed an affluent lifestyle as a result, until husband's gambling debts lead to bankruptcy. Can a trial court consider husband's gambling when dividing what is left of the marital and divisible property?



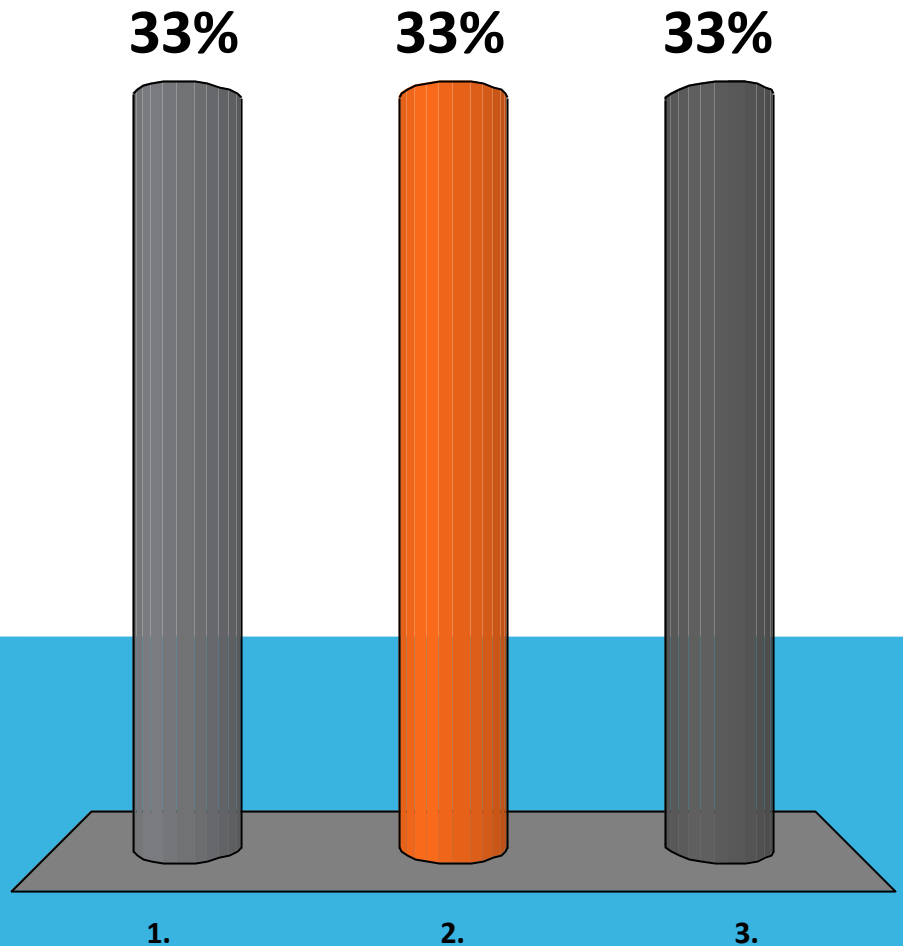
CAN YOU CONSIDER GAMBLING?

1. Yes
2. No
3. It depends



IT DEPENDS ON.....???

1. The length of the marriage
2. Whether wife also gambled
3. How long between the bankruptcy and separation



CONSIDERING FAULT IN DISTRIBUTION

Consideration of marital misconduct generally prohibited


However, can consider fault which impacts value of marital and divisible estate

But, only if conduct occurs “substantially contemporaneously” with separation

Fountain v. Fountain, 148 NC App 329 (2002)

So **Answer is #3 – how long before separation?**

Why????



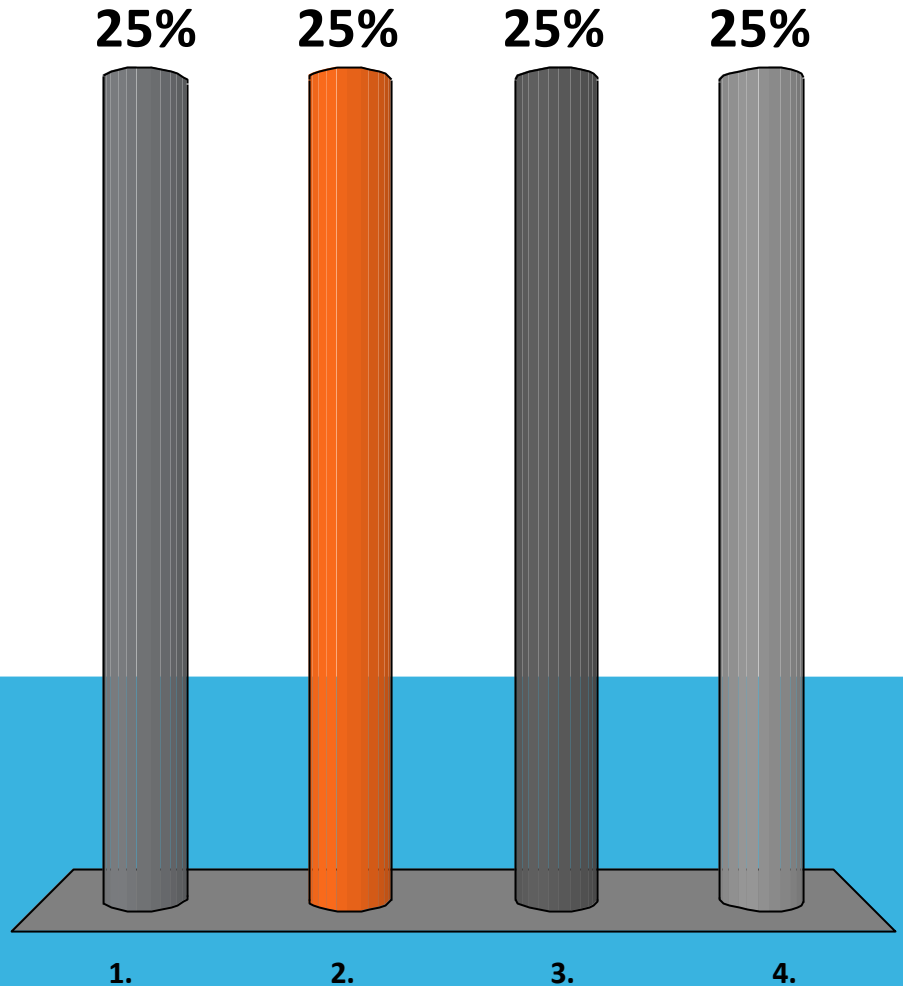
WHAT DO YOU THINK?

Parties are the parents of a severely disabled adult child. One parent provides constant care for the child and therefore is not able to work outside the home. Can you consider this as a distribution factor?



CONSIDER DISABLED CHILD?

1. Yes
2. No
3. Only if parent needs marital residence to care for child
4. Maybe



CONSIDERATION OF CUSTODY

Statute specifically allows consideration of “need of custodial parent to occupy marital residence”

Cases say no other consideration of custody is allowed

Parents have no legal obligation to care for disabled adult child

But earning capacity of a party generally is a distribution factor

Answer??????????



WHAT DO YOU THINK?

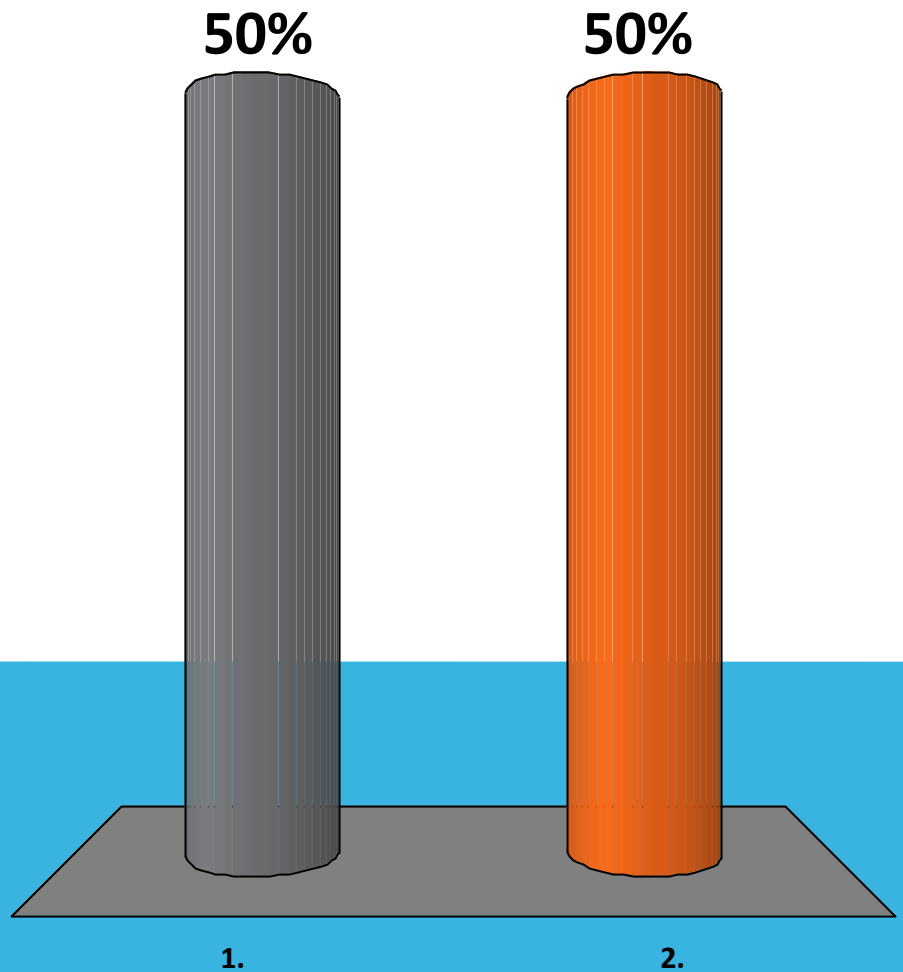
Child support order grants parent with custody exclusive possession of marital residence.

Can you consider parent's exclusive use as a factor in distribution?



CONSIDER POSSESSION OF RESIDENCE?

1. Yes
2. No



CONSIDERATION OF SUPPORT PAYMENT

Answer is **No**

Statute provides that ED must be made without regard to alimony and child support

Both alimony and child support can be reconsidered after ED

GS 50-20(f)



WHAT DO YOU THINK?

Child support order grants parent with custody exclusive possession of marital residence.

Can you award marital residence to other party in equitable distribution?



PROPERTY PROVISIONS IN SUPPORT ORDERS

Answer unclear but probably not??

Good reason to limit possession in support orders to “until final order of equitable distribution”

Other ideas?



SUPPORT PROVISIONS

PSS order requires supporting spouse to pay mortgage on marital residence.

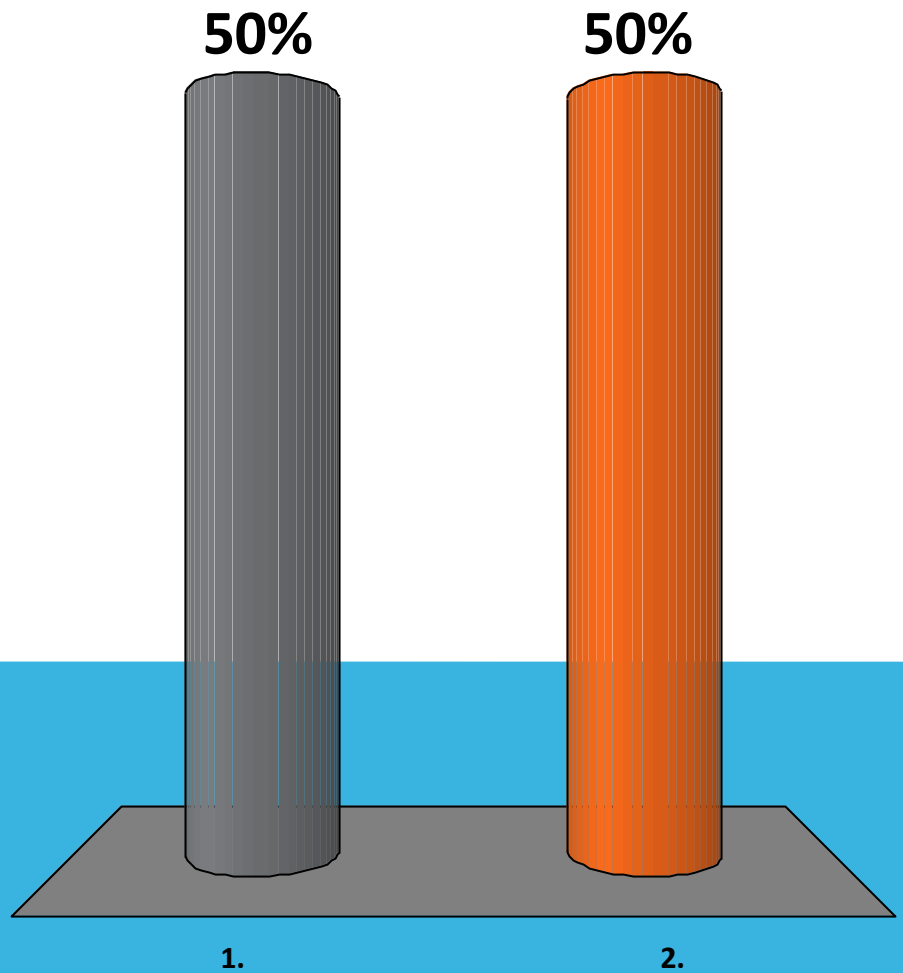
Is the paying spouse entitled to “credit” for the postseparation payment of marital debt?



CREDIT?

1. Yes

2. No



CONSIDERATION OF SUPPORT ORDERS

- General rule – no consideration of alimony or support
- *Wirth v. Wirth*, 193 NC App 657 (2008)

Only case since divisible property. Trial court said payments “not considered” and was affirmed

- What if dependent spouse uses alimony to pay mortgage?



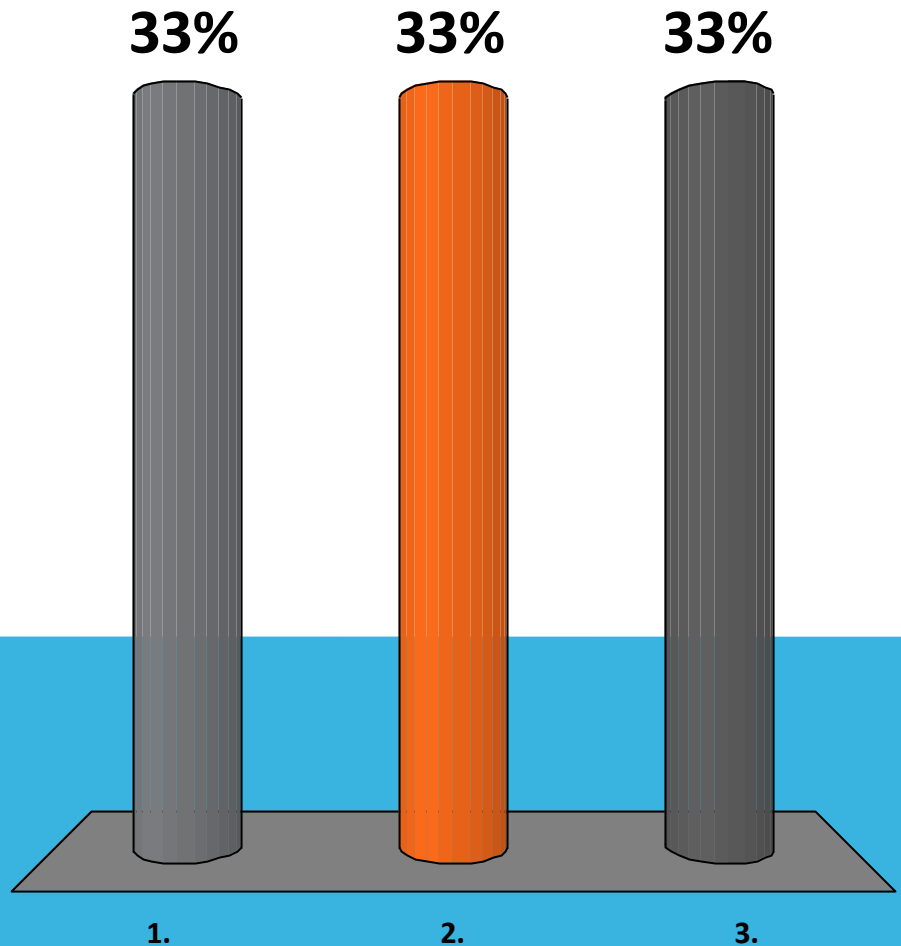
WHAT DO YOU THINK?

Husband owns one-third interest in profitable partnership. His interest is marital property and value is established. Husband offers evidence of the tax consequences that will occur if he sold his interest in the partnership. Can you consider the tax consequences as a distribution factor?



CONSIDER TAX CONSEQUENCES?

1. Not unless sale is ordered in ED
2. Yes because evidence was offered
3. Yes unless you decide sale is unlikely



TAX CONSEQUENCES

Answer is unclear but probably should be “**Yes, unless you decide not to consider taxes because sale is unlikely**”

See *Peltzer v. Peltzer*, 732 SE2d 357 (2012)


But be aware of *Pellom and Cochran*.....



TAX CONSEQUENCES

Since 2005, GS 50-20(c)(11):

Trial 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 trial court may, however, in its discretion, consider whether and when such tax consequences are reasonable likely to occur in determining the equitable value deemed appropriate for this factor”



TAXES

- NEVER consider tax consequences unless evidence of consequences is presented
- Before 2005, courts held no consideration unless distribution will cause tax consequences

See Dolan v. Dolan, 148 NC App 538 (2002)

- Amendment in 2005, but cases continued to hold taxes too speculative to consider unless distribution ordered by trial court will cause taxes to be incurred

See Pellom v. Pellom, 194 NC App 57 (2009)

Cochran v. Cochran, 198 NC App 224 (2010)

But then *Peltzer*???????



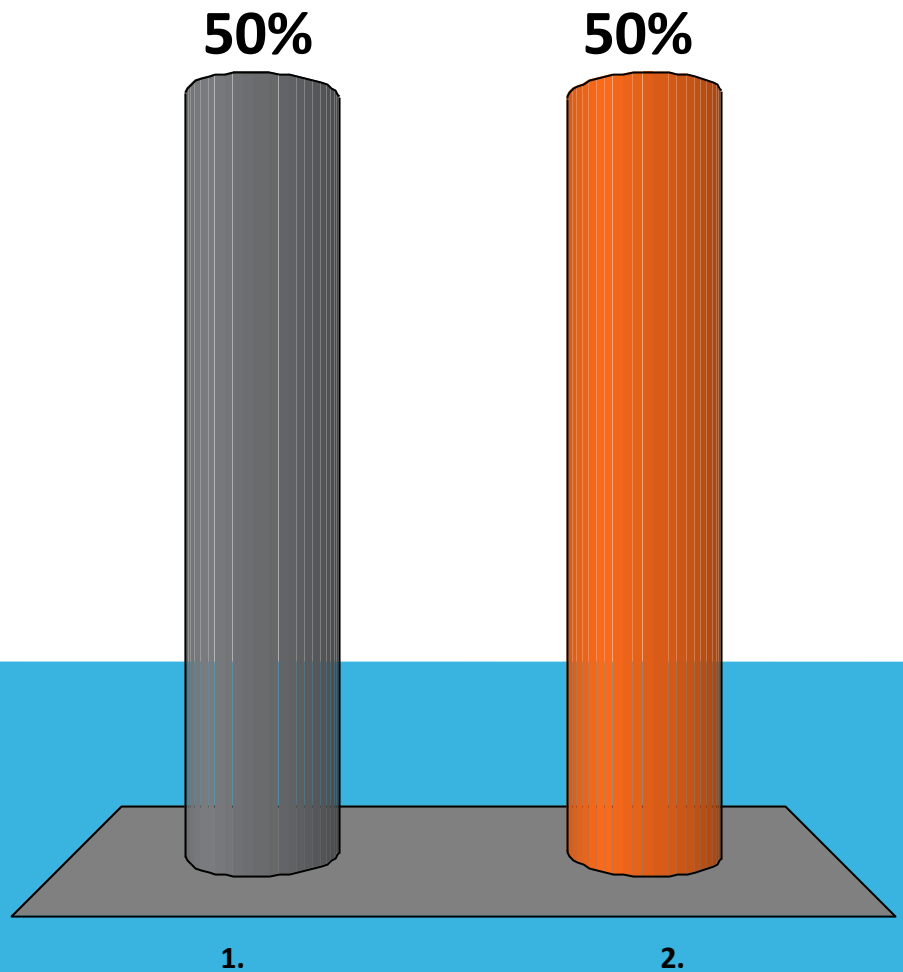
TRUE OR FALSE??

Even if trial court concludes presumption in favor of in-kind division has been rebutted, trial court cannot order a distributive award unless court finds paying party has ability to pay.



WHAT IS YOUR OPINION?

1. True
2. False



DISTRIBUTIVE AWARDS

This is **False**

If liquid assets available to pay the award are not obvious from the ED judgment, judgment must identify how party will pay the amount ordered to be paid.

Why?

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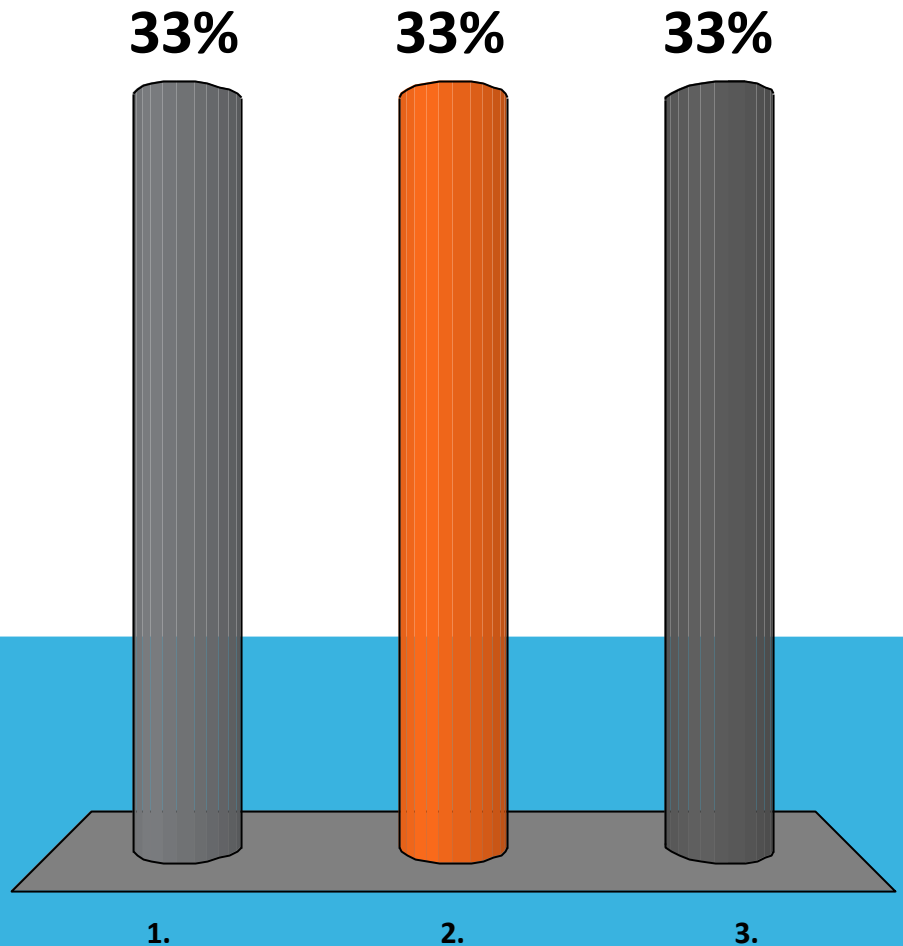
WHAT DO YOU THINK?

Only action filed between parties is for absolute divorce. After divorce judgment is entered, one party files a motion in the cause asking court to enter QRDO to divide a retirement account as provided in a separation agreement. You are asked to sign consent order.



DO YOU SIGN THE ORDER?

1. Of course. I always sign consent orders
2. Yes, it is a valid QDRO
3. No



ORDERS DIVIDING RETIREMENT ACCOUNTS

- Until 2019, the answer was no; now answer is **Yes**
- GS 50-20.1(j) added by SL 2019-172, effective for distributions entered on or after Oct. 1, 2019

By complaint or motion in the case, party can request order effectuating the division of a pension, retirement account or deferred compensation provided for in a validly executed separation agreement or property settlement agreement.