

# Advanced Family Law for District Court Judges

July 20 – 22, 2022

School of Government, Chapel Hill, NC

## Wednesday, July 20

- 1:00pm**      **Welcome and Introductions**  
Cheryl Howell, Professor of Public Law and Government
- 1:30pm**      **Pretrial Orders and Stipulations**  
Cheryl Howell, Professor of Public Law and Government
- 2:30pm**      **Break**
- 2:45pm**      **Classification Issues: Presumptions and Burdens of Proof**  
Cheryl Howell, Professor of Public Law and Government
- 3:45pm**      **Break**
- 4:00pm**      **Retirement Accounts and Deferred Compensation**  
Cheryl Howell, Professor of Public Law and Government
- 5:00pm**      **Adjourn**

## Thursday, July 21

- 9:00am**      **Classification Issues: Applying Law to Specific Assets**  
Cheryl Howell, Professor of Public Law and Government  
Nancy Grace, Attorney, Wake Family Law Group
- 10:30am**      **Break**
- 10:45am**      **Classification Issues: Applying Law to Specific Assets, continued**
- 12:00pm**      **Lunch (provided)**
- 1:00pm**      **Valuation Methodologies**  
Judge Sue Burch, Greensboro
- 2:00pm**      **Break**

- 2:15pm**      **Valuation Methodologies**, continued
- 3:15pm**      **Break**
- 3:30pm**      **Legal Issues in Distribution**  
Cheryl Howell, Professor of Public Law and Government
- 5:00pm**      **Adjourn**  
Homework: Distribute assets in case study

**Friday, July 22**

- 9:00am**      **Discussion of Distribution Case Study**  
Judge Beth Keever, Fayetteville (confirmed)
- 10:15am**      **Break**
- 10:30am**      **Post-Trial Issues**  
Cheryl Howell, Professor of Public Law and Government
- 12:00am**      **Wrap-up and Evaluation**
- 12:15pm**      **Adjourn**

CJE hrs: *12 hours*

## **Equitable Distribution Statutes Current through July 2022**

### **§ 50-20. Distribution by court of marital and divisible property.**

(a) Upon application of a party, the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties in accordance with the provisions of this section.

(b) For purposes of this section:

- (1) "Marital property" means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property in accordance with subdivision (2) or (4) of this subsection. Marital property includes all vested and nonvested pension, retirement, and other deferred compensation rights, and vested and nonvested military pensions eligible under the federal Uniformed Services Former Spouses' Protection Act. It is presumed that all property acquired after the date of marriage and before the date of separation is marital property except property which is separate property under subdivision (2) of this subsection. It is presumed that all real property creating a tenancy by the entirety acquired after the date of marriage and before the date of separation is marital property. Either presumption may be rebutted by the greater weight of the evidence.
- (2) "Separate property" means all real and personal property acquired by a spouse before marriage or acquired by a spouse by devise, descent, or gift during the course of the marriage. However, property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance. Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance. The increase in value of separate property and the income derived from separate property shall be considered separate property. All professional licenses and business licenses which would terminate on transfer shall be considered separate property.
- (3) "Distributive award" means payments that are payable either in a 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.
- (4) "Divisible property" means all real and personal property as set forth below:

- a. All appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property.
- b. All property, property rights, or any portion thereof received after the date of separation but before the date of distribution that was acquired as a result of the efforts of either spouse during the marriage and before the date of separation, including, but not limited to, commissions, bonuses, and contractual rights.
- c. Passive income from marital property received after the date of separation, including, but not limited to, interest and dividends.
- d. Passive increases and passive decreases in marital debt and financing charges and interest related to marital debt.

(c) There shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably. The court shall consider all of the following factors under this subsection:

- (1) The income, property, and liabilities of each party at the time the division of property is to become effective.
- (2) Any obligation for support arising out of a prior marriage.
- (3) The duration of the marriage and the age and physical and mental health of both parties.
- (4) The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects.
- (5) The expectation of pension, retirement, or other deferred compensation rights that are not marital property.
- (6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker.
- (7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse.
- (8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage.
- (9) The liquid or nonliquid character of all marital property and divisible property.
- (10) The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of

retaining such asset or interest, intact and free from any claim or interference by the other party.

- (11) The tax consequences to each party, including those federal and State tax consequences that would have been incurred if the marital and divisible property had been sold or liquidated on the date of valuation. The trial court may, however, in its discretion, consider whether or when such tax consequences are reasonably likely to occur in determining the equitable value deemed appropriate for this factor.
- (11a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital property or divisible property, or both, during the period after separation of the parties and before the time of distribution.
- (11b) In the event of the death of either party prior to the entry of any order for the distribution of property made pursuant to this subsection:
  - a. Property passing to the surviving spouse by will or through intestacy due to the death of a spouse.
  - b. Property held as tenants by the entirety or as joint tenants with rights of survivorship passing to the surviving spouse due to the death of a spouse.
  - c. Property passing to the surviving spouse from life insurance, individual retirement accounts, pension or profit-sharing plans, any private or governmental retirement plan or annuity of which the decedent controlled the designation of beneficiary (excluding any benefits under the federal social security system), or any other retirement accounts or contracts, due to the death of a spouse.
  - d. The surviving spouse's right to claim an "elective share" pursuant to G.S. 30-3.1 through G.S. 30-33, unless otherwise waived.

(12) Any other factor which the court finds to be just and proper.

(c1) Notwithstanding any other provision of law, a second or subsequent spouse acquires no interest in the marital property and divisible property of his or her spouse from a former marriage until a final determination of equitable distribution is made in the marital property and divisible property of the spouse's former marriage.

(d) Before, during or after marriage the parties may by written agreement, duly executed and acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1, or by a written agreement valid in the jurisdiction where executed, provide for distribution of the marital property or divisible property, or both, in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties.

(e) 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. In any action in which the presumption is rebutted, the court in lieu of 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.

(f) The court shall provide for an equitable distribution without regard to alimony for either party or support of the children of both parties. After the determination of an equitable distribution, the court, upon request of either party, shall consider whether an order for alimony or child support should be modified or vacated pursuant to G.S. 50-16.9 or 50-13.7.

(g) 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 G.S. 1A-1, Rule 70 and G.S. 1-228.

(h) If either party claims that any real property is marital property or divisible property, that party may cause a notice of lis pendens to be recorded pursuant to Article 11 of Chapter 1 of the General Statutes. Any person whose conveyance or encumbrance is recorded or whose interest is obtained by descent, prior to the filing of the lis pendens, shall take the real property free of any claim resulting from the equitable distribution proceeding. The court may cancel the notice of lis pendens upon substitution of a bond with surety in an amount determined by the court to be sufficient provided the court finds that the claim of the spouse against property subject to the notice of lis pendens can be satisfied by money damages.

(i) Upon filing an action or motion in the cause requesting an equitable distribution or alleging that an equitable distribution will be requested when it is timely to do so, a party may seek injunctive relief pursuant to G.S. 1A-1, Rule 65 and Chapter 1, Article 37, to prevent the disappearance, waste or conversion of property alleged to be marital property, divisible property, or separate property of the party seeking relief. The court, in lieu of granting an injunction, may require a bond or other assurance of sufficient amount to protect the interest of the other spouse in the property. Upon application by the owner of separate property which was removed from the marital home or possession of its owner by the other spouse, the court may enter an order for reasonable counsel fees and costs of court incurred to regain its possession, but such fees shall not exceed the fair market value of the separate property at the time it was removed.

(i1) 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 has been filed and prior to the final judgment of equitable distribution, enter orders declaring what is separate property and may also 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.

Hearings held pursuant to this subsection may be held at sessions arranged by the chief district court judge pursuant to G.S. 7A-146 and, if held at such sessions, shall not be subject to the reporting requirements of G.S. 7A-198.

(j) 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 the marital property and divisible property has been equitably divided.

(k) The rights of the parties to an equitable distribution of marital property and divisible property are a species of common ownership, the rights of the respective parties vesting at the time of the parties' separation.

- (l) (1) A claim for equitable distribution, whether an action is filed or not, survives the death of a spouse so long as the parties are living separate and apart at the time of death.
- (2) The provisions of Article 19 of Chapter 28A of the General Statutes shall be applicable to a claim for equitable distribution against the estate of the deceased spouse.
- (3) Any claim for equitable distribution against the surviving spouse made by the estate of the deceased spouse must be filed with the district court within one year of the date of death of the deceased spouse or be forever barred. (1981, c. 815, s. 1; 1983, c. 309; c. 640, ss. 1, 2; c. 758, ss. 1-4; 1985, c. 31, ss. 1-3; c. 143; c. 660, ss. 1-3; 1987, c. 663; c. 844, s. 2; 1991, c. 635, ss. 1, 1.1; 1991 (Reg. Sess., 1992), c. 960, s. 1; 1995, c. 240, s. 1; c. 245, s. 2; 1997-212, ss. 2-5; 1997-302, s. 1; 1998-217, s. 7(c); 2001-364, ss. 2, 3; 2002-159, s. 33; 2003-168, ss. 1, 2; 2005-353, s. 1; 2011-284, s. 51; 2013-103, s. 1.)

#### **§ 50-20.1. Pension, retirement, and deferred compensation benefits.**

(a) The distribution of vested marital pension, retirement, or deferred compensation benefits may be made payable by any of the following means:

- (1) As a lump sum from the plan, program, system, or fund for those benefits subject to subsection (d1) of this section.
- (2) Over a period of time in fixed amounts from the plan, program, system, or fund for those benefits subject to subsection (d1) of this section.
- (3) As a prorated portion of the benefits made to the designated recipient, if permitted by the plan, program, system, or fund (i) at the time the participant-spouse is eligible to receive the benefits, (ii) at the time the participant-spouse actually begins to receive the benefits, or (iii) at the participant-spouse's earliest retirement age. For purposes of this section, "participant-spouse" means the spouse who is a participant in the plan, program, system, or fund.
- (4) By awarding a larger portion of other assets to the party not receiving the benefits and a smaller share of other assets to the party entitled to receive the benefits.
- (5) As a lump sum, or over a period of time in fixed amounts, by agreement.

(b) The distribution of nonvested marital pension, retirement, or deferred compensation benefits may be made payable by any of the following means:

- (1) As a lump sum by agreement.
- (2) Over a period of time in fixed amounts by agreement.
- (3) As a prorated portion of the benefits made to the designated recipient, if permitted by the plan, program, system, or fund (i) at the time the participant-spouse is eligible to receive the benefits, (ii) at the time the participant-spouse actually begins to receive the benefits, or (iii) at the participant-spouse's earliest retirement age.

(c) Notwithstanding the provisions of subsections (a) and (b) of this section, the court shall not require the administrator of the plan, program, system, or fund involved to make any payments or distributions to the nonparticipant spouse, except as permitted by the terms of the plan, program, system, or fund.

(d) When the amount of the benefit payable by the plan, program, system, or fund to the participant-spouse is determined in whole or part by the length of time of the participant-spouse's employment, the marital portion shall be determined using the proportion of time the marriage existed (up to the date of separation of the parties) simultaneously with the total time of the employment which earned the benefit subject to equitable distribution, to the total amount of time of employment that earned the benefit subject to equitable distribution. The determination shall be based on the vested and nonvested accrued benefit, as provided by the plan, program, system, or fund, calculated as of the date of separation, and shall not include contributions, years of service, or compensation which may accrue after the date of separation. The award shall include gains and losses on the prorated portion of the benefit vested at the date of separation and cost-of-living adjustments and similar enhancements to the participant's benefit. Notwithstanding any other provision of this Chapter, if the court makes the award payable pursuant to subdivision (a)(3) or (b)(3) of this section and the court divides the marital portion of the benefit equally between the participant-spouse and nonparticipant spouse, the court shall not be required to determine the total value of the marital benefits before classifying and distributing the benefits. However, neither party shall be prohibited from presenting evidence of the total value of any marital benefits or of any benefits that are separate property of either spouse. When a pension, retirement, or deferred compensation plan, program, system, or fund, or an applicable statute limits or restricts the amount of the benefit subject to equitable distribution by a State court, the award shall be determined using the proportion of time the marriage existed (up to the date of separation of the parties) simultaneously with the total time of the employment which earned the benefit subject to equitable distribution to the total time of employment, as limited or restricted by the plan, program, system, fund, or statute that earned the benefit subject to equitable distribution.

(d1) When the amount of the benefit payable by the plan, program, system, or fund is not determined in whole or part by the length of time of the participant-spouse's employment, but is instead based on contributions and held in one or more accounts with readily determinable balances, including, but not limited to, individual retirement accounts and defined contribution plans, such as those within the definitions of Internal Revenue



Code section 401(k), 403(b), 408, 408A, or 457, the court shall not determine the award using the fraction described in subsection (d) of this section. The court instead shall determine the marital portion of the benefit by determining the amount of the account balance that is due to contributions made or earned during the marriage and before separation, together with the income, gains, losses, appreciation, and depreciation accrued on those contributions. If sufficient evidence is not presented to the court to allow the court to make this determination, the court shall then determine the marital portion of the benefit by using the fraction described in subsection (d) of this section, namely, by using the proportion of time the marriage existed (up to the date of separation of the parties) simultaneously with the employment which earned the benefit subject to equitable distribution to the total amount of time of employment. In either event, the award shall be based on the vested and nonvested accrued benefit as of the date of separation, together with the income, gains, losses, appreciation, and depreciation accrued after the date of separation on the date-of-separation benefits. However, the award shall not include contributions that may accrue or be made after the date of separation, or any income, gains, losses, appreciation, and depreciation accrued on those contributions.

(e) No award shall exceed fifty percent (50%) of the benefits the person against whom the award is made is entitled to receive as vested and nonvested pension, retirement, or deferred compensation benefits, except that an award may exceed fifty percent (50%) if (i) other assets subject to equitable distribution are insufficient; or (ii) there is difficulty in distributing any asset or any interest in a business, corporation, or profession; or (iii) it is economically desirable for one party to retain an asset or interest that is intact and free from any claim or interference by the other party; or (iv) more than one pension or retirement system or deferred compensation plan, program, system, or fund is involved, but the benefits award may not exceed fifty percent (50%) of the total benefits of all the plans added together; or (v) both parties consent. In no event shall an award exceed fifty percent (50%) if a plan, program, system, or fund prohibits an award in excess of fifty percent (50%).

(f) In the event the person receiving the award dies, the unpaid balance, if any, of the award shall pass to the beneficiaries of the recipient by will, if any, or by intestate succession, or by beneficiary designation with the plan, program, system, or fund consistent with the terms of the plan, program, system, or fund unless the plan, program, system, or fund prohibits such designation. In the event the person against whom the award is made dies, the award to the recipient shall remain payable to the extent permitted by the pension or retirement system or deferred compensation plan, program, system, or fund involved.

(f1) Whenever the award is made payable pursuant to subdivision (a)(3) or (b)(3) of this section, and the pension or retirement or deferred compensation plan, program, system, or fund permits the use of a "separate interest" approach in the order, there shall be a presumption, rebuttable by the greater weight of the evidence, that the "separate interest" approach shall be used to divide the benefit in question. For purposes of this section, the phrase "separate interest" approach means any method of dividing pension or retirement system or deferred compensation benefits in which the nonparticipant spouse, the spouse

not a participant in the plan, program, system, or fund in question, receives an interest that allows the nonparticipant spouse to receive benefits in a manner independent, in whole or part, of the benefits received by the participant-spouse, or to make elections concerning the receipt of benefits independently of the elections made by the participant-spouse.

(f2) Whenever the pension or retirement or deferred compensation benefit is distributed pursuant to subdivision (a)(3) or (b)(3) of this section in an order that does not employ the "separate interest" approach, the court may, considering the length of the marriage and the ages of the parties, (i) award all or a portion of a survivor annuity to the nonparticipant spouse or former spouse and (ii) allocate the cost of providing the survivor annuity between the parties. The survivor annuity awarded by the court, if any, shall be allocated in accordance with the terms of the retirement plan, program, system, or fund.

(f3) Whenever the pension or retirement or deferred compensation plan, program, system, or fund does not automatically provide pre-retirement survivor annuity protection for the nonparticipant spouse, the court shall order pre-retirement survivor annuity protection for the nonparticipant spouse if permitted by the plan, program, system, or fund.

(f4) The court may allocate equally between the parties any fees assessed by a plan, program, system, or fund in order to process any domestic relations order or qualified domestic relations order.

(g) The court may require distribution of the award by means of a qualified domestic relations order, or as defined in section 414(p) of the Internal Revenue Code of 1986, or by domestic relations order or other appropriate order. To facilitate the calculating and payment of distributive awards, the administrator of the plan, program, system, or fund may be ordered to certify the total contributions, years of service, and pension, retirement, or other deferred compensation benefits payable.

(h) This section and G.S. 50-21 shall apply to all vested and nonvested pension, retirement, and deferred compensation plans, programs, systems, or funds, including, but not limited to, uniformed services retirement programs, federal government plans, State government plans, local government plans, Railroad Retirement Act pensions, executive benefit plans, church plans, charitable organization plans, individual retirement accounts within the definitions of Internal Revenue Code sections 408 and 408A, and accounts within the definitions of Internal Revenue Code section 401(k), 403(b), or 457.

(i) If a plan, program, system, or fund deems unacceptable an order providing for a distribution of pension, retirement, or deferred compensation benefits, then the court may upon motion of a party enter a subsequent order clarifying or correcting its prior order, as may be necessary to comply with the specific technical requirements of the plan, program, system, or fund.

(j) Notwithstanding any other provision of this Chapter, a claim may be filed, either as a separate civil action or as a motion in the cause in an action brought pursuant to this Chapter, for an order effectuating the distribution of pension, retirement, or deferred compensation benefits provided for in a valid written agreement, as defined in G.S. 50-20(d), whether or not a claim for equitable distribution has been filed or adjudicated. The court may enter an order effectuating the distribution provided for in the valid written agreement. (1997-212, s. 1; 2019-172, s. 1.)

**§ 50-21. Procedures in actions for equitable distribution of property; sanctions for purposeful and prejudicial delay.**

(a) At any time after a husband and wife begin to live separate and apart from each other, a claim for equitable distribution may be filed and adjudicated, either as a separate civil action, or together with any other action brought pursuant to Chapter 50 of the General Statutes, or as a motion in the cause as provided by G.S. 50-11(e) or (f). Within 90 days after service of a claim for equitable distribution, the party who first asserts the claim shall prepare and serve upon the opposing party an equitable distribution inventory affidavit listing all property claimed by the party to be marital property and all property claimed by the party to be separate property, and the estimated date-of-separation fair market value of each item of marital and separate property. Within 30 days after service of the inventory affidavit, the party upon whom service is made shall prepare and serve an inventory affidavit upon the other party. The inventory affidavits prepared and served pursuant to this subsection shall be subject to amendment and shall not be binding at trial as to completeness or value. The court may extend the time limits in this subsection for good cause shown. The affidavits are subject to the requirements of G.S. 1A-1, Rule 11, and are deemed to be in the nature of answers to interrogatories propounded to the parties. Any party failing to supply the information required by this subsection in the affidavit is subject to G.S. 1A-1, Rules 26, 33, and 37. During the pendency of the action for equitable distribution, discovery may proceed, and the 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.

Real or personal property located outside of North Carolina is subject to equitable distribution in accordance with the provisions of G.S. 50-20, and the court may include in its order appropriate provisions to ensure compliance with the order of equitable distribution.

(b) For purposes of equitable distribution, marital property shall be valued as of the date of the separation of the parties, and evidence of preseparation and postseparation occurrences or values is competent as corroborative evidence of the value of marital property as of the date of the separation of the parties. Divisible property and divisible debt shall be valued as of the date of distribution.

(c) Nothing in G.S. 50-20 or this section shall restrict or extend the right to trial by jury as provided by the Constitution of North Carolina.

(d) Within 120 days after the filing of the initial pleading or motion in the cause for equitable distribution, the party first serving the pleading or application shall apply to the court to conduct a scheduling and discovery conference. If that party fails to make application, then the other party may do so. At the conference the court shall determine a schedule of discovery as well as consider and rule upon any motions for appointment of expert witnesses, or other applications, including applications to determine the date of separation, and shall set a date for the disclosure of expert witnesses and a date on or before which an initial pretrial conference shall be held.

At the initial pretrial conference the court shall make inquiry as to the status of the case and shall enter a date for the completion of discovery, the completion of a mediated settlement conference, if applicable, and the filing and service of motions, and shall determine a date on or after which a final pretrial conference shall be held and a date on or after which the case shall proceed to trial.

The final pretrial conference shall be conducted pursuant to the Rules of Civil Procedure and the General Rules of Practice in the applicable district or superior court, adopted pursuant to G.S.

7A-34. The court shall rule upon any matters reasonably necessary to effect a fair and prompt disposition of the case in the interests of justice.

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

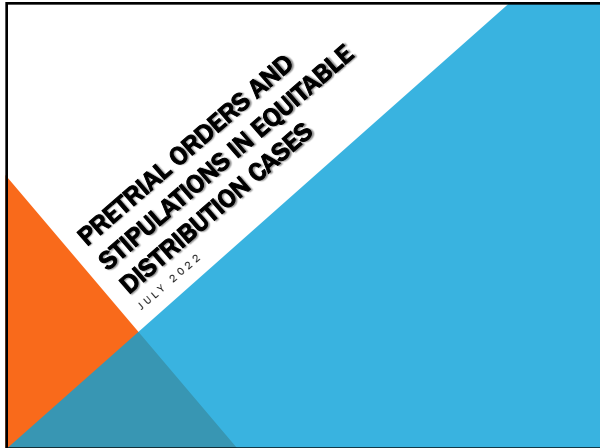
- (1) The party has willfully obstructed or unreasonably delayed, or has attempted to obstruct or unreasonably delay, discovery proceedings, including failure to make discovery pursuant to G.S. 1A-1, Rule 37, or has willfully obstructed or unreasonably delayed or attempted to obstruct or unreasonably delay any pending equitable distribution proceeding, and
- (2) The willful obstruction or unreasonable delay of the proceedings is or would be prejudicial to the interests of the opposing party.

Delay consented to by the parties is not grounds for sanctions. The sanction may include an order to pay the other party the amount of the reasonable expenses and damages incurred because of the willful obstruction or unreasonable delay, including a reasonable attorneys' fee, and including appointment by the court, at the offending party's expense, of an accountant, appraiser, or other expert whose services the court finds are necessary to secure in order for the discovery or other equitable distribution proceeding to be timely conducted. (1981, c. 815, s. 6; 1983, c. 671, s. 1; 1985, c. 689, s. 21; 1987, c. 844, s. 1; 1991, c. 610, s. 2; 1991 (Reg. Sess., 1992), c. 910, s. 1; 1993, c. 209, s. 1; 1995, c. 244, s. 1; c. 245, s. 1; 1997-302, s. 2; 2001-364, s. 1.)

## **Conferences in ED Cases**

### **Discussion Questions**

1. Is it your general practice to hold a pretrial conference before an ED trial? Why or why not?
2. If you hold pretrial conferences, what is your goal in doing so, meaning what is it you hope to accomplish as a result of the conference?
3. Do you frequently meet that goal? Why or why not?
4. What is the role of the judge in a pretrial conference?



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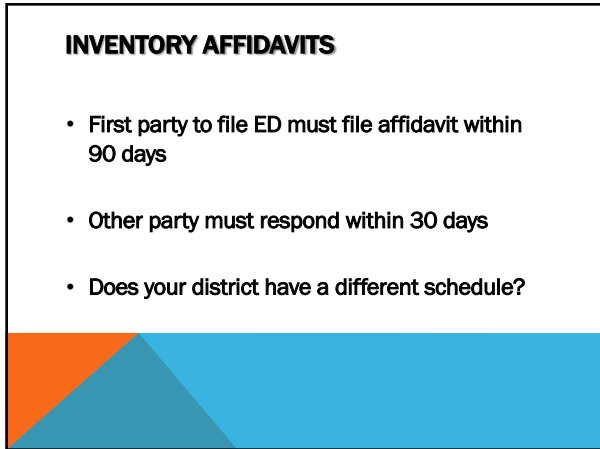
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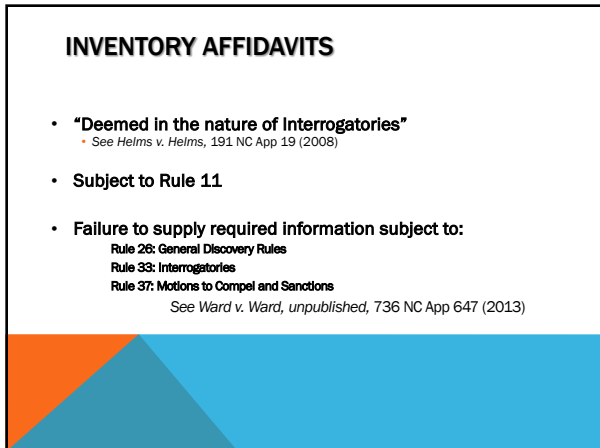
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## INVENTORY AFFIDAVITS

- Can be amended at any time by parties
- Nonbinding at trial as to completeness and as to values
- Unless local rules provide otherwise

*Young v. Young*, 133 NC App 332 (1999)



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## PRETRIAL CONFERENCES GENERALLY

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



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## GOALS OF PRETRIAL CONFERENCE

Rule 16 of Rules of Civil Procedure :

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



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## ED PRETRIAL CONFERENCES

Three required by GS 50-21.

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

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

At initial pretrial conference, must set final pretrial conference

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

Different Local Rules?



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## PRETRIAL ORDER = STIPULATIONS

- Binding on Court and on Parties
- Can be set aside in the interest of justice  
On request of a party or on court's own motion  
Only upon proper notice and opportunity for parties to present evidence not presented due to stipulation  
See *Plomartits v. Plomartits*, 222 NC App 94 (2012)



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## CASES TO CONSIDER

*White v. Davis*, 163 NC App 21 (2004)  
Values "TBD" by specific date

*Brackney v. Brackney*, 199 NC App 375 (2009)  
Postseparation appreciation of house resulted from market forces alone

*Ubertaccio v. Ubertaccio*, 359 NC 175, adopting concurring opinion in 161 NC App 352 (2003)  
Stock received after DOS earned as result of wife's efforts during marriage

*Miller v. Miller*, 97 NC App 77 (1990)  
Equal division is equitable



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## **Rule 16, Rules of Civil Procedure.**

### **Pre-trial procedure; formulating issues.**

- (a) In any action, the court may in its discretion direct the attorneys for the parties to appear before the court for a conference to consider
  - (1) The simplification and formulation of the issues;
  - (2) The necessity or desirability of amendments to the pleadings;
  - (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
  - (4) The limitation of the number of expert witnesses;
  - (5) The advisability or necessity of a reference of the case, either in whole or in part;
  - (6) Matters of which the court is to be asked to take judicial notice;
  - (7) Such other matters as may aid in the disposition of the action.

If a conference is held, the judge shall make an order which recites the action taken at the conference, any amendments allowed to the pleadings, and any agreements made by the parties as to any of the matters considered, and which may limit the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. If any issue for trial as stated in the order is not raised by the pleadings in accordance with the provisions of Rule 8, upon motion of any party, the order shall require amendment of the pleadings.

## **Rule 7, Superior and District Court Rules**

### **Pre-Trial Procedure (See Rule 16)**

There shall be a pre-trial conference in every civil case, unless counsel for all parties stipulate in writing to the contrary and the court approves the stipulation. Upon its own motion or upon request of any party, the court may dispense with or limit the scope of the pre-trial conference or order. In uncontested divorce, default, and magistrate cases and magistrate appeals, a pre-trial conference or order is not required. A party who has not requested a pre-trial conference may not move for a continuance on the ground that it has not been held. At least twenty-one days prior to trial date, the plaintiff's attorney shall arrange a pre-trial conference with the defendant's attorney to be held not later than seven days before trial date. At such conference a pre-trial order shall be prepared and signed by the attorneys. If, after due diligence, plaintiff's attorney cannot arrange a conference with defendant's

attorney, he may apply to the presiding judge or other judge holding court in the district (or district court judge with respect to district court cases) who shall make an appropriate order. The defense attorney may initiate pre-trial under the same rules applicable to plaintiff's attorney. The pre-trial order shall be in substance as shown on the attached sample form.

## Sections from Chapter 6, N.C. Trial Judges' Bench Book, Volume 1, Family Law

### Pretrial Remedies, Procedures, and Protective Measures

#### Pretrial Remedies and Protective Measures

Lis pendens. [G.S. 50-20(h).]

If either party claims that any real property is marital or divisible property, that party may cause a notice of lis pendens to be recorded under Article 11, Chapter 1 of the General Statutes. [G.S. 50-20(h).]

Any person whose conveyance or encumbrance is recorded or whose interest is obtained by descent prior to the filing of the lis pendens takes the real property free of any claim resulting from the equitable distribution proceeding. [G.S. 50-20(h).]

The court may cancel the notice of lis pendens upon substitution of a bond with surety in an amount determined by the court to be sufficient, provided the court finds that the spouse's claim against the property can be satisfied by money damages. [G.S. 50-20(h).]

G.S. 50-20(h) appears to limit a trial court's authority to distribute real property after title to the property has vested in third parties, if a lis pendens was not filed before title passed.

Injunctions. [G.S. 50-20(i).]

A party who seeks equitable distribution or who alleges that equitable distribution will be sought when timely may request injunctive relief pursuant to G.S. 1A-1, Rule 65 and G.S. 1-485 *et seq.* [G.S. 50-20(i).]

An injunction may be requested to prevent the disappearance, waste, or conversion of property alleged to be marital property, divisible property, or the separate property of the party seeking an injunction. [G.S. 50-20(i).]

An injunction is available only when injury is actually threatened and practically certain. [*Mauser v. Mauser*, 75 N.C. App. 115, 330 S.E.2d 63 (1985) (dicta) (decided under former version of G.S. 50-20(i).)]

Bond.

The court, in lieu of granting an injunction, may require a bond or other assurance of sufficient amount to protect the interest of the other spouse in the property. [G.S. 50-20(i).]

Rule 65 provides that no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant in such sum as the judge

deems proper. [G.S. 1A-1, Rule 65(c). *But see Huff v. Huff*, 69 N.C. App. 447, 454, 317 S.E.2d 65, 69 (1984) (quoting *Keith v. Day*, 60 N.C. App. 559, 562, 299 S.E.2d 296, 298 (1983)) (court held that no security was required when a preliminary injunction was issued “to preserve the trial court’s jurisdiction over the subject matter involved” or where the record established that the injunction would do the restrained party “no material damage” and the applicant had sufficient assets to respond in damages if the injunction proved to be wrongful).]

Injunctive relief to protect separate property.

Injunctive relief is available to protect separate as well as marital property.

On the application of the owner of separate property removed from the marital home or from the possession of its owner by the other spouse, the court may enter an order for reasonable counsel fees and court costs incurred to regain possession, not to exceed the fair market value of the property at the time of its removal. [G.S. 50-20(i). *See McKissick v. McKissick*, 129 N.C. App. 252, 497 S.E.2d 711 (1998) (upholding award of attorney fees).]

A trial court had jurisdiction to enter an order pursuant to G.S. 50-20(i) requiring a husband to return his wife’s separate property, even though the court later determined that equitable distribution was barred by premarital agreement. [*McKissick v. McKissick*, 129 N.C. App. 252, 497 S.E.2d 711 (1998) (until the court enters an order finding that the agreement bars equitable distribution, the court has jurisdiction to enter preliminary orders pursuant to the equitable distribution statute).]

Interim distributions. [G.S. 50-20(i1).]

G.S. 50-20(i1) was amended in 1997 “to encourage interim distribution of property or debt.” [S.L. 1997-302 (quoting title of session law). *See Wirth v. Wirth*, 193 N.C. App. 657, 668 S.E.2d 603 (2008) (recognizing that parties should be encouraged to settle as many matters as possible before an equitable distribution trial and refusing to discourage such contractual arrangements by interpreting them in a way contrary to their express terms).]

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 has been filed and prior to the final judgment of equitable distribution, enter orders declaring what is separate property and may also enter orders dividing part of the marital property, divisible property or debt, or marital debt between the parties. [G.S. 50-20(i1).]

A partial distribution under G.S. 50-20(i1) may provide for a distributive award and may also provide for a distribution of marital property, marital debt, divisible property, or divisible debt. [G.S. 50-20(i1).] The 1997 amendment to G.S. 50-20(i1) (see [Section IV.A.3.a](#), above) overruled the holding in *Brown v. Brown*, 112 N.C. App. 15, 434 S.E.2d 873 (1993) (not allowing a cash distributive award before final classification and valuation of the marital estate).]

Any order for interim distribution must be taken into consideration at trial and proper credit given. [G.S. 50-20(i1); *Wirth v. Wirth*, 193 N.C. App. 657, 668 S.E.2d 603 (2008). *Cf. Johnson v. Johnson*, 230 N.C. App. 280, 750 S.E.2d 25 (2013) (when

wife made post–interim distribution payments on the marital residence, which she received in the interim distribution, the payments were payments on her own personal residence—they were not made for the marital estate, were not payments on marital debt, and were not payments that benefitted husband—and did not have to be accounted for in the final equitable distribution order).]

Interim equitable distribution orders are by nature preliminary to entry of a final equitable distribution judgment and thus are interlocutory. [*Hunter v. Hunter*, 126 N.C. App. 705, 486 S.E.2d 244 (1997) (interim order ruling that insurance proceeds were husband’s separate property not immediately appealable).]

Depending on the language of an interim order, an order for interim distribution may be the final distribution of property.

Where a consent order making an interim distribution of property provided that the distribution of a condominium to wife was “final” for purposes of equitable distribution and set out the amount at which the condominium should be valued, the consent order precluded further valuation of the condominium at the equitable distribution trial and precluded consideration of the appreciation of the condominium as divisible property. [*Wirth v. Wirth*, 193 N.C. App. 657, 668 S.E.2d 603 (2008).]

Where a consent order making an interim distribution of property provided for the sale of the marital residence with the net proceeds to be distributed to wife and provided that a sale before the equitable distribution trial would establish the net fair market value of the marital residence for purposes of equitable distribution, the proceeds upon distribution to wife became her separate property. Interest earned on the proceeds was wife’s separate property and could not be considered divisible property. [*Wirth v. Wirth*, 193 N.C. App. 657, 668 S.E.2d 603 (2008).]

Depending on the language used, an order for interim distribution can preserve certain claims of the parties.

When an interim order providing for husband to close on a house under contract on the date of separation included language that the transaction was “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).]

## Pretrial Procedures

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

The party who first asserts a claim for equitable distribution 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).]

The opposing party must serve a responding inventory within thirty days after service of the inventory affidavit. [G.S. 50-21(a).]

The inventory affidavits are subject to amendment and are nonbinding at trial as to completeness or value. [G.S. 50-21(a).]

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.

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).]

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 equitable distribution 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).]

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).]

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).]

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).]

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 equitable distribution 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 2007 order 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.)]

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

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 equitable distribution hearing).]

Scheduling and discovery conference. [G.S. 50-21(d).]

Within 120 days after filing, the party first requesting equitable distribution must request that the court conduct a scheduling and discovery conference. If that party fails to request a conference, the other party may do so. [G.S. 50-21(d).]

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).]

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).]

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).]

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

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).]

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

At the scheduling conference mandated by G.S. 50-21(d) in all equitable distribution actions in all judicial districts, or at such earlier time as specified by local rule, the court shall include in its scheduling order a requirement that the parties and their counsel attend a mediated settlement conference or, if the parties agree, other settlement procedure conducted pursuant to the 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).]

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).]

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).]

The FFS Rules 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,” <https://www.nccourts.gov/assets/inline-files/Rules-for-Settlement-Procedures-in-District-Court-Family-Financial-Cases-Codified-1-October-2021.pdf?jDt2PWtSO1vHaxxLrULWHyMhmlJ.gYm>

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

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:

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

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).]

Sanctions for delay of the proceedings may include an order:

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

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

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

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).]

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).]



Trial court did not abuse its discretion in awarding wife a portion of her attorney fees as a sanction where husband unreasonably delayed equitable distribution 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).]

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).]

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 equitable distribution proceedings. [*Crutchfield v. Crutchfield*, 132 N.C. App. 193, 511 S.E.2d 31 (1999) (defendant and her counsel failed to attend hearings).]

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".)]

Notice of sanctions required.

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).]

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).]

Notice sufficient.

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.)]

Notice not sufficient.

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 equitable distribution 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).]

Notice has been found not to have been provided by:

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*).]

Language in an equitable distribution 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).]

Statements by plaintiff's counsel.

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).]

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

G.S. 1A-1, Rule 11 sanctions for delay of an equitable distribution proceeding.

Rule 11 sanction of \$10,000 against defendant was appropriate where his refusal to participate in the pretrial process caused him to file numerous motions on the eve of trial, resulting in delay and additional expense to plaintiff, and where trial court concluded that the motions were filed for the purpose of delaying the equitable distribution trial. [*Chafin v. Chafin*, 250 N.C. App. 19, 791 S.E.2d 693 (2016), *review denied*, 369 N.C. 486, 795 S.E.2d 219 (2017).]

Temporary orders pursuant to G.S. 50-21(a).

During the pendency of the equitable distribution 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).]

## Stipulations

### Generally

Stipulations are different from consent judgments.

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.

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.

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*, 247 N.C. App. 135, 786 S.E.2d 12 (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 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](#).

In equitable distribution actions, "our courts favor *written stipulations* which are duly executed and acknowledged by the parties." [*Smith v. Smith*, 247 N.C. App. 135, 163, 786 S.E.2d 12, 33 (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.

#### Effect of a stipulation.

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).]

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).]

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).]

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 equitable distribution 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).]

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).]

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).]

Stipulation in a pretrial order that property acquired subsequent to reconciliation was included in wife’s equitable distribution claim prevented husband from arguing that a separation agreement and property settlement barred wife’s equitable distribution 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).]

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 postseparation 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).]

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*, 247 N.C. App. 135, 786 S.E.2d 12 (2016).]

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 equitable distribution case had been tried in reliance upon the pretrial order, without giving the parties notice and an opportunity to be heard); *Clemons v. Clemons*, 265 N.C. App. 113, 828 S.E.2d 501 (2019) (trial court erred in classifying property contrary to a stipulation by the parties without setting aside the stipulation following notice to the parties and an opportunity for the parties to be heard).]

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”).]

#### Pretrial orders.

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).]

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.

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).]

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).]

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).]

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).]

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 equitable distribution hearing).]

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

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).]

In equitable distribution 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*).]

North Carolina courts "favor *written stipulations* which are duly executed and acknowledged by the parties." [*Smith v. Smith*, 247 N.C. App. 135, 163, 786 S.E.2d 12, 33 (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).]

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).]

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).]

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

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:

The trial court read the terms of the stipulations to the parties as dictated to the clerk of court,

The parties understood the legal effects of their agreement and the terms of the agreement, and

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).]

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).]

*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).]

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 equitable distribution 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).]

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).]

Trial court's finding of fact that parties in equitable distribution case stipulated as to the division of certain retirement accounts must be affirmatively reflected in the record for the equitable distribution 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 equitable distribution trial, but that fact was not mentioned in the review of this challenge to the equitable distribution order).]

### Procedure to Set Aside a Stipulation

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).]

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 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 equitable distribution issues and before entry of an equitable distribution 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"); *Clemons v. Clemons*, 265 N.C. App. 113, 828 S.E.2d 501 (2019) (trial court erred in classifying property contrary to a stipulation by the parties without setting aside the stipulation following notice to the parties and an opportunity for the parties to be heard.

**Equitable Distribution**  
Managing Complex ED Cases from Start to Finish  
Retired Judge Sue Burch  
Judge Jena Culler

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**Six areas of Management**

1. Scheduling Conference and Pretrial Conferences
2. Pre-trial Motions
3. Final Pre-trial Order
4. Trial
5. Decision
6. Order

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**Scheduling Conference and Pretrial Conferences**

- NCGS 50-21 sets forth timelines
- Use form orders to discover issues that need addressing and schedule time to address those issues as needed
- Sample Forms
- Pretrial conferences start to allow for triaging complex cases and allow for setting follow up status conferences for the complex cases
- Consider at a status conference whether bifurcating a complex issue and handling it first will be helpful and agreeable to the parties

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## Pre-trial Motions

- TROs and Injunctions
- Interim Distribution
- Compel Discovery
- Add 3<sup>rd</sup> party defendants
- Return of Separate Property
- Determine DOS (if not addressed already addressed at a hearing set at a conference)

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## Final Pretrial Order

- Good format makes your life easier
- It is your roadmap for the trial
- Sample forms
- Discuss how to complete with attorneys in advance to get consistency
- Give attorneys a deadline to have the FPTO filed and delivered to you in advance of trial
- Conference with attorneys a few days in advance of trial to get preview of the factual/legal issues
- Get an extra hard copy and an electronic copy for your use

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## Trial

- Time management – set the rules before you start
- Order of presentation of evidence -discuss a plan with the attorneys
- Opening Statements
- Mantra – Classify, Value, Distribute
- Tips for taking and organizing your notes
- Recordings of the court proceedings
- Immediately after trial – Voice Recorder tip

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## Decision

- Determine the best place to start
- Do one item at the time and document your findings and result for each item so you can easily give your whole decision when you are done
- Fill in your FPTO as you make your decisions
- Distribute to who's name the item is in whenever possible
- FPTO in Excel is valuable tool for you to organize and turn into summary of (Exhibit to) your decision
- When you have classified, valued, and distributed everything, then look at your bottom line
- Go over the distribution factors and determine "equal is equitable" or "equal is not equitable"
- Determine if distributive award necessary to effectuate equitable distribution
- Remember 6 years from divorce IRS rule

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## Order

- Assign preparer and deadline and follow up on the deadline
- Determine how disagreements to the form of the order are to be presented to you
- Your spreadsheet and notes as you made your decision can help in streamlining the order
- Consider practical implications and wording

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Equitable Distribution:  
Managing Complex Cases from Start to Finish

Retired Judge Sue Burch

Judge Jena Culler

Contents:

N.C.G.S. §50-21 Procedures in actions for equitable distribution of property; sanctions for purposeful and prejudicial delay

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Pre-trial Order

Standing Order

Mecklenburg County

Initial Pretrial Conference, Scheduling and Discovery Order

ED Status Conference Checklist and Order

Final Pre-trial Order and Schedule

Final Pre-trial Order Schedule Sample

**§ 50-21. Procedures in actions for equitable distribution of property; sanctions for purposeful and prejudicial delay.**

(a) At any time after a husband and wife begin to live separate and apart from each other, a claim for equitable distribution may be filed and adjudicated, either as a separate civil action, or together with any other action brought pursuant to Chapter 50 of the General Statutes, or as a motion in the cause as provided by G.S. 50-11(e) or (f). Within 90 days after service of a claim for equitable distribution, the party who first asserts the claim shall prepare and serve upon the opposing party an equitable distribution inventory affidavit listing all property claimed by the party to be marital property and all property claimed by the party to be separate property, and the estimated date-of-separation fair market value of each item of marital and separate property. Within 30 days after service of the inventory affidavit, the party upon whom service is made shall prepare and serve an inventory affidavit upon the other party. The inventory affidavits prepared and served pursuant to this subsection shall be subject to amendment and shall not be binding at trial as to completeness or value. The court may extend the time limits in this subsection for good cause shown. The affidavits are subject to the requirements of G.S. 1A-1, Rule 11, and are deemed to be in the nature of answers to interrogatories propounded to the parties. Any party failing to supply the information required by this subsection in the affidavit is subject to G.S. 1A-1, Rules 26, 33, and 37. During the pendency of the action for equitable distribution, discovery may proceed, and the 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.

Real or personal property located outside of North Carolina is subject to equitable distribution in accordance with the provisions of G.S. 50-20, and the court may include in its order appropriate provisions to ensure compliance with the order of equitable distribution.

(b) For purposes of equitable distribution, marital property shall be valued as of the date of the separation of the parties, and evidence of preseparation and postseparation occurrences or values is competent as corroborative evidence of the value of marital property as of the date of the separation of the parties. Divisible property and divisible debt shall be valued as of the date of distribution.

(c) Nothing in G.S. 50-20 or this section shall restrict or extend the right to trial by jury as provided by the Constitution of North Carolina.

(d) Within 120 days after the filing of the initial pleading or motion in the cause for equitable distribution, the party first serving the pleading or application shall apply to the court to conduct a scheduling and discovery conference. If that party fails to make application, then the other party may do so. At the conference the court shall determine a schedule of discovery as well as consider and rule upon any motions for appointment of expert witnesses, or other applications, including applications to determine the date of separation, and shall set a date for the disclosure of expert witnesses and a date on or before which an initial pretrial conference shall be held.

At the initial pretrial conference the court shall make inquiry as to the status of the case and shall enter a date for the completion of discovery, the completion of a mediated settlement conference, if applicable, and the filing and service of motions, and shall determine a date on or after which a final pretrial conference shall be held and a date on or after which the case shall proceed to trial.

The final pretrial conference shall be conducted pursuant to the Rules of Civil Procedure and the General Rules of Practice in the applicable district or superior court, adopted pursuant to G.S. 7A-34. The court shall rule upon any matters reasonably necessary to effect a fair and prompt disposition of the case in the interests of justice.

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

- (1) The party has willfully obstructed or unreasonably delayed, or has attempted to obstruct or unreasonably delay, discovery proceedings, including failure to make discovery pursuant to G.S. 1A-1, Rule 37, or has willfully obstructed or unreasonably delayed or attempted to obstruct or unreasonably delay any pending equitable distribution proceeding, and
- (2) The willful obstruction or unreasonable delay of the proceedings is or would be prejudicial to the interests of the opposing party.

Delay consented to by the parties is not grounds for sanctions. The sanction may include an order to pay the other party the amount of the reasonable expenses and damages incurred because of the willful obstruction or unreasonable delay, including a reasonable attorneys' fee, and including appointment by the court, at the offending party's expense, of an accountant, appraiser, or other expert whose services the court finds are necessary to secure in order for the discovery or other equitable distribution proceeding to be timely conducted. (1981, c. 815, s. 6; 1983, c. 671, s. 1; 1985, c. 689, s. 21; 1987, c. 844, s. 1; 1991, c. 610, s. 2; 1991 (Reg. Sess., 1992), c. 910, s. 1; 1993, c. 209, s. 1; 1995, c. 244, s. 1; c. 245, s. 1; 1997-302, s. 2; 2001-364, s. 1.)



## Guilford County Selected Rules and Forms

**RULE 14**  
**ENTRY OF ORDER OR JUDGMENT**

- 14.01 **Preparation of Order.** Following a hearing or trial, the presiding judge shall direct an attorney to draft a proposed Order or Judgment. The drafting attorney shall draft the document and seek approval from opposing counsel or party within ten (10) business days, or within such time as the judge directs. The opposing counsel or party shall have ten (10) business days, or within such time as the judge directs, thereafter within which to object, propose changes or additions, or submit an alternate order to the drafting attorney. If the parties or attorneys are unable to agree on the terms of a proposed order, the drafting attorney shall submit the proposed Order or Judgment to the presiding judge with a cover letter succinctly explaining the lack of approval and the reasons therefore. A copy of the proposed order submitted and cover letter must be furnished to opposing counsel. Within a reasonable time thereafter the presiding judge may (a) sign the submitted proposed order, (b) ask for a conference to settle the terms of the proposed order, or (c) direct the attorneys to modify the document submitted and notify the other attorney accordingly.
- 14.02 **Required Preamble.** All proposed Orders and Judgments shall in their preamble make reference to the session of court and the date of hearing in a form substantially as follows:
- THIS MATTER** came on for hearing and being heard before the Honorable {Judge's name}, District Court Judge for the Eighteenth Judicial District, Guilford County during the {date i.e. October 1, 2012} civil {jury or non-jury} session of Court and was heard on {dates i.e. October 10, 11, & 12, 2012}, upon {Plaintiff's or Defendant's} {motion or other pleading} for {issue}.
- 14.03 **Statement of Representation.** All proposed Orders and Judgments submitted shall in their preamble make reference to any attorney at law who appeared as counsel in the matter in a form substantially similar as follows:
- IT APPEARING TO THE COURT** that the plaintiff was represented by Attorney {name} and defendant was not represented by counsel.
- 14.04 No attorney may be relieved as Counsel of Record, nor abandon the duty of Counsel of Record to prepare an Order in accordance herewith, until the Court has entered the appropriate Order or Judgment.

NORTH CAROLINA  
GUILFORD COUNTY

IN THE GENERAL COURT OF JUSTICE  
DISTRICT COURT DIVISION  
File No. \_\_\_\_\_

\_\_\_\_\_  
Plaintiff  
v.

\_\_\_\_\_  
Defendant

**STANDING ORDER**  
(EQUITABLE DISTRIBUTION)

**TAKE NOTICE THAT** in accordance with the Case Management Rules for the District Court of the Eighteenth Judicial District, the parties shall operate within the following time restrictions unless the Court waives compliance with any or all provisions of this Standing Order.

**IT IS THEREFORE ORDERED AS FOLLOWS:**

1. **30 days after service of this Standing Order**, the moving party must serve on the responding party an Equitable Distribution Inventory Affidavit (hereinafter "EDIA") (see Form CMR-230) and Initial Disclosures pursuant to Case Management Rule 25.06.
2. **30 days after service of the first EDIA**, the responding party must serve their EDIA and Initial Disclosures pursuant to Case Management Rule 25.06.
3. **Within 90 days after the filing of the first claim for equitable distribution**, the parties shall agree upon and select a mediator and a Consent Stipulation (Form CMR-240) regarding selection of mediator shall be filed with the Equitable Distribution Judicial Assistant (hereinafter, "EDJA") and the Clerk. If a Consent Stipulation is not filed, then the EDJA shall place the matter on the next available district court session.
4. **No later than 210 days after the filing of the first claim for equitable distribution**, the moving party, responding party, and the mediator must hold a court ordered mediated settlement conference, after which the mediator must produce a certification that an impasse was declared or a settlement was reached.
5. **No later than 210 days after the filing of the first claim for equitable distribution**, the assigned judge will hold an Initial Pretrial Conference. Each party should be present in Court or available by telephone with his or her attorney at the time of this conference. At the conference, the assigned judge will:
  - (a) Review the status of the case.
  - (b) Enter a date for completion of discovery, if not previously completed.
  - (c) Enter a date for the filing and service of motions, and determine a date on which the Final Pretrial Conference shall be held.
  - (d) Determine a trial date.
  - (e) Set the dates for service and completion of a Final Pretrial Order.
6. **No later than 240 days after the first equitable distribution claim is filed**, the assigned judge must hold a Final Pretrial Conference.
7. **No later than 270 days after the first equitable distribution claim is filed**, the assigned judge must hold a trial.
8. Either party may file a Calendar Request and Notice of Hearing (Form CMR-200) for a pre-trial conference at any time during the course of this action if they feel one is necessary considering the circumstances of the case.

**SO ORDERED**, this the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
DISTRICT COURT JUDGE PRESIDING

Plaintiff	v.
Defendant	

<b>EQUITABLE DISTRIBUTION INVENTORY AFFIDAVIT OF</b>	
<input type="checkbox"/>	Plaintiff
<input type="checkbox"/>	Defendant

**Purpose:**

The Plaintiff and Defendant were married and accumulated some property. Now, someone has asked the Judge to fairly, or equitably, divide this property. The purpose of this Equitable Distribution Inventory Affidavit is to give the Judge the information needed to equitably divide the property. The Judge will need to know this information because at the trial the Judge must determine the Fair Market Value (FMV) of each item of property and whether each item of property is Marital or Separate. The Judge must then decide who gets each item of property. Therefore, you must carefully list each item of property (or debt owed) which either of you owned or had any interest in as of the day of separation, no matter in whose name the property was titled, and no matter who has current possession of the property. List everything, and if you believe that the property is not Marital, list that item as "Separate."

This Affidavit is not binding on the Affiant as to completeness of unknown marital property, values or distribution.

**DEFINITIONS:** As used in these schedules, the following abbreviations have the following meanings:

- (1) **DOM** means the "Date of Marriage of the parties." The Date of Marriage is \_\_\_\_\_.
- (2) **DOS** means the "Date of Separation" of the parties, which is the last date you stopped living together in the same residence with the intent of at least one of the parties that the Separation would be permanent. The Date of Separation is \_\_\_\_\_.
- (3) **FMV** means "Fair Market Value."
- (4) **LIEN** means a "Lien on a property." Whether created by a mortgage, deed of trust, security agreement or otherwise.
- (5) **PROPERTY** means anything that you can own (not just land and house, but also bank accounts and retirement accounts)
- (6) **SEPARATE PROPERTY** means property that either of you received either before the marriage or after the DOS, or that either of you received during the marriage by gift (from someone other than your spouse) or inheritance.
- (7) **MARITAL PROPERTY** means property that is not Separate Property, no matter whose name it is in, that either of you received between the DOM and the DOS.
- (8) **MIXED PROPERTY** means property that is part-marital, part-separate (e.g. car that was purchased prior to DOM, but paid for during marriage).

**SCHEDULE A**

**FINANCIAL ACCOUNTS AND LIFE INSURANCE POLICIES**

(Checking, Savings, CD's, Money Market, Credit Union Accounts, Stocks, Stock Options, Bonds, Mutual Funds, Securities, Traveler's Checks, Cash on hand, etc.)  
**For Life Insurance Policies:** Use Cash Values of your Life Insurance policies for FMV. Include Policy Number, Face Value and Life Insurance Company, Term or Whole Life  
 Include a description of the property sufficient that the Court can identify it. - Attach statements as of DoS & at present, if available.

Item	Property	Classification			Possession			Value		Distribution				
		Husband Contentends Marital or Separate (M or S)	Wife Contentends Marital or Separate (M or S)	Agreed on or Court Finding (M or S)	Husband Contentends who has it? (H or W)	Wife Contentends who has it? (H or W)	Agreed on or Court Finding who has it? (H or W)	Husband Contentends the DOS FMV	Wife Contentends the DOS FMV	Husband Contentends who gets it? (H or W)	Wife Contentends who gets it? (H or W)	Agreed on or Court Finding: FMV Distributed to Husband	Agreed on or Court Finding: FMV Distributed to Wife	
A1														
A2														
A3														
A4														
A5														
A6														
A7														
A8														
A9														
A10														
A11														
A12														
A13														
A14														
A15														
A16														
A17														
A18														
A19														
A20														
A21														
<b>Subtotal</b>														

**SCHEDULE B**

**REAL PROPERTY**

(Land (that you own), Houses (that you own), Rental Property (that you own), Fixtures, Trailers (that you own), Mobile Homes (that you own), Investment Property (that you own))  
 Include a description of the property sufficient that the Court can identify it. Attach copies of deeds, UCC statements, appraisals.

Item	Classification			Possession		Value		Distribution			
	Husband Contentends Marital or Separate (M or S)	Wife Contentends Marital or Separate (M or S)	Agreed on or Court Finding (M or S)	Husband Contentends who has it? (H or W)	Wife Contentends who has it? (H or W)	Husband Contentends the DOS FMV	Wife Contentends the DOS FMV	Husband Contentends who gets it? (H or W)	Wife Contentends who gets it? (H or W)	Agreed on or Court Finding: FMV Distributed to Wife	Agreed on or Court Finding: FMV Distributed to Husband
B1											
B2											
B3											
B4											
B5											

**SCHEDULE B-i**

**DEBTS RELATED TO REAL PROPERTY**

(List your debts that are secured by a lien on real property. Include the name, address, telephone number, and the account number of the creditor. For each creditor, identify (in the same manner you did in the "property schedules") the real property securing the debt.)

Attach a copy of the documentation you used to determine the amount of the debt. Attach copies of statements of the debts as of DoS and present, if available.

Item	Classification			Possession		Value		Distribution			
	Husband Contentends Marital or Separate (M or S)	Wife Contentends Marital or Separate (M or S)	Agreed on or Court Finding (M or S)	Husband Contentends who has been paying? (H or W)	Wife Contentends who has been paying? (H or W)	Husband Contentends the DOS FMV	Wife Contentends the DOS FMV	Husband Contentends who gets it? (H or W)	Wife Contentends who gets it? (H or W)	Agreed on or Court Finding: FMV Distributed to Husband	Agreed on or Court Finding: FMV Distributed to Wife
B-i1											
B-i2											
B-i3											
B-i4											
B-i5											

Subtotal Schedule B	
Subtotal Schedule B-i	
<b>Subtotal (Sch. B less Sch. B-i)</b>	


BUSINESS OR PROFESSIONAL INTERESTS													
SCHEDULE C													
(S-Corps, C-Corps, LLC, LLP, Sch. C, 1040, Partnerships, Sole Proprietorship )													
Include Name of Business or Professional Interest and the Nature of your Ownership Interest/Percentage of Ownership													
Include a description of the property sufficient that the Court can identify it. Attach Schedule C or K-1's, operating and buy/sell agreements, appraisals, offers to purchase, if available.													
Item	Property (Name of Business)	Classification			Possession			Value			Distribution		
		Husband Content Marital or Separate (M or S)	Wife Content Marital or Separate (M or S)	Agreed on or Court Finding (M or S)	Husband Content who has it? (H or W)	Wife Content who has it? (H or W)	Agreed on or Court Finding who has it? (H or W)	Husband Content the DOS FMV	Wife Content the DOS FMV	Husband Content who gets it? (H or W)	Wife Content who gets it? (H or W)	Agreed on or Court Finding: FMV Distributed to Husband	Agreed on or Court Finding: FMV Distributed to Wife
C1													
C2													
C3													
C4													
C5													
C6													
RETIREMENT													
SCHEDULE D													
(Pensions, 401(k), 403(b) and similar plans, Profit Sharing Plans, IRAs, SEP, Roth, Non-Qualified Plans, KEOGHs, Annuities, etc )													
For each account state the following: The Name of the Plan, Date Employment Began, Date Participation Began, Date Participation Ended, Participant's Date of Birth													
Include a description of the property sufficient that the Court can identify it. Attach copies of statements from DoM, DoS and present, if available.													
Item	Retirement Accounts	Classification			Possession			Value			Distribution		
		Husband Content Marital or Separate (M or S)	Wife Content Marital or Separate (M or S)	Agreed on or Court Finding (M or S)	Husband Content who has it? (H or W)	Wife Content who has it? (H or W)	Agreed on or Court Finding who has it? (H or W)	Husband Content the DOS FMV	Wife Content the DOS FMV	Husband Content who gets it? (H or W)	Wife Content who gets it? (H or W)	Agreed on or Court Finding: FMV Distributed to Husband	Agreed on or Court Finding: FMV Distributed to Wife
D1													
D2													
D3													
D4													
D5													
D6													
Subtotal Sch C													
Subtotal Sch D													
Subtotal (Sch. C & Sch. D)													

**SCHEDULE E**

**MOTOR VEHICLES**

(Cars, Motorcycles, Trucks, Boats, Jet Skis, Airplanes, RVs, 4-wheelers (that you own)); DO NOT LIST LEASED VEHICLES  
 Include Year/Make/Model - Include a description of the property sufficient that the Court can identify it. - Attach a copy of the title if paid for.

Item	Classification			Possession			Value			Distribution		
	Husband Contents Marital or Separate (M or S)	Wife Contents Marital or Separate (M or S)	Agreed on or Court Finding (M or S)	Husband Contents who has it? (H or W)	Wife Contents who has it? (H or W)	Agreed on or Court Finding who has it? (H or W)	Husband Contents the DOS FMV	Wife Contents the DOS FMV	Husband Contents who gets it? (H or W)	Wife Contents who gets it? (H or W)	Agreed on or Court Finding: FMV Distributed to Husband	Agreed on or Court Finding: FMV Distributed to Wife
E1												
E2												
E3												
E4												
E5												

**SCHEDULE E-i**

**LIENS ON MOTOR VEHICLES**

List your debts that are secured by a lien on your motor vehicles. Include the name, address, telephone number, and the account number of the creditor.  
 For each creditor, identify (in the same manner you did in the "property schedules") the vehicle securing the debt.

Attach a copy of the documentation you used to determine the amount of the debt. - Attach copies of all statements as of DoS and present, if available.

Item	Classification			Possession			Value			Distribution		
	Husband Contents Marital or Separate (M or S)	Wife Contents Marital or Separate (M or S)	Agreed on or Court Finding (M or S)	Husband Contents who has been paying? (H or W)	Wife Contents who has been paying? (H or W)	Agreed on or Court Finding who has been paying? (H or W)	Husband Contents the DOS FMV	Wife Contents the DOS FMV	Husband Contents who gets it? (H or W)	Wife Contents who gets it? (H or W)	Agreed on or Court Finding: FMV Distributed to Husband	Agreed on or Court Finding: FMV Distributed to Wife
E-i1												
E-i2												
E-i3												
E-i4												
E-i5												

Subtotal Sch E	
Subtotal Sch E-i	
<b>Subtotal (Sch. E less Sch. E-i)</b>	



**SCHEDULE F**

**HOUSEHOLD FURNISHINGS, COLLECTIBLES,  
& MISCELLANEOUS PERSONAL PROPERTY**

Fair Market Value is what a willing buyer would pay a willing seller and NOT replacement value.

(Furniture, Antiques, Pictures, Wall Hangings, Appliances, Electronics, Linens, Books, Outdoor Furniture, Sporting Goods, Collectibles, Collections (coin, stamp, etc.), Silver, China, Crystal, Tools, Guns, Lawn Equipment, Jewelry, Animals, Etc. )

Include a description of the property sufficient that the Court can identify it. - Attach any appraisals. - Attach separate sheets as needed.

Item	Description of Personal Property	Classification			Possession			Value			Distribution		
		Husband Contents Marital or Separate (M or S)	Wife Contents Marital or Separate (M or S)	Agreed on or Court Finding (M or S)	Husband Contents who has it? (H or W)	Wife Contents who has it? (H or W)	Agreed on or Court Finding who has it? (H or W)	Husband Contents the DOS FMV	Wife Contents the DOS FMV	Husband Contents who gets it? (H or W)	Wife Contents who gets it? (H or W)	Agreed on or Court Finding: FMV Distributed to Husband	Agreed on or Court Finding: FMV Distributed to Wife
F1													
F2													
F3													
F4													
F5													
F6													
F7													
F8													
F9													
F10													
F11													
F12													
F13													
F14													
F15													
F16													
F17													
F18													
F19													
F20													
<b>Subtotal</b>													

**SCHEDULE G**

**MISCELLANEOUS ASSETS**

(Cash on Hand, Federal Tax Refund, State Tax Refund, Interest in Trust, Accounts Receivable, Money Owed to Marriage, PSLs, Frequent Flyer Miles, Security Deposits, Intellectual Property Rights (Patent, Copyright, Trademark/Trade Name), Commissions, Royalties, Bonuses, Hotel/Loyalty Rewards Points)  
 Include a description of the property sufficient that the Court can identify it. - Attach statement, 1099s, appraisals, if available.

Item	Property	Classification			Possession			Value		Distribution			
		Husband Contends Marital or Separate (M or S)	Wife Contends Marital or Separate (M or S)	Agreed on or Court Finding (M or S)	Husband Contends who has it? (H or W)	Wife Contends who has it? (H or W)	Agreed on or Court Finding who has it? (H or W)	Husband Contends the DOS FMV	Wife Contends the DOS FMV	Husband Contends who gets it? (H or W)	Wife Contends who gets it? (H or W)	Agreed on or Court Finding: FMV Distributed to Wife	Agreed on or Court Finding: FMV Distributed to Husband
G1													
G2													
G3													
G4													
G5													
G6													
G7													
G8													
G9													
G10													
G11													
G12													
G13													
G14													
G15													
G16													
G17													
G18													
G19													
G20													

**Subtotal**

**SCHEDULE H**

**DEBTS NOT PREVIOUSLY LISTED**

List any remaining debts that were owed on the DoS **NOT PREVIOUSLY LISTED**, including but not limited to **Credit Cards, Promissory Notes, Federal or State Tax Liabilities**.  
 Include the name, address, telephone number, and the account number of the creditor.  
 For each creditor, identify (in the same manner you did in the "property schedules") the property securing the debt.  
 Attach a copy of the documentation you used to determine the amount of the debt.

Item	Debt	Classification			Possession			Value		Distribution						
		Husband Contentends Marital or Separate (M or S)	Wife Contentends Marital or Separate (M or S)	Agreed on or Court Finding (M or S)	Husband Contentends who has been paying? (H or W)	Wife Contentends who has been paying? (H or W)	Agreed on or Court Finding who has been paying? (H or W)	Husband Contentends the DOS FMV	Wife Contentends the DOS FMV	Husband Contentends who gets it? (H or W)	Wife Contentends who gets it? (H or W)	Agreed on or Court Finding: FMV Distributed to Husband	Agreed on or Court Finding: FMV Distributed to Wife			
H1																
H2																
H3																
H4																
H5																
H6																
H7																
H8																
H9																
H10																
H11																
H12																
H13																
H14																
H15																
H16																
H17																
H18																
H19																
<b>Subtotal</b>																

**SCHEDULE I**

**CONTENTIONS AS TO SEPARATE PROPERTY**

*Enter All Property from Previous Schedule in which you ALLEGE that the item is Separate Property  
When Listing Item # and Property Description, Use the Same Item Number and Property Description from Previous Schedules*

Item #	Property (Use Same Description of the Property as on Previous Schedules)	Husband's Contentions as to Separate or Marital and Why?	Wife's Contentions as to Separate or Marital and Why?	DoS FMV	Current Possession (H or W)

SCHEDULE J	DIVISIBLE PROPERTY
<i>Itemize on a separate sheet as needed</i>	
<b>Factors</b>	
<p>1. Appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution. Do NOT include the appreciation or diminution in value, which is the result of post-separation actions or activities of spouse.</p>	
<b>Husband's Contentions:</b>	
<b>Wife's Contentions:</b>	
<p>2. Property, property rights, or any portion thereof received after the date of separation but before the date of distribution that was acquired as a result of the efforts of either spouse during the marriage and before the date of separation, including, but not limited to, commissions, bonuses, and contractual rights.</p>	
<b>Husband's Contentions:</b>	
<b>Wife's Contentions:</b>	
<p>3. Passive income from marital property received after the date of separation, including, but not limited to, interest and dividends.</p>	
<b>Husband's Contentions:</b>	
<b>Wife's Contentions:</b>	
<p>4. Increases in marital debt and financing charges and interest related to marital debt.</p>	
<b>Husband's Contentions:</b>	
<b>Wife's Contentions:</b>	

**SCHEDULE K**

**FACTORS JUSTIFYING AN UNEQUAL DISTRIBUTION**

N.C. Gen. Stat. § 50-20(c)

*Itemize on a separate sheet as needed*

**Factors**

1. The income, property, and liabilities of each party at the time the division of property is to become effective.

**Husband's Contentions:**

**Wife's Contentions:**

2. An obligation for support arising out of a prior marriage.

**Husband's Contentions:**

**Wife's Contentions:**

3. The duration of the marriage and the age and physical and mental health of both parties.

**Husband's Contentions:**

**Wife's Contentions:**

4. The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to sell or own its household effects.

**Husband's Contentions:**

**Wife's Contentions:**

5. The expectation of pension, retirement or other deferred compensation rights, which are not marital property.

**Husband's Contentions:**

**Wife's Contentions:**

6. An equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services or lack thereof as a spouse.

**Husband's Contentions:**

**Wife's Contentions:**

7. Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse.

**Husband's Contentions:**

**Wife's Contentions:**

8. Any direct contributions to an increase in value of separate property which occurs during the course of the marriage.

**Husband's Contentions:**

**Wife's Contentions:**

9. The liquid or non-liquid character of all marital property and divisible property.

**Husband's Contentions:**

**Wife's Contentions:**

10. The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party.

**Husband's Contentions:**

**Wife's Contentions:**

11. The tax consequences to each party.

**Husband's Contentions:**

**Wife's Contentions:**

<p>12. Acts of either party to maintain, preserve, develop, or expand; or to waste neglect, devalue or convert the marital or divisible property, or both, during the period after separation of the parties and before the time of distribution.</p> <p><b>Husband's Contentions:</b></p> <p><b>Wife's Contentions:</b></p>
<p>13. Payments on marital debt since separation.</p> <p><b>Husband's Contentions:</b></p> <p><b>Wife's Contentions:</b></p>
<p>14. Repairs or improvements to marital assets since separation.</p> <p><b>Husband's Contentions:</b></p> <p><b>Wife's Contentions:</b></p>
<p>15. Separate property was used for the purchase price of a marital asset.</p> <p><b>Husband's Contentions:</b></p> <p><b>Wife's Contentions:</b></p>
<p>16. Party's family paid the purchase price of a marital asset.</p> <p><b>Husband's Contentions:</b></p> <p><b>Wife's Contentions:</b></p>
<p>17. Any other factor which the Court finds just and proper.</p> <p><b>Husband's Contentions:</b></p> <p><b>Wife's Contentions:</b></p>

STATE OF NORTH CAROLINA

GUILFORD COUNTY

In The General Court of Justice  
District Court Division

File Number: \_\_\_\_\_

Plaintiff	v.
Defendant	<input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant

Plaintiff <input type="checkbox"/>	Defendant <input type="checkbox"/>
---------------------------------------	---------------------------------------

The undersigned affiant, after being duly sworn as shown below, states as follows,

1. I am submitting this Equitable Distribution Inventory Affidavit in accordance with Rule \_\_\_\_ of the Case Management Rules for the District Court Division of the 18th Judicial District and N.C. Gen. Stat. § 50-21.
2. The information contained in this affidavit is true, accurate, and complete to the best of my ability.
3. I have made a full and complete disclosure of all marital, divisible and separate property/debts known to me. I have provided my best estimate as to the date of separation value and present value of all assets and debts.
4. I certify that I am serving contemporaneously with this Equitable Distribution Inventory Affidavit the "Mandatory Documents" required under Rule \_\_\_\_ of the Case Management Rules of the District Court Division of the 18th Judicial District.
5. I hereby certify that all disclosures required by any schedule on which I have listed property or debt have been served with this affidavit on the opposing party or his/her counsel;

This the \_\_\_\_\_ day of \_\_\_\_\_, 201\_\_\_\_\_.

Affiant

<input type="checkbox"/>	Plaintiff
<input type="checkbox"/>	Defendant

STATE OF NORTH CAROLINA, COUNTY OF GUILFORD

I, the undersigned Notary Public for said county and state, do hereby certify that the following person personally appeared before me and (  ) I have personal knowledge of the identify of said person or (  ) I have seen satisfactory evidence of said person's identify by a current state or federal identification with said person's photograph, and having being sworn or affirmed, said person acknowledged to me that he/she voluntarily signed the foregoing document for the purposes stated therein.

Person: \_\_\_\_\_

Date: \_\_\_\_\_

(signature)

Notary Public's  
Name Printed: \_\_\_\_\_

My Commission Expires: \_\_\_\_\_



# SUMMARY

## Marital Property

Schedule	
A	Financial Accounts and Life Insurance
B/B-i	Real Property less Secured Debt
C	Business or Professional Interests
D	Retirement
E/E-i	Motor Vehicles less Secured Debt
F	Household Furnishings/Collectibles
G	Miscellaneous Assets
H	Debts Not Previously Listed

DOS FMV to Husband

DOS FMV to Wife

**Totals**

**Divisible Property - Total FMV**

**Distributive Award**

**Cross Check**

**Separate Property - Total FMV**

NORTH CAROLINA  
GUILFORD COUNTY

IN THE GENERAL COURT OF JUSTICE  
DISTRICT COURT DIVISION  
File No. \_\_\_\_\_

\_\_\_\_\_  
Plaintiff  
v.

\_\_\_\_\_  
Defendant

**FINAL PRE-TRIAL ORDER  
(EQUITABLE DISTRIBUTION)**

**THIS MATTER** having been duly calendared for Pretrial Conference pursuant to the Case Management Rules of the 18th Judicial District on this date, and having discussed with the parties, or their counsel (or those who were present at the scheduled conference), the status of the case and the remaining steps necessary to bring this matter to a conclusion, the Court makes the following

**THIS MATTER** was heard by the undersigned Presiding Judge during a Final Pre-Trial Conference upon pleadings seeking a determination of marital or divisible property and an equitable distribution of such property and debts as shall be determined to be marital or divisible;

**IT APPEARING TO THE COURT** that the parties have reached agreement on certain facts and on certain issues and have delineated the areas of agreement and disagreement; the parties, by their signatures affixed hereto, stipulate agreement with the facts and issues represented herein as agreed upon; the parties further stipulate that the facts and issues represented herein as being in dispute are accurately reflected and are the only issues to be determined by the Court; the parties warrant and avow that they have disclosed the existence of all separate, marital and divisible property, to which he or she may have claim at the date of valuation of marital property (regardless of to whom such property may be titled or in whom actual ownership may be designated) and said disclosure has been full and honest and is free from taint of fraud.

**IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED** and stipulated as follows:

1. The Court has jurisdiction over the parties and subject matter of this action.
2. Plaintiff and Defendant were married on \_\_\_\_\_, \_\_\_\_\_.
3. Plaintiff and Defendant separated on \_\_\_\_\_, \_\_\_\_\_.
4. The date of valuation is \_\_\_\_\_, \_\_\_\_\_.
5.  An equal division is an equitable division.  An unequal division is an equitable division.
6. Schedules attached hereto list all of the property owned by the parties at the date of separation.
7.  Schedule 1 is a list of all documents, reports and other exhibits may be admitted without authentication:
8.  Schedule 2 is a list of all other documents Plaintiff intends to introduce at trial. A copy has been provided to opposing counsel (or party, if unrepresented).
9.  Schedule 3 is a list of all other documents Defendant intends to introduce at trial. A copy has been provided to opposing counsel (or party, if unrepresented).
10.  The parties shall submit affidavits or signed reports of expert witnesses to be called at trial to opposing counsel (or party, if unrepresented) no later than one week prior to the start of the session wherein the case is scheduled for hearing (except upon "good cause shown..." Seven (7) days from receipt thereof, counsel for each party shall advise the other of any stipulations that can be entered with regard to the contents of the affidavit or reports (to avoid having the witness present at trial).

11.  Schedule 4 is a list of the names and addresses of all known witnesses the Plaintiff may offer at the trial.
12.  Schedule 5 is a list of the names and addresses of all known witnesses the Defendant may offer at the trial.
13.  This matter is set for trial during the session of \_\_\_\_\_.
14.  The estimated length of trial time is \_\_\_\_\_.
15.  No later than 24 hours before trial, counsel for the parties shall label, number and list all trial exhibits, and shall exchange exhibit lists, and supplement copies of exhibits and witness lists. A copy of each list shall be provided to the Judge when the case is called for trial.

This the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
DISTRICT COURT JUDGE PRESIDING

**CONSENTED TO:**

\_\_\_\_\_  
Plaintiff

\_\_\_\_\_  
Plaintiff's Attorney

\_\_\_\_\_  
Defendant

\_\_\_\_\_  
Defendant's Attorney

NORTH CAROLINA  
GUILFORD COUNTY

VERIFICATION

\_\_\_\_\_, being first duly sworn, deposes and says that he is the Plaintiff Defendant in the foregoing action, that he has read the foregoing FINAL PRE-TRIAL ORDER (EQUITABLE DISTRIBUTION) and knows the contents thereof to be true of his own personal knowledge except for those matters and things alleged therein upon information and belief, and as to those matters and things, he believes same to be true.

\_\_\_\_\_  
(Signature of Husband)

Sworn to and subscribed before me this  
the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
NOTARY PUBLIC  
My commission expires: \_\_\_\_\_

\_\_\_\_\_  
Assistant/Deputy Clerk of Court

NORTH CAROLINA  
GUILFORD COUNTY

VERIFICATION

\_\_\_\_\_, being first duly sworn, deposes and says that she is the Plaintiff Defendant in the foregoing action, that she has read the foregoing FINAL PRE-TRIAL ORDER (EQUITABLE DISTRIBUTION) and knows the contents thereof to be true of her own personal knowledge except for those matters and things alleged therein upon information and belief, and as to those matters and things, she believes same to be true.

\_\_\_\_\_  
(Signature of Wife)

Sworn to and subscribed before me this  
the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
NOTARY PUBLIC  
My commission expires: \_\_\_\_\_

\_\_\_\_\_  
Assistant/Deputy Clerk of Court

## Mecklenburg County Selected Forms

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE  
DISTRICT COURT DIVISION

COUNTY OF \_\_\_\_\_

\_\_\_\_-CVD-\_\_\_\_\_

\_\_\_\_\_

Plaintiff,

vs.

\_\_\_\_\_

Defendant.

**INITIAL PRETRIAL CONFERENCE, SCHEDULING, AND  
DISCOVERY ORDER  
IN EQUITABLE DISTRIBUTION MATTER**

THIS CAUSE comes on to be heard on \_\_\_\_\_, 20\_\_\_\_, by the undersigned District Court Judge after proper service and notice. It is set for an Initial Equitable Distribution Pretrial Conference (IPTC). Present in Court were:

- Plaintiff  appearing pro se  represented by counsel, \_\_\_\_\_.
- Defendant  appearing pro se  represented by counsel, \_\_\_\_\_.

IT IS HEREBY ORDERED AS FOLLOWS:

1. Date of marriage and date of separation.

- The parties date of marriage is \_\_\_\_\_ and their date of separation is \_\_\_\_\_.
- There is a dispute about the  date of marriage  date of separation. A hearing to resolve this issue is set for \_\_\_\_\_, 20\_\_\_\_ at \_\_\_\_\_ in courtroom \_\_\_\_\_.
- Other: \_\_\_\_\_.

2. Service of Equitable Distribution (ED) Affidavits.

- Plaintiff  Defendant has/have filed and served his/her Affidavit prior to this conference pursuant to local rules.
- \_\_\_\_\_'s Equitable Distribution Affidavit(s) has/have not been filed and served in a timely manner. Any party who has not yet filed and served an Equitable Distribution Affidavit shall do so no later than \_\_\_\_\_. Failure to do so may result in sanctions.

3. Amendments to Equitable Distribution Affidavits. The parties may file and serve amendments to their ED Affidavits, which amendments shall be filed and served on the opposing party by ten (10) calendar days prior to the date the case is scheduled for trial. The parties shall update their affidavits as they acquire additional pertinent information. The Final Pretrial order shall be deemed to constitute an amendment of each party's ED Affidavit.

4. Discovery Issues. The following discovery issues have been identified:

- a. \_\_\_\_\_
- b. \_\_\_\_\_

5. Discovery Schedule. Discovery shall be completed ten (10) calendar days prior to the date the case is scheduled for trial.

6. Agreed Upon Experts. The parties have agreed to \_\_\_\_\_ as a court appointed expert to value \_\_\_\_\_ . The following rules shall apply:

- a. The parties will cooperate in furnishing information and making premises available to the expert.
- b. The expert will furnish a report simultaneously to plaintiff and defendant.
- c. The expert shall value the property as of the date of separation and as of the present time.
- d. The expert's report may be received into evidence without further authentication and without the expert being present in Court.
- e. Neither party is bound by the expert's report. Either party may contradict or impeach the expert's report and may cross examine the expert about the report. The party wishing to cross examine the expert about the report shall be responsible for issuing a subpoena for his/her appearance at trial and arranging for his/her appearance.
- f. With respect to the cost of the expert, the following shall apply: \_\_\_\_\_

7. Exchange of Other Expert Reports. Either party may wish to offer testimony of expert witnesses at trial with regard to various matters at issue including valuation of assets. A written report of any such expert shall be exchanged by the Status Conference, and each party shall be permitted to depose the other party's expert witness(es). Written reports shall comply with the requirements of Rule 26(b)(4)a.2 of the NC Rules of Civil Procedure.

8. Court Appointed Experts Pursuant to Rule 706. Motions pursuant to Rule 706 and Orders to Show Cause shall be filed and served within 30 days. The hearing for the Motion shall be scheduled with Family Court at the time it is filed.

9. Alternative Dispute Resolution. The following alternative dispute resolution procedure shall be utilized by the parties *and shall be completed prior to the Status Conference.*

- Mediated Settlement Conference with mediator selected by the parties. \_\_\_\_\_  
The parties represent to the court that the selected mediator has been contacted and is available to conduct the mediation prior the deadline.
- Mediated Settlement Conference with court appointed mediator. \_\_\_\_\_
- Arbitration. \_\_\_\_\_
- Early Neutral Evaluation. \_\_\_\_\_
- Other \_\_\_\_\_

10. A Status Conference is hereby scheduled on \_\_\_\_\_ (date as given by Family Court). At the Status Conference, the court shall confirm completion of events scheduled in this order, address any outstanding discovery issues, set the trial term for this matter, set the due date for the Final Pretrial Order, and address any other outstanding issues.

This the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_\_.

\_\_\_\_\_  
District Court Judge Presiding

We Consent:

\_\_\_\_\_  
Plaintiff

\_\_\_\_\_  
Defendant

\_\_\_\_\_  
Plaintiff's Counsel

\_\_\_\_\_  
Defendant's Counsel

STATE OF NORTH CAROLINA  
 COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE  
 DISTRICT COURT DIVISION  
 \_\_\_\_\_-CVD-\_\_\_\_\_

\_\_\_\_\_  
 Plaintiff,  
 vs.  
 \_\_\_\_\_  
 Defendant.

**STATUS CONFERENCE  
 CHECKLIST AND ORDER  
 FOR EQUITABLE DISTRIBUTION MATTER**

*Present in Court:*

Plaintiff  Plaintiff's Counsel:

Defendant  Defendant's Counsel:

Date of Marriage:

Date of Separation:

<b>ACTION</b>	<b>DONE ✓</b>	<b>DUE DATE</b>	<b>OTHER</b>
Have Equitable Distribution Affidavits been filed?			
Have all documents required by Local Rules been exchanged?			
Has Alternative Dispute Resolution been completed?			
Is discovery complete?			
Have all valuation methods been selected (i.e., appraisal, etc.)?			
How are household furnishings being handled?			
Have expert witnesses been identified?			
Have expert reports been exchanged?			
Have all witnesses been determined?			
Have stipulations re: authentication or other matters been discussed?			
What is the estimated length of trial?			
<b>Equitable Distribution is set for the trial term beginning:</b> ____ / ____ / ____			
When will the Final Pretrial Order be due?			

Other:

SO ORDERED:

This the \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

\_\_\_\_\_  
 District Court Judge



## ED FINAL PRETRIAL ORDER INSTRUCTIONS

1	Start with the Schedule
2	Enter case number, case name, date of marriage, date of Separation, and date of divorce at the top. (If not divorced, leave blank.)
3	Round all values to the nearest dollar.
4	Item numbers should be sequential for each item in the FPTO all the way through the entire order (i.e. do not start renumbering). One exception is if you would like to use a number and subletter for a divisible component of an asset, or a secured debt related to an asset such as a mortgage or car loan, under the asset as a separate entry. For example Item 1 house, Item 1b mortgage, Item 1c divisible component of house. (See Sample Schedule) Consider using Household Furnishings Addendum if they are numerous and leaving one line in the main schedule for the total of the household furnishings.
5	Under "Stipulations" enter all stipulations to classification, DOS (or divisible) value, and distribution. Leave blank anything that is not stipulated to. If an item is stipulated to as Divisible, a stipulation of value is the divisible value instead of DOS Value. Classification should be one of the following things (M=marital, H's S=Husband's Separate Property, W's S=Wife's separate property, D=Divisible, Mx=Mixed Asset (part M, part S))
6	Fill out contentions section for the issues that lack a stipulation. It is not necessary to fill out contentions for issues where there are stipulations entered.
7	Use exhibit numbers that correspond to the Item number. If there is more than one exhibit for an Item, use a subletter for the exhibit. For example, Plaintiff's Exhibits P1a, P1b, P1c, P1d, all would relate to Item #1.
8	Enter "H" for Husband and "W" for Wife next to "P/___" or "D/___" in the blank in the Exhibit column heading.
9	Do not enter a separate section for separate property. Separate property contentions can be set forth in contentions next to the item under the type of asset or debt it is.
10	Add or delete rows as needed. Use consistent format/shading as the rest of the document.
11	Complete the Schedule, Factors, and Cover Sheet.
12	Print Cover Sheet in portrait format. Print Schedule and Factors in landscape format, scaling to fit all columns on one letter size page.
13	Sample Schedule is provided as an example of a mock completed schedule to provide some illustrative assistance if needed.

STATE OF NORTH CAROLINA  
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE  
DISTRICT COURT DIVISION  
FILE NO. \_\_-CVD-\_\_\_\_\_

vs.	Plaintiff,
	Defendant.

**FINAL EQUITABLE DISTRIBUTION  
PRETRIAL ORDER**

THIS CAUSE comes before the undersigned Judge upon pleadings seeking an Equitable Distribution.

IT APPEARS that the parties have reached agreement on certain facts and issues and have set forth their stipulations and contentions in the attached Schedule which is hereby incorporated herein by reference.

IT IS STIPULATED AND THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

1. This court has personal jurisdiction over this matter.
2. The attached Final Pretrial Order Schedule is attached hereto and incorporated herein by reference and sets forth the items the parties contend are to be part of the Equitable Distribution, and the parties contentions and/or stipulations for each item.
3. The parties date of marriage, date of separation, and date of divorce (if listed) are stipulated to be the dates as set forth in the attached Schedule.
4. All matters under the columns "Stipulations" are matters that are stipulated to as shown as to classification, value, and/or distribution and shall not require further evidence.
5. The following documents, reports, and or other exhibits may be admitted into evidence without further identification and/or authentication:

- A.
- B.
- C.
- D.
- E.

6. Additional Stipulations: (Add as many paragraphs as needed)

This the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
District Court Judge Presiding

We consent:

\_\_\_\_\_  
Plaintiff

\_\_\_\_\_  
Defendant

\_\_\_\_\_  
Plaintiff's Counsel

\_\_\_\_\_  
Defendant's Counsel

Final Pretrial Order Schedule

Case Number:  
Case Name:

Date of Marriage:      Date of Separation:      Date of Divorce:

ITEM#	ITEM OF MARITAL PROPERTY	In the name of	Contentions						Stipulations							
			H Class	W Class	H DOS Value	W DOS Value	H DOT Value	W DOT Value	Husband's Comments	Wife's Comments	P/L's Exh	D/L's Exh	Class.	Value	Distributed to Husband (\$)	Distributed to Wife (\$)
	ASSETS															
	REAL ESTATE															
	AUTOMOBILES															
	ACCOUNTS															
	INVESTMENTS															
	RETIREMENT															

ITEM#	In the name of	Contentions										Stipulations				
		H Class	W Class	H DOS Value	W DOS Value	H DOT Value	W DOT Value	Husband's Comments	Wife's Comments	P/E's Est	D/E's Est	Class.	Value	Distributed to Husband (\$)	Distributed to Wife (\$)	
	ITEM OF MARITAL PROPERTY															
	BUSINESS INTERESTS															
	JEWELRY															
	COLLECTIONS															
	LIFE INSURANCE															
	HOUSEHOLD FURNISHINGS															
	DEBTS															
	DIVISIBLE PROPERTY (IF ANY REMAINING THAT IS NOT ADDRESSED ABOVE)															
	Totals															



	Husband's Contentions	Wife's Contentions
The income, property, and liabilities of each party at the time the division of property is to become effective		
Any obligation for support arising out of a prior marriage		
The duration of the marriage and the age and physical and mental health of both parties		
The need of a parent with custody of a child(ren) of the marriage to occupy or own the marital residence and to use or own its household effects		
The expectation of pension, retirement, or other deferred compensation rights that are not marital property		
Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker		
Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse		
Any direct contribution to an increase in value of separate property which occurs during the course of the marriage		
The liquid or nonliquid character of all marital property and divisible property		

	Husband's Contentions	Wife's Contentions
<p>The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party</p>		
<p>Tax consequences to each party</p>		
<p>Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital property or divisible property, or both, during the period after separation of the parties and before the time of distribution</p>		
<p>Any other factor the court finds just and proper</p>		

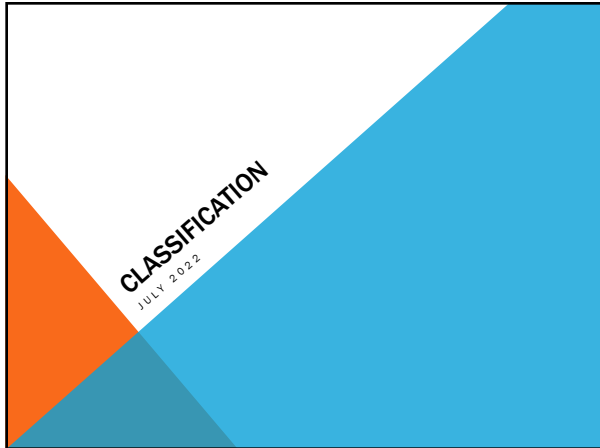
Final Pretrial Order Schedule SAMPLE

21CV000000  
 Doe v. Doe  
 Married: 1/1/2010 Separated: 6/1/2020 Divorced: 9/1/2021

ITEM#	ITEM OF MARITAL PROPERTY of	In the name of	H Class	W Class	Contentions				Stipulations								
					H DOS Value	W DOS Value	H DOT Value	W DOT Value	H Comments	W Comments	P/H's Exh	D/W's Exh	Class.	DOS Value	Distributed to Husband (\$)	Distributed to Wife (\$)	
<b>ASSETS</b>																	
<b>REAL ESTATE</b>																	
1	123 Main Street		H/W													\$500,000	
1a	PNC Mortgage on Item #1		H/W														-\$200,000
1b	Divisible Component of Item #1				\$600,000	\$800,000			Per Husband's Expert current FMV is \$600,000.		Per Wife's expert current fmv is \$800,000	P1	D1	D			
<b>AUTOMOBILES</b>																	
2	2015 Ford Escape	H			\$12,000				Per NADA DOS value is \$10,000. It is low mileage.		Per KBB DOS value is \$12,000. It is low mileage.	P2	D2	M			
3	2018 Honda Odyssey	W			\$21,000	\$19,000			Per NADA DOS is \$21,000		Per KBB DOS is \$19,000	P3	D3	M			
<b>ACCOUNTS</b>																	
4	Wells Fargo	H														\$510	
5	First Citizens	H/W			\$10,000				Wife took all the money.		This was support because she had to use it to pay bills.	P5	D5	M		\$10,000	
<b>RETIREMENT</b>																	
6	Wife's Pension	W							Stipulate 50/50 division		Stipulate 50/50 division			M			
<b>BUSINESS INTERESTS</b>																	
7	Acme, LLC (100% interest)		H's S	Mx	\$500,000	\$600,000	\$900,000	\$1,400,000	He started this single member LLC business before marriage and it is his separate property. He is 100% member of the LLC. H's expert values at DOS \$500,000 and at DOT \$600,000 and says it is all H's separate property.		This is a mixed asset and W's expert says it is worth \$1,000,000 at DOS and that \$900,000 of that is marital and \$100,000 is H's separate property. DOS and DOT values stated for W are her contentions of the values of the marital portion of the asset.	P7a, P7b, P7c	D7a, D7b, D7c, D7d, D7e, D7f				



ITEM #	In the name of	Contentions						Stipulations								
		H Class	W Class	H DOS Value	W DOS Value	H DOT Value	W DOT Value	H Comments	W Comments	P/H's Exh	D/W's Exh	Class.	DOS Value	Distributed to Husband (\$)	Distributed to Wife (\$)	
7a	Item #7 Divisible Property		D					No portion is divisible. All active increase in value since DOS.	Current value of the whole asset is \$2,000,000 and the divisible portion of that is passive increase in value of \$500,000. (Current value of marital portion is \$1,400,000.) Distribute marital and divisible portion to Husband.	See above under Item 7						
	HOUSEHOLD FURNISHINGS							parties have divided equally and this is not part of ED	parties have divided equally and this is not part of ED							
DEBTS																
8	Wells Fargo CC ending in 1234	H												M	-\$5,000	-\$5,000
9	First Citizens CC ending in 5678	W	W's S	M		-\$20,000		H has no idea W even had this card. It is W's separate property.	W used it for household shopping. It is marital property.		D9					
DIVISIBLE PROPERTY (IF ANY REMAINING THAT IS NOT ADDRESSED ABOVE - DO NOT DUPLICATE ENTRIES ABOVE)																
Totals																



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**CLASSIFICATION**

- **Classification is a legal conclusion**
- **Must be supported by findings of fact (or a stipulation)**
- **COA says classification needs:**
  - Date property was acquired
  - Who acquired the property and how
  - Date of marriage
  - Date of separation
  - (also value on DOS)

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**BURDEN OF PROOF**

- **Party seeking marital classification must go first**
  - Property interest acquired during the marriage
  - By either or both spouses
  - Owned on DOS
  - Value on DOS
- **Burden shifts to party seeking to show separate property interest**

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### CATEGORIES OF SEPARATE PROPERTY

- Property acquired before marriage
- Property acquired by a spouse by gift or bequest
- Property acquired in exchange of separate property
- Passive appreciation of separate property during marriage
- Passive income earned from separate property during marriage
- Nontransferable professional licenses



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### BURDENS OF PROOF

- Appreciation of separate property during the marriage is presumed active and therefore marital
- Burden of tracing value acquired during the marriage always on person seeking separate classification
- No presumptions re: debt or value/property/debt acquired after DOS
  - **Except** appreciation/depreciation of marital property after DOS and before DOD is presumed passive and therefore divisible



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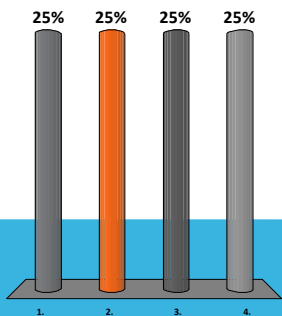
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### INVESTMENT ACCOUNT CLASSIFICATION?

1. Entirely marital
2. Entirely separate
3. \$25,000 separate/\$30,000 marital
4. Other



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**401K CLASSIFICATION?**

1. \$20,000 plus a reasonable rate of return is separate
2. 4/5 marital; 1/5 separate
3. All separate
4. All marital
5. None of the above

Option	Percentage
1.	0%
2.	0%
3.	0%
4.	0%
5.	0%

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**JOINT SAVINGS ACCOUNT**

1. Most likely all marital
2. \$45,000 marital
3. Other

Option	Percentage
1.	33%
2.	33%
3.	33%

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**HORSE FARM CLASSIFICATION?**

1. All separate
2. \$500,00 separate, \$150,000 marital
3. \$500,000 separate for sure but some marital for sure

Option	Percentage
1.	33%
2.	33%
3.	33%

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**FARM AFTER TENANCY BY THE ENTIRETY**

1. Same classification as last problem  
2. All marital

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**DIVISIBLE DEBT**

- For payments made before October 1, 2013, any increase or decrease in marital debt is divisible debt
  - No need to identify 'passive or active'
  - No presumptions apply regarding classification
- Divisible debt must be classified and distributed between the parties
  - Subject to general presumption that an equal distribution is equitable, divisible debt is distributed in discretion of trial court
  - Trial court should consider the source of payment for any decrease in marital debt. See *Bodle v. Bodle*, 221 NC App 29 (2012)

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**POSTSEPARATION DEBT PAYMENTS**

Payments of marital debt made by one or both spouses on or after October 1, 2013 will not be divisible debt

- After that date, only passive increases and decreases in marital debt are divisible property

Trial court has discretion to determine appropriate way to account for postseparation payments

- Distribution factor
- "Credit"

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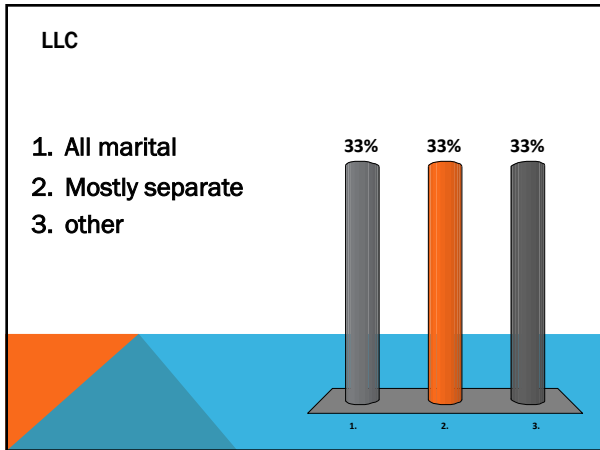
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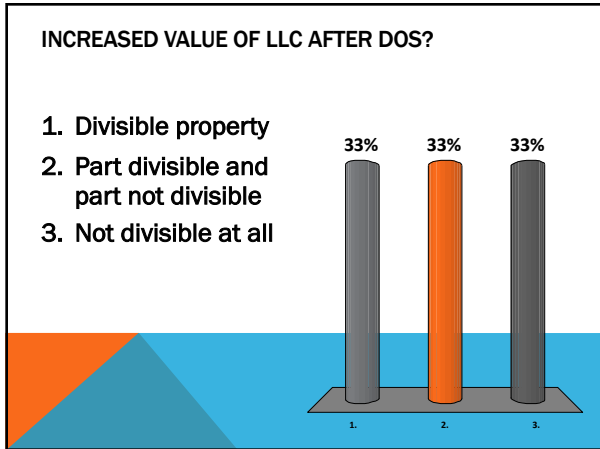
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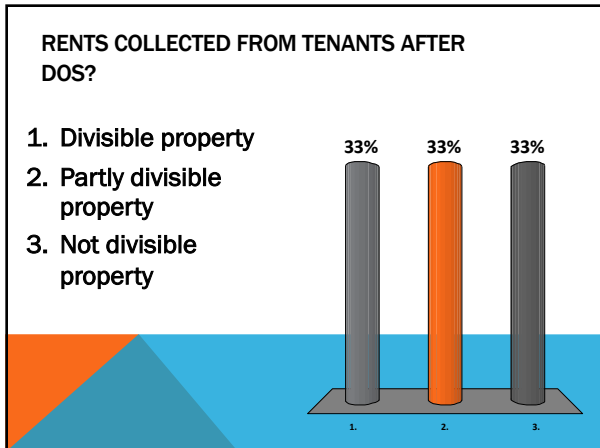
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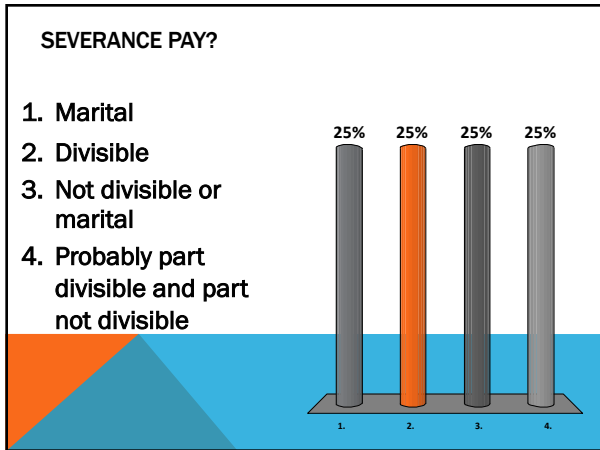
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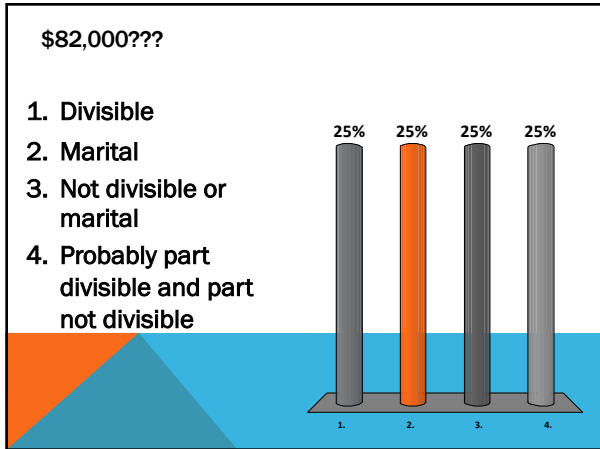
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- c. Shea and Edward opened a joint savings account a week after they married. They deposited money into the account over the years and on the date of separation the account had a balance of \$100,000. They both agree that each of them made regular deposits into the account from their monthly work paychecks throughout the marriage and that they took money out of the account whenever they needed extra funds for household expenses or family vacations. In addition, they both agreed that Shea deposited into this account the \$15,000 she received when she sold the diamond ring her grandmother gave her before the wedding and that Edward always deposited into this account the dividends he received from IBM stock he purchased years before the marriage. He estimates these dividends amounted to approximately \$40,000.
- d. During the marriage, Edward inherited his grandmother's horse farm. Edward's accountant testifies that the farm was worth \$500,000 at the time of the inheritance. Both Edward and Shea were thrilled with the inheritance because they loved horses. The farm included a farmhouse and a couple of small barns. Shea and Edward painted all of the buildings and replaced the roof on the farmhouse. They also fixed several broken fences. Shea painted the inside of the farmhouse, bought new furnishings and curtains and planted a beautiful flower garden in the yard. Unfortunately, their mutual love of horses was not enough to sustain their marriage, and they separated 5 years after Edward inherited the farm. Shea offers into evidence an appraisal of the farm which states that it was worth \$650,000 on the date of separation.

- e. Same facts as d. above except Edward transferred title to the horse farm to tenancy by the entirety shortly after receiving it from his grandmother's estate. Edward testifies that he transferred title only because his accountant told him he should do so for tax and liability purposes.
- f. Janet and Eddie were married 10 years before they separated. On the date of separation, they owned the marital residence as tenants by the entirety. The house had a market value of \$300,000 on the date of separation and a mortgage with a balance of \$200,000. Janet remained in the house throughout the two years it took to get to court for the equitable distribution trial. For the first year of the separation, Janet paid the mortgage payment in the amount of \$1500 each month, which included principal (\$500) and interest (\$700) on the loan, as well as the amounts required to be placed in escrow for homeowners' insurance (\$150) and property taxes (\$150). Because she was unemployed for the first three months of the separation, Janet paid the first three mortgage payments using funds from the marital savings account. The rest of the payments during that first year of separation came from her postseparation employment. At the end of the first year, the mortgage balance was \$194,000. Before Janet could make any payment during the second year, Eddie used money he received from an inheritance to pay off the mortgage completely. Janet remained in the house and paid the homeowners' insurance premium and the property taxes for the second year of separation – a total of \$3600.

- g. Peg and Andrew were married for 30 years. During that time, they jointly owned and operated several business entities engaged in residential and commercial development. They also had owned several similar businesses over the years with various members of Andrew's family. About 5 years before the date of separation, Peg and Andrew formed a new Limited Liability Corporation (an LLC). The purpose of the LLC was to own and manage commercial rental property. Peg and Andrew were equal owners of the LLC and there were no other owners. Shortly after the LLC was formed, Andrew's parents transferred title to a small shopping center to the LLC and no consideration was paid. The LLC owned the shopping center and collected rents from the tenants in that shopping center up to and following the date of separation. The value of the LLC on the date of separation was \$1.5 million dollars. The value was based in large part on the income-producing potential of the shopping center.
- h. After the date of separation, Peg had no involvement with the LLC. Andrew had regular contact with the tenants in the shopping center and collected the rent. He also handled the business affairs of the LLC by keeping all business records, overseeing all maintenance of the shopping center, negotiating the renewal of leases with the tenants, and generally managing the day-to-day requirements of maintaining the business. During the 3 years between the date of separation and the date of trial, Andrew collected \$250,000 in rent from the tenants; \$75,000 was deposited into the LLC's business account and \$175,000 was deposited by Andrew into his personal account and used for his personal expenses during separation. By the date of trial, the value of the LLC was \$1.8 million dollars. The valuation expert testified that the date of trial value would be higher if Andrew had not used the \$175,000 in rents for his personal benefit.

- i. During John and Jane's 15-year marriage, Jane worked for the same company that hired her the day after the couple returned from their honeymoon. Sadly, one month after John and Jane separated, the company announced it needed to downsize by terminating most of their employees, including Jane. All terminated employees were given a severance payment in an amount determined by a formula which took into account the individual's salary at the time of termination and the number of years the individual had worked for the company. Jane received a lump sum severance payment of \$75,000 three months after the date of separation and before the equitable distribution trial.
  
- j. Instead of offering Jane a severance package, the company she had worked for during the 15-year marriage offered Jane a position in a new "spin-off" company – the old company was reorganizing by splitting into several smaller businesses. Two months before separation, Jane signed an employment contract with the new company. That agreement provided that in addition to her salary, Jane would receive shares of stock in the new company. The agreement provided that she would receive some of the shares 3 months after she began working and the rest of the shares 9 months after she began working. The agreement provided that the shares would be transferred to her as long as she remained "an employee in good standing" at the designated times. During separation and before the ED trial, Jane received the stock, sold it and received net proceeds in the amount of \$82,000.



## Equitable Distribution: When does the marital LLC have to be joined as a party?

**Author :** Cheryl Howell

**Categories :** [Family Law](#)

**Tagged as :** [Equitable Distribution; LLC; Joinder of Parties](#)

**Date :** February 12, 2016

The equitable distribution statutes only give trial courts the authority to distribute marital property. This means equitable distribution is all about – and only about – identifying property owned by either or both spouses on the date of separation and determining how it should be distributed between those two people.

Marital property may include ownership interests in businesses and corporations. Just as parties can own stock in a traditional C corporation, parties also can own an LLC or an interest in an LLC. And just as a court would not be required to join, for example, Exxon Corporation or Google before distributing stock owned by the parties, a court is not required to join an LLC in an ED case if the court simply distributes the marital ownership interest in the LLC between the parties.

But just as a C corporation is a legal entity, an LLC also is a person in the eyes of the law. So just as a court cannot enter orders affecting the property or personal rights of an individual without first acquiring jurisdiction over that individual and affording that person due process, a trial court cannot enter orders affecting the ‘person’ or the property of the LLC without first acquiring jurisdiction over the LLC by making it a party to the ED action.

Two recent opinions from the court of appeals illustrate this distinction.

[Montague v. Montague, 767 SE2d 71 \(NC App 2014\)](#)

This opinion is an example of the most common ED scenario involving an LLC. Joinder of the LLC was not even discussed by the appellate court because there clearly was no need to make the LLC a party. The former spouses were the sole owners of the LLC and the only issue before the trial court was how to classify, value and distribute the marital and divisible property interest in that LLC and in the funds paid from the LLC to the husband following the date of separation. Neither party claimed that property titled in the name of the LLC should be classified as marital property or distributed by the court, and neither party asked the court to order the LLC, or to order the parties in their capacity as managers of the LLC, to do anything.

While there certainly must have been need for a significant amount of evidence about the finances, daily operations and management of the LLC in order for the court to classify, value and distribute the LLC and the funds distributed by the LLC following separation, the trial court had no need to enter any order directly affecting property owned by the LLC or directly affecting the corporate structure of the LLC. Instead, evidence in the possession of the LLC could be gathered through the use of subpoenas, just as evidence is gathered from non-parties in other types of civil cases. There certainly is no need to join the recipient of a subpoena as a party to a civil case. See Rules of Civil Procedure, G.S. 1A-1, Rule 45.

[Campbell v. Campbell, 773 SE2d 93 \(NC App 2015\)](#)

The situation was more complicated in this case. The trial court was requested to enter an injunction to protect the

value and business integrity of the LLC while the ED case was pending. While the ultimate goal in the ED case was to distribute the marital ownership interest in the LLC, the trial court attempted to protect the marital interest by entering orders that required action by the LLC, ordered the transfer of funds belonging to the LLC, and otherwise affected the 'person' of the LLC by altering the management structure pending the final outcome of the ED case.

The court of appeals explained:

...[T]he trial court ordered Defendant to transfer \$350,000.00 of TSG assets without first adding TSG as a party. The trial court also effectively ordered TSG to act by ordering the parties, as the only members of TSG, to appoint Dr. Tharp as an interim controlling manager of TSG, and it specifically ordered TSG to act by ordering TSG to indemnify and pay Dr. Tharp and to post an unsecured bond during the pendency of the preliminary injunction. Finally, the trial court affected the management structure of TSG by finding that Defendant was not a manager of TSG, even though TSG's filings consistently listed Defendant as a manager of TSG and TSG's attorney repeatedly testified that Defendant was a manager, albeit not one "necessary to the function of the company."

In holding that the LLC must be joined before such orders will be valid, the [Campbell](#) opinion states:

The courts are not free, for the sake of convenience, to completely ignore the existence of a legal entity, such as [an] LLC." ... "A corporation, even one closely held, is recognized as a separate legal entity ... [even when its members are] engaged in litigation which is personal in nature[.]" ... "When the separate legal entity has not been made a party to an action, the trial court does not have the authority to order that entity to act. ... Moreover, even where a named party to an action is a member-manager of an LLC, the assets of which are contested in a pending equitable distribution action, "[t]he trial court exceed [s] its authority when it order[s] [that named party] to transfer the assets of the LLC" without first adding the LLC as a party to the action.

#### **More to Come....**

Sometimes a party will allege that property actually owned by another person or entity - such as an LLC - nevertheless is marital property because one or both parties were the 'equitable' owners of that property on the date of separation. Parties become 'equitable' owners when the court determines that it is unjust or otherwise inequitable for the legal owner of the property to retain ownership of the property.

This will be the topic of my next blog post, but of course, the legal owner must be joined and afforded due process before that property can be declared marital property and distributed to other people.

## Equitable Distribution: When Marital Property is Not Owned by a Party.....

**Author :** Cheryl Howell

**Categories :** [Family Law](#)

**Tagged as :** [Equitable Distribution; classification; marital property; equitable ownership; trusts; constructive trust; resulting trust](#)[Necessary parties](#)

**Date :** February 17, 2016

In the recent case of [Nicks v. Nicks, 774 SE2d 365 \(NC App 2015\)](#), husband transferred property acquired during the marriage to an LLC and the LLC thereafter was transferred to a trust. All of this occurred before the date of separation. Understandably, the trial judge in the equitable distribution action filed after the parties separated felt that the property transferred to the LLC should be classified as marital property and distributed between the spouses, so the trial court classified the LLC itself as marital property and distributed it the husband as his share of the marital estate. The court of appeals vacated the ED judgment and remanded the case to the trial court after concluding the LLC was not marital property because it was not owned by either or both spouses on the date of separation.

Does this mean a spouse can avoid ED simply by transferring ownership of property to an LLC or other third party before the date of separation, or by allowing family members or others to hold legal title to property acquired with marital funds during the marriage?

Not necessarily. Equitable principles can be applied to bring property that should have belonged to one or both spouses on the date of separation into the marital estate, but only if appropriate procedure is followed and the legal title holder of the property is afforded due process.

### Only Marital and Divisible Property Can be Distributed

As I said in [my last post addressing when a marital LLC needs to be joined as a party to an ED action](#), equitable distribution is all about – and only about – distributing marital and divisible property. The court has no authority to distribute any property that is not marital or divisible property. Marital property includes only property owned by either or both spouses on the date of separation. In [Nicks](#), the court of appeals vacated the ED judgment because the trial court distributed the LLC that was owned by the trust rather than by either or both spouses. Similarly, in *Weaver v. Weaver*, 72 NC App 409 (1988), a piano gifted to the children of the parties before the date of separation was not marital property because it was not owned by either spouse on the date of separation. And there are a number of other similar opinions from the court of appeals. Property cannot be marital property unless it is owned by one or both spouses on the date of separation.

### Ownership Includes Equitable Ownership

However, in *Upchurch v. Upchurch*, 122 NC App 172 (1996)(Upchurch I), the court of appeals held that ownership for purposes of ED includes both legal and equitable ownership and recognized that within the context of an ED proceeding, a court has the equitable authority to impose a constructive or resulting trust upon property legally owned by someone other than a spouse. While in other situations a party has a right to have a jury determine whether grounds exist for the imposition of a trust, the Supreme Court held in *Sharp v. Sharp*, 351 NC 37 (1999), that there is no jury trial right when the issue arises in the context of an ED case. The judge rather than the jury must decide whether a trust should be imposed.

The court of appeals also has held that a trial court can impose a trust on property owned by a third party even if neither spouse expressly requests that relief in a pleading. *Weatherford v. Keenan*, 128 NC App 178 (1998).

If the trial court finds grounds to impose a trust, the court can order the title to the property be conveyed to one or both spouses and classified as marital property. *Gragg v. Gragg*, 94 NC App 134 (1989).

### **Three Types of Trusts**

The three types of trust are express, resulting and constructive. Express is as the name implies; a trust created by an actual agreement between the parties that a third party will hold title for one or both spouses. The court simply enforces the express agreement between the parties.

A resulting trust arises from the presumed intent of the parties at the time title is taken by one party under facts and circumstances showing that the beneficial interest in the real or personal property is in another. The most common situation giving rise to a resulting trust is when title is held by one person but one or both spouses provided the purchase money for the property. For example, a resulting trust was imposed in *Gragg* because although husband's father held title to the parties' marital home and had paid a down payment for the property, the husband and wife made monthly payments on the mortgage for 10 years.

A constructive trust is the most commonly imposed trust, appropriate when the court determines it is necessary to prevent the unjust enrichment of the title holder when he or she acquired title through fraud, breach of duty or some other circumstance making it inequitable for that person to retain title. *Upchurch; Glaspy v. Glaspy*, 143 NC App 435 (2001); *Dechkovskaia v. Dechkovskaia*, 754 SE2d 831 (NC App 2014). So in *Upchurch v. Upchurch*, 128 NC App 46 (1998)(Upchurch II), the court imposed a constructive trust in favor of wife on bonds, title to which was transferred shortly before separation by husband to son to avoid equitable distribution. And in *Weatherford*, a constructive trust was imposed in favor of wife on one-half the value of improvements made to the parties' home, which was originally titled in name of husband's parents but which husband inherited after separation.

### **Legal Owner Is a Necessary Party**

Significantly, the court of appeals in Nicks did not reverse the trial court. Instead, the court vacated and remanded, holding that while it was inappropriate for the trial court to classify the LLC as marital property while it was owned by the trust rather than by one of the parties, the party seeking to have the property classified as marital was not without a remedy. However, the remedy cannot be imposed unless the legal owner of the property – in this case the trust – is joined as a party to the ED action for the sole purpose of determining whether an equitable trust should be imposed. Principles of due process require that property not be taken from a legal owner without the court first acquiring jurisdiction over the person or entity and affording the person or entity the opportunity to participate in the legal process that may result in the loss of ownership of that property. *Dechkovskaia*.



## Equitable Distribution: LLCs and Divisible Property

**Author :** Cheryl Howell

**Categories :** [Family Law](#)

**Tagged as :** [Equitable distribution; classification; divisible property](#)

**Date :** November 13, 2015

Because the marital estate ‘freezes’ on the date of separation, *see Becker v. Becker*, 88 NC App 606 (1988), an increase or decrease in the value of marital property occurring after the date of separation, or income received from marital property after the date of separation, is not included in the marital estate. The category of divisible property was created to allow a court to distribute these postseparation assets along with the marital property. If the change in value or the income is classified as divisible, it can be distributed. If it is not divisible property, the court can do nothing more than consider the income or change in value as a distribution factor.

### LLCs and the *Montague Case*

The continuing operation of a marital LLC during separation often creates challenging divisible property classification issues and the recent case of [Montague v. Montague, 767 SE2d 71, \(NC App, Dec. 16, 2014\)](#), illustrates a fairly common fact pattern in ED. The Montagues were co-owners of an LLC during the marriage, with wife owning 49% of the LLC and husband owning 51%. The LLC owned and managed rental property, and the distributions from the LLC provided income to the family before the date of separation. After the date of separation, husband continued to manage the LLC and continued to receive payments. By the time of the ED trial, husband had collected approximately \$31,200 and the LLC had increased in value since the date of separation by about \$32,000. Wife claimed both the payments and the increased value of the LLC as divisible property subject to distribution, but husband claimed both belonged to him because both had been earned as the result of his work following separation.

### Shareholder Distributions as Divisible Property

[GS 50-20\(b\)\(4\)\(c\)](#) defines divisible property to include “passive income from marital property received after the date of separation...”. Ms. Montague argued that the income received by Mr. Montague from the LLC was a “passive” distribution from the LLC and therefore should be classified as divisible property and distributed along with the marital estate. Mr. Montague, on the other hand, argued that he received the money from the LLC as compensation for the services he provided to the LLC during separation. Because the funds were not “passive” income but rather were earned from his personal effort during separation, he argued the funds could not be classified as divisible property and distributed by the court.

Unlike in the classification of marital property, there are no presumptions and clearly delineated burdens of proof with regard to divisible property yet – except to the extent discussed below with regard to increases and decreases in the value of marital property. Instead, the court of appeals has stated only that the party claiming property to be divisible must establish that it is divisible. *Walter v. Walter*, 149 NC App 723, n.2 (2002); *but cf. Simon v. Simon*, 753 SE2d 475 (2013)(husband had burden of showing distributions from marital corporation were not divisible property). Ms. Montague attempted to establish the divisible classification of the payments received by Mr. Montague during separation by showing they were distributions from the LLC. Because distributions from a LLC are paid to shareholders based solely on ownership interest and are unrelated to actions of the owners, she contended the distributions were passive income.

The trial court concluded the income received by husband was management fees, compensation for his services to the

LLC during separation. The ED judgment stated:

[Husband] actively manages the commercial property (negotiates all leases, collects rent payments, arranges for any “fit-up” required for a tenant, handles maintenance calls, does the landscaping, touch-up painting) and has done so since prior to the parties' separation. *Plaintiff pays himself a management fee for this work in the form of a distribution.*

Based on this finding of fact, the trial court refused to classify the payments as divisible property and left them in the possession of Mr. Montague.

The court of appeals did not disagree with the trial court's conclusion that this finding of fact regarding husband's actions during separation would be sufficient to establish that the payments were not divisible property. However, the court of appeals reversed the trial court because the record showed the parties had claimed the income as shareholder distributions from the LLC on their joint tax return. According to the court of appeals, the parties were “bound by their established methods of operating the business,” meaning husband could not tell the IRS the payments were shareholder distributions but claim them as personal compensation in the ED.

### **Appreciation of the LLC as Divisible Property**

[GS 50-20\(b\)\(4\)\(a\)](#) defines as divisible property “all appreciation and diminution in value of marital property ... except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse...”. In *Wirth v. Wirth*, 193 NC App 657 (2008), the court of appeals interpreted this provision as creating a presumption that any increase or decrease in the value of marital property between the date of separation and the date of distribution is divisible property. Therefore, the party seeking to classify appreciation of a marital asset as divisible simply needs to show that the property is worth more on the date of distribution than on the date of separation. The burden then shifts to the party resisting the divisible property classification to show the change in value was caused by actions of one of the spouses during separation.

The trial court in [Montague](#) concluded that the increase in the value of the marital LLC was the result of Mr. Montague's work with the LLC after separation. Wife did not dispute that husband's efforts contributed to the profitability of the business. Rather, she argued that because he had been fully compensated for his efforts by the LLC, any appreciation of the LLC by the date of trial was value acquired above the value of his efforts.

The court of appeals did not address the merits of Ms. Montague's contention. Instead, the court held that because she had argued that the payments to husband from the LLC were distributions rather than compensation for his work on the issue relating to the income received during separation, she could not argue the opposite on the issue relating to the appreciation of the business. Because she argued the payments were distributions, she was estopped from asserting on this issue that Mr. Montague had in fact been compensated by these payments.



## Equitable Distribution: Classification of Marital Debt

**Author :** Cheryl Howell

**Categories :** [Family Law](#)

**Tagged as :** [Equitable distribution; classification; marital debt; joint benefit; student loans](#)

**Date :** June 19, 2015

For a reason never articulated by our appellate courts, debts incurred during a marriage are treated very differently in equitable distribution than is property. While public policy – codified as the marital property presumption found in [GS 50-20\(b\)](#) – is to include **all** property acquired during the marriage in the marital estate unless it is shown to fit within one of the limited categories of separate property, debt incurred during the marriage is excluded from the marital estate unless a party can prove the debt was incurred for the joint benefit of the parties.

The court of appeals recently reaffirmed and strengthened this presumption against the inclusion of debt in the marital estate by further limiting the definition of ‘joint benefit’ – at least in the context of student loans incurred by one spouse during the marriage – to mean only that debt which can be shown to **actually have benefited** both parties. Despite acknowledging that the court of appeals “has never required evidence that the marital unit actually benefited from the debt incurred,” the court in [Warren v. Warren, \(NC App. June 16, 2015\)](#), nevertheless held:

“In order for the court to classify student loan debt as marital debt, the parties must present evidence regarding whether the marriage lasted long enough after incurring the debt and receiving the degree for the married couple to substantially enjoy the benefits of the degree or higher earnings.”

### Statute Does Not Define Marital Debt

While [GS 50-20](#) gives the court authority to distribute marital property, it does not specifically address marital debt. Nevertheless, in *Dorton v. Dorton*, 77 NC App 667 (1985), the court held that because [GS 50-20\(c\)\(1\)](#) requires that the court consider all liabilities of the parties when making a distribution, the court is required to account for marital debt. Shortly thereafter, in *Geer v. Geer*, 84 NC App 471 (1987), the court reaffirmed that marital debt should be accounted for in the marital estate and defined marital debt to be that debt incurred for the joint benefit of the parties. Neither *Geer* nor any opinion issued since *Geer* has defined ‘joint benefit’.

### No Marital Debt Presumption

In *Becker v. Becker*, 127 NC App 409 (1997), the court made it clear there is no presumption that debt incurred during the marriage is marital. In that case, the court held that even a debt incurred for dental work for one spouse during the marriage cannot be classified as marital unless the trial court concludes the debt was incurred for the joint benefit of the parties. And in *Riggs v. Riggs*, 124 NC App 647 (1996), the court reversed a trial court for classifying credit card debt as marital where the appellate court found “no evidence in the record” to support the conclusion that the charges were incurred for the joint benefit of the parties.

### Joint Benefit

As support for its definition of marital debt, *Geer* cites the South Carolina case of *Allen v. Allen*, 287 SC 501 (1986), wherein the court reversed the trial court for classifying as marital certain debts owed by husband. Explaining that the trial court had included debts incurred after the date of separation, the South Carolina court instructed the trial court on remand to classify as marital only those debts ‘incurred for the joint benefit of the parties’.

We know that a debt does not need to be in the name of both spouses to be marital, *Wornom v. Wornom*, 126 NC App 461 (1997), and conversely, the fact that a debt is in the joint names of the parties does not establish joint benefit. *Miller v. Miller*, 97 NC App 77 (1990).

We also knew before [Warren](#) that evidence of actual benefit to the marriage is sufficient to establish joint benefit. *Glaspay v. Glaspay*, 143 NC App 435 (2001)(business profits were used by the family during the marriage so tax lien on the business was a marital debt); *Godley v. Godley*, 110 NC App 99 (1993)(debt to husband's capital account from his withdrawal of funds was marital where the funds benefited the marriage "both directly and indirectly"). [But cf. Comstock v. Comstock, 771 S.E.2d 602 \(N.C. App., April 7, 2015\)](#)(debt owed by husband on a home equity line was his separate debt even though both parties acknowledged funds were used for household expenses where wife testified she was unaware during the marriage that husband had borrowed the money).

#### [Warren v. Warren](#)

After getting married, the parties in [Warren](#) agreed plaintiff would stop working to stay home with the children. When the children grew older, the parties agreed plaintiff would return to school to earn a degree so she could "increase her income for the benefit of the family." She incurred student loans in her name alone. The funds were used for school expenses but also for living expenses of the family while wife was a full-time student.

After wife graduated, she was employed in the field of her degree and earned much more than she had earned before deciding to stay at home with the children. The parties remained together for twenty months after plaintiff began earning this income.

The trial court classified the loan debt as marital based upon findings that the loans were incurred with the intent that the degree would benefit the marriage, some of the loan proceeds were used to pay household expenses, and the increased earning capacity of the plaintiff actually benefited the family during the marriage.

The court of appeals affirmed, pointing to all of those facts as supporting the conclusion of joint benefit. Despite citing cases from other states indicating that ***an expectation*** of joint benefit at the time of the loans is sufficient to support a marital classification, the court of appeals nevertheless held that evidence must show the marriage "lasted long enough" for the couple to "substantially enjoy" benefits gained from the degree.

So it appears from this holding that even if loans are incurred because the parties jointly believe at the time the debt is incurred that they both will benefit, the debt will not be marital if, for example, the parties separate before the degree is earned. Or, if the degree is earned but for some reason – such as the unavailability of jobs or the onset of a medical disability– the spouse is unable to actually earn more money because of the degree, the debt will not be marital.





## Equitable Distribution: Can we use the date of separation from the divorce judgment?

**Author :** Cheryl Howell

**Categories :** [Family Law](#)

**Tagged as :** [Equitable Distribution](#); [Date of Separation](#); [Divorce Judgment](#); [Collateral Estoppel](#); [law of the case](#)

**Date :** August 5, 2016

Anyone who works with equitable distribution knows that the date of separation is a critical fact that must be established before anything else can be done in the case because it is the date used to define and value the marital estate. The date of separation should be established before the parties spend time and money engaging in the discovery process and definitely must be established before the court begins the process of classifying and valuing marital and divisible property.

So what is the relationship between a date of separation found as a fact in an absolute divorce judgment and the date of separation in the equitable distribution case? If the parties have obtained an absolute divorce and that judgment contains a date of separation, is that date binding on the equitable distribution case? Can one of the parties argue in the ED case that a different date was the actual date of separation?

The North Carolina Supreme Court has told us pretty clearly that, at least in those situations where neither party in the divorce case alleged a date of separation that was less than one full year before the divorce complaint was filed, a date of separation found as a fact in a divorce judgment is not binding on the court hearing the equitable distribution matter because the date of separation was not at issue in the divorce trial. This is true even if the parties actually disagreed as to the actual date of separation in the divorce proceeding and the trial court resolved the issue.

[Stafford v. Stafford, 351 NC 94 \(1999\)](#)

On May 14, 1996, plaintiff Ms. Stafford filed a Complaint seeking absolute divorce and equitable distribution. Mr. Stafford filed an Answer and Counterclaims. As usual, the divorce came on for trial before the equitable distribution. The trial court severed the divorce from the remaining issues in the case and tried the divorce. Plaintiff contended, and the trial court found, that the date of separation was the first week of October 1992. The defendant contended that the date of separation was September 13, 1991.

Defendant husband appealed the divorce judgment, arguing that the trial court erred in determining the date of separation to be October, 1992. The court of appeals dismissed the appeal after concluding it was an inappropriate interlocutory appeal. Defendant argued that the trial court's "determination of the date of separation is so fundamental to an equitable distribution trial that it affects a substantial right," entitling him to an immediate appeal. The court of appeals rejected defendant's argument, stating without explaining that no threat of inconsistent verdicts was present in this situation because "[w]hile the determination of the date of separation may have an impact on the unresolved issue of equitable distribution, the same factual issues are not present." Dissenting, Judge Greene wrote that the appeal did affect a substantial right in part because "the trial court's determination of the date of separation in the divorce action precludes relitigation of that issue for purposes of equitable distribution."

In a short per curiam opinion affirming the majority of the Court of Appeals decision that the appeal did not affect a substantial right and evidently disagreeing with the dissent's assertion that the issue of the date of separation could not be litigated again in the ED case, the Supreme Court held that the date of separation in the divorce judgment was

not binding on the ED court because the trial court in the divorce case was not required to determine the date of separation to determine whether to grant the divorce. The court stated:

"A basis for granting an absolute divorce is that the parties must live separate and apart for one year. Regardless of the date of separation, the parties [in this case] have been separated for a period far in excess of one year. Therefore, the date of separation has no bearing in this case on the legality of the final divorce judgment. The contested issue of fact concerning the date of separation is an issue in the [pending] equitable distribution claim..."

[Stafford, 351 NC 94 \(1999\).](#)

Similarly, in the more recent decision in [Khaja v. Husna, 777 SE2d 781 \(NC App, Oct. 6, 2015\)](#), the Court of Appeals reversed a trial court's determination that it was bound by the date of separation found in a summary judgment divorce. The trial court hearing an alimony claim ruled that the date of separation contained in the divorce judgment was "law of the case" and refused to hear evidence of a different date of separation. The Court of Appeals held because neither party alleged that the two had not been separated at least one full year, the trial court was not required to determine the date of separation to resolve the divorce claim. Because the findings in the divorce judgment "went beyond facts necessary to resolve the limited issues before it," the unnecessary findings were not binding in subsequent proceedings.

### **So what does this mean?**

Many divorce judgments are entered in cases where the defendant makes no objection to the entry of judgment and raises no issue regarding the date of separation. [Stafford](#) and [Khaja](#) seem to tell us that a judgment entered in one of these cases should not contain an actual date of separation as a finding of fact. If the judgment does contain such a finding, the date is not binding in subsequent alimony and ED cases.

A party can request a jury trial in an absolute divorce proceeding on the issue of whether the parties were separated for a year before the divorce action was initiated. [GS 50-10\(a\)](#); [McCall v. McCall, 138 NC App 706 \(2000\)](#). A jury never should be asked to determine a specific date of separation and a jury trial never should be allowed when the parties agree they separated at least one year before the action was filed. Such requests have been made in response to the Court of Appeals' determination that a party is not entitled to a jury trial to determine the specific date of separation in an equitable distribution case. [See McCall, id.](#)

### **What if one party to the divorce does allege less than one year of separation?**

We do not have case law in North Carolina directly addressing this issue. Both [Stafford](#) and [Khaja](#) involved situations where, despite the disagreement between the parties about the specific date of separation, both agreed they had been separated a year. However, both [Stafford](#) and [Khaja](#) remind us that a specific date of separation never is a required finding in a divorce judgment. Even in a situation where one alleges the parties have not been separated a full year, the trial court only needs to determine as ultimate fact that the parties were separated a year. The court never needs to find a specific date to determine whether to grant a divorce. Perhaps this was the meaning of the Court of Appeals statement in *Stafford*, that "the factual issues are not the same" in a divorce case and in an ED case.

If the factual issue resolved in the first proceeding is not the same as that to be resolved in the subsequent proceeding, collateral estoppel does not apply. [See State v. Macon, 227 NC App 152 \(2013\)](#) (collateral estoppel only applies to an issue of ultimate fact determined by a judgment in a previous case when that issue of ultimate fact was necessary to the entry of the judgment). When collateral estoppel does not apply, the court in the subsequent proceeding is not bound by the determination made in the first proceeding.

### **But if there was a judicial admission in the divorce pleadings .....**

Regardless of whether collateral estoppel applies, it seems clear that if a party alleged a specific date of separation in a pleading in the earlier divorce proceeding, judicial estoppel will apply to prohibit that same party from later alleging a different date in the subsequent ED proceeding. [See e.g. Pickard v. Pickard, 176 NC App 93 \(2006\).](#)





## Equitable Distribution: What is Property?

**Author :** Cheryl Howell

**Categories :** [Family Law](#)

**Tagged as :** [Equitable distribution](#); [marital property](#); [property](#); [timber rights](#); [contracts](#); [educational degrees](#); [professional licenses](#)

**Date :** May 5, 2017

In the recent case of [Miller v. Miller, \(NC App. April 18, 2017\)](#), the court of appeals held that a “Timber Agreement” was “too speculative” to be identified as a property interest in equitable distribution. The agreement between a husband and his cousin provided that husband would receive at some point in the future the value of timber growing on a specific track of land. Citing *Cobb v. Cobb*, 107 NC App 382 (1992), the court stated that the future value of timber that will not mature until many years after the trial should not be considered marital property or a distribution factor, since “characterizing growing trees as a vested property right is far too speculative,” and “an equitable distribution trial would become overwhelmingly complicated.”

This case raises the interesting question of what exactly is the definition of “property” in the context of equitable distribution?

### **To be marital property, an item or interest first must be property.**

Fortunately, most items in these cases constitute property within the generally recognized meaning of that term. Tangible things, such as houses and other real estate, automobiles, money, jewelry, furniture, etc., clearly are property. Even family pets have been classified as property for purposes of equitable distribution in other states. *See e.g. Bennett v. Bennett*, 655 So. 2d 109 (Fla. Dist. Ct. App. 1995). *See also Shera v. NC State University Veterinary Hospital*, 219 NC 117 (2012)(dog is personal property in North Carolina).

However, the status of intangible rights is less clear. Courts in other states have struggled over whether interests such as job seniority, accumulated sick leave and vacation, frequent flyer miles, the future right to purchase medical insurance in retirement and future inheritance rights constitute property interests that need to be considered in equitable distribution. For more discussion, *see* Brett Turner, Golden, *Equitable Distribution of Property*, § 5.08-10, 269 (3<sup>rd</sup> Edition 2005). Regarding inheritance rights in North Carolina, *see Loeb v. Loeb*, 72 N.C. App. 205, 324 S.E. 2d 33 (1985) (allowing consideration as a factor in distribution that wife had a vested interest in a trust, the principal of which would pass to her upon the death of her mother).

### **Do we have a definition?**

The short answer is not really.

North Carolina's equitable distribution statute does not contain a definition of property and the few cases that have addressed this issue have not offered a definition. Further, North Carolina property law does not recognize a general definition that gives the term precisely the same meaning in all contexts. Instead, the definition of property is broad and necessarily varies “according to the subject treated of and according to the context.” *Wachovia Bank and Trust v. Wolfe*, 243 N.C. 469, 475 (1956). In other words, whether an interest constitutes property very much depends on whether the question is asked in an equitable distribution case or in a taxation case, for example. Some legal scholars argue that, in general, determining whether an interest constitutes property is as much a question of public policy as

anything else. For example, a New York court held that equitable distribution creates a new species of property and that interests should be classified as property if necessary to accomplish the goals of equitable distribution, regardless of the common law definition of property. *O'Brien v. O'Brien*, 489 N.E.2d 712 (1985).

Most dictionary definitions of property indicate that transferability, meaning the ability to exchange the interest for value or to pass ownership to another, is an important characteristic of property. However, North Carolina clearly recognizes items that cannot be transferred or assigned a *market* value as valuable property interests; consider pensions, professional licenses, and interests in closely held businesses and corporations.

Because the concept of property is necessarily broad and non-specific, the law, both in North Carolina and other states, has traditionally identified property interests on a case-by-case basis, weighing the traits of the interest against those traditionally recognized as attributes of property and considering the public policy issues raised by the context of each particular case. See Brett Turner, *Equitable Distribution of Property*, § 5.08-10, 269.

### **Besides timber contracts, what else is not property in North Carolina ED?**

#### **1. VA Loan Eligibility**

In *Jones v. Jones*, 121 N.C. App. 523 (1996), the court refused to classify certain veteran benefits as property for purposes of equitable distribution. Defendant argued that his VA loan eligibility should be classified as his separate property. The parties had used defendant's eligibility to obtain a VA loan for the purchase of the marital residence. At the time of separation, the only value of the residence was the VA loan and defendant argued that the court should have "restored" his separate property to him by awarding him the marital residence. The court of appeals rejected defendant's contention that his VA loan eligibility was analogous to military pensions and should likewise be identified as property. The court reasoned that while "[a] military pension is a quantifiable, legally enforceable property interest[,] ...[d]efendant's VA loan eligibility in itself created no enforceable right in defendant other than the right to *apply* for a VA loan. In order to receive a loan, defendant still had to *qualify* for such a loan."

#### **2. Educational Degrees**

In North Carolina, professional and business licenses are property but educational degrees are not, at least in the context of equitable distribution. Our case law outside of equitable distribution recognizes professional licenses as valuable property interests entitled to protection under the law, see e.g., *N.C. State Bar v. Dumont*, 52 N.C. App. 1, 15, (1981), and the North Carolina equitable distribution statute also recognizes professional licenses as property. G.S. 50-20(b)(2) provides that "all professional and business licenses which would terminate on transfer shall be considered separate property." In *Poore v. Poore*, 75 N.C. App. 414, 423, 331 S.E. 2d 266, 272-73 (1985), the court of appeals held that it was reversible error for a trial judge to fail to classify the defendant's license to practice dentistry as defendant's separate property and to consider that property interest when deciding how to distribute the marital property. Further, in a concurring opinion in *Sonek v. Sonek*, 105 N.C. App. 247 (1992), Judge Greene wrote that "[a] professional license is a valuable property right, reflected in the money, effort, and lost opportunity for employment expended in its acquisition, and also in the enhanced earning capacity of its holder ...."

However, in *Haywood v. Haywood*, 106 N.C. App. 91 (1992), *rev'd on other grounds*, 333 N.C. 342 (1993), the court of appeals held that defendant's masters degree in economics and business was not property, stating that "[b]ecause educational degrees, like professional and business licenses, are personal to their holders, are difficult to value, cannot be sold, and represent enhanced earning capacity, the vast majority of states which have addressed the issue have held that such degrees are not property for purposes of equitable distribution." The court acknowledged that the equitable distribution statute specifically defines professional and business licenses as property, but rather than distinguishing degrees from licenses, the court held that by not including degrees in the definition of separate property along with licenses, the General Assembly evidenced a legislative intent that educational degrees not be recognized as property.

### 3. Contingent Contract Rights

In *Godley v. Godley*, 110 N.C. App. 99 (1993), defendant was a party to a contract which granted him the right to receive a portion of the profits earned by a business in exchange for his consulting services. By the date of separation, he had finished providing the consulting services but the amount he would receive as compensation was uncertain due to the fact that the company had yet to realize the profits upon which defendant's commission would be based. The court of appeals characterized defendant's right to receive the commissions as "a mere contractual right to receive an uncertain amount of commissions at some indefinite time in the future, if at all," and held that the commission was "too speculative" to be distributed or considered in distribution.

Like the recent *Miller* case, the court in *Cobb v. Cobb*, 107 NC App 382 (1992), was faced with the issue of whether the future value of timber being grown on marital property should itself be classified as marital property. The parties had planted trees on their property in 1971, they divorced in 1989, and evidence indicated that the timber would be ready for clear cut in 2007, at which time the owner would realize approximately \$174,300 from the sale of the timber. Defendant argued that the projected earnings from the timber should be classified as marital property. The court, however, held that the right to receive the profit from the timber sale in the future was "far too speculative" to characterize as a "vested property right," and held that the future interest could not be classified as marital property nor considered as a factor in distribution. In support of its conclusion, the court pointed to the risk that the future value might not be realized "if, for example, the trees are destroyed by fire or insects, or if [the owner] decides to sell the property or to not cut the trees at all."

However, in *Christensen v. Christensen*, 101 N.C. App. 47, 50, 398 S.E. 2d 634, 636 (1990), the court identified a management contract for future services as a valuable asset of a business. The contract at issue in *Christensen* provided for services to be rendered for a specified period of time (40 years) and the amount to be paid for the services was certain (\$36,000 per year).

Likewise, in *Smith v. Smith*, 111 N.C. App. 460, 433 S.E. 2d 196 (1993), the court indicated that a contract to redeem stock was a vested property interest where the sale price and time for payment was clearly identified in the contract.

# Bankruptcy and the Application of the Automatic Stay to Family Law Cases

**Author :** Cheryl Howell

**Categories :** [Family Law](#)

**Tagged as :** [Bankruptcy: automatic stay](#)

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One does not have to be a bankruptcy specialist to be aware of the automatic stay provisions that go into effect immediately upon the filing of any type of bankruptcy proceeding. [11 USC sec. 362](#). Because the stay is extremely broad and prohibits the continuation or commencement of most legal proceedings against the debtor or the debtor's property and because violation of the stay can lead to harsh sanctions against creditors and attorneys alike, most lawyers and judges are inclined to immediately stop litigating a case once they become aware that a bankruptcy case has been commenced by one of the parties.

While that generally is an appropriate response, the federal law actually excludes a number of family law proceedings from the scope of the stay.

## The Automatic Stay: Immediate Relief to a Debtor

The stay has been described as “an injunction against all the world, obtained simply by filing a bankruptcy petition.” Sommer & McGarity, *Collier Family Law and the Bankruptcy Code*, sec. 5.03, p. 5-29 (Matthew Bender 2015). The intent of the stay is to:

“give the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization, or simply to be relieved of the financial pressures that drove him into bankruptcy.”

*Id.*, citing a 1997 House Congressional Report.

Unless the bankruptcy court grants relief from the stay, it generally remains in effect until the debtor is granted or denied a discharge or until the bankruptcy case is dismissed or closed.

## Family Law Exceptions to the Automatic Stay

[The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, P.L. 109-8](#), made extensive changes to the Bankruptcy Code. [USC Title 11](#). A number of those changes made it easier to move forward with some family law issues despite the filing of a bankruptcy petition and other provisions added protections from discharge for some family related debts and financial obligations.

[11 USC sec. 362](#) provides that the automatic stay does not apply to the commencement or continuation of a legal proceeding against the debtor:

- For divorce or dissolution of marriage except to the extent that the action seeks to determine the division of property that is property of the estate.
- Concerning child custody or visitation.

- Regarding domestic violence.
- To establish or modify an order for a domestic support obligation.
  - A domestic support obligation is defined in [11 USC sec. 101\(14A\)](#). In general, a domestic support obligation is alimony and child support that arises from a court order or separation agreement. Collier, sec. 302[1][a], p. 3-6.
- To establish paternity.

[11 USC sec. 362](#) provides that the automatic stay also does not prohibit:

- Withholding the debtor's income (regardless of whether the income is or is not property of the debtor's bankruptcy estate) for payment of a domestic support obligation under a judicial or administrative order or statute.
- Revoking a debtor's drivers license, recreational license, or professional or occupational license to enforce the debtor's child support obligation in accordance with state child support enforcement statutes.
- Enforcing a debtor's medical support obligation in accordance with federal and state child support enforcement statutes.
- Attaching a debtor's federal or state income tax refund by or on behalf of a state or local child support enforcement agency to collect past-due spousal or child support in accordance with federal and state child support enforcement statutes.
- Reporting the debtor's child support debt to a consumer reporting agency in accordance with federal child support enforcement requirements.
- Collecting a domestic support obligation from property that is not property of the debtor's bankruptcy estate.

In addition:

- The automatic stay does not prohibit the commencement or continuation of a criminal contempt proceeding against a debtor based on the debtor's failure to pay a pre-bankruptcy spousal or child support debt *if* the purpose and effect of the criminal contempt proceeding is to punish the debtor's failure to pay spousal or child support and not to coerce or require the debtor's payment of spousal or child support.
- The automatic stay does not prohibit the commencement or continuation of an action against the debtor for divorce, equitable distribution, alimony, child custody, or child support if the action accrued after the debtor filed for bankruptcy and could not have been commenced before the debtor filed for bankruptcy *and* does not involve any act to obtain possession of property that is property of the debtor's bankruptcy estate or to create, perfect, or enforce a lien against property that is property of the debtor's bankruptcy estate.
- The automatic stay does not prohibit the collection, through civil contempt or otherwise, of court-ordered spousal or child support that accrues after the debtor files for bankruptcy as long as such action does not involve any act to obtain possession of property that is property of the debtor's bankruptcy estate or to create, perfect, or enforce a lien against property that is property of the debtor's bankruptcy estate.
- The automatic stay does not prohibit the commencement or continuation of an action by the debtor for divorce, equitable distribution, alimony, child custody, or child support as long as it does not involve any act to obtain possession of property that is property of the debtor's bankruptcy estate or to create, perfect, or enforce a lien against property that is property of the debtor's bankruptcy estate.

### **Some Family Law Proceedings That are Barred by the Stay**

The automatic stay bars commencement or continuation of a legal proceeding against the debtor for equitable distribution of marital property if (a) the proceeding involves property that is property of the debtor's bankruptcy estate *or* (b) the claim for equitable distribution arose before the debtor filed for bankruptcy and it is not joined in an action for divorce.

The automatic stay bars any action to establish, enforce, or collect a pre-bankruptcy debt incurred in connection with

divorce or separation that is not a debt for a domestic support obligation.

The automatic stay prohibits collection of a pre-bankruptcy or post-bankruptcy domestic support obligation from property that is property of the debtor's bankruptcy estate by means other than income withholding, license revocation, or attaching the debtor's federal or state income tax refund.

The automatic stay prohibits creating, perfecting, or enforcing a lien for pre-bankruptcy or post-bankruptcy domestic support obligation against property that is property of the debtor's bankruptcy estate.

The Collier Bankruptcy Treatise cited above is an excellent resource for information about the impact of bankruptcy on family law cases.



## Equitable Distribution: The Marital Property Presumption

**Author :** Cheryl Howell

**Categories :** [Family Law](#)

**Tagged as :** [burden of proof](#), [classification](#), [equitable distribution](#), [marital property](#), [marital property presumption](#), [separate property](#)

**Date :** September 8, 2017

Immediately following the definition of marital property in G.S. 50-20(b)(1), the statute states “[i]t is presumed that all property acquired after the date of marriage and before the date of separation is marital property except property which is separate property under subdivision (2) of this subsection.” This presumption probably is the most important core principle of classification of property in North Carolina equitable distribution because it defines the burdens of proof.

### Why is the burden of proof important?

Appellate courts consistently have held that the party claiming a particular classification of property has the initial burden of presenting evidence to support the classification and to support the court’s valuation of the asset. See *Johnson v. Johnson*, 317 NC 437 (1986); *Brackney v. Brackney*, 199 NC App 375 (2009). A trial court must identify and classify “property as marital or separate depending upon the proof presented to the trial court of the nature of the assets.” *Atkins v. Atkins*, 102 NC App 199, 206 (1991). In other words, a trial court is only obligated to classify and value property in accordance with the evidence presented. If neither party meets the burden of proof to establish that the property is marital or that it is separate, the property falls outside of equitable distribution. This means that the property is neither distributed nor considered in distribution, and the parties are limited to seeking common law remedies to determine their respective interests in the property. *Grasty v. Grasty*, 125 NC App 736 (1997)(business); *Johnson v. Johnson*, 230 NC App 280 (2013)(military pension).

### Proving property is marital

A party seeking a marital classification for a particular item of property must show that the property was acquired 1) by either spouse or both spouses, (2) during the course of the marriage, and (3) before the date of separation, and that the property was (4) owned by either spouse or both spouses on the date of separation. *Atkins v. Atkins*, 102 NC App 199 (1991). Once the party has met that burden, the statutory marital property presumption applies and the property is presumed to be marital. There is no requirement that a party seeking a marital classification prove that the property is not separate property. See *Uhlig v. Civitarese, unpublished*, 781 SE2d 828 (2016)(explaining that there is no presumption that property is marital until the party seeking the marital classification proves the elements listed above).

The court of appeals has made it clear that a party seeking a marital classification also bears the burden of proving the date of separation net value of the asset. Early appellate opinions held that a trial judge has the affirmative obligation to value marital property and remanded cases to the trial court when there was no finding of value or when there was insufficient evidence of value offered to support a finding. See e.g. *Wade v. Wade*, 72 NC App 372 (1985)(court must value asset even though conduct of defendant made it difficult). However, more recent opinions have clarified that the trial court’s obligation to value exists only when there is credible evidence offered by the parties supporting the value of the asset. *Lund v. Lund*, 798 SE2d 424 (2017); *Johnson v. Johnson*, 230 NC App 280 (2013). Rather than remanding cases to give parties another opportunity to offer proper evidence of value, the court has held that the party with the burden of proof on classification also bears the burden on valuation. Therefore, if credible evidence of value is not offered, the asset cannot be distributed in equitable distribution even when it is clearly shown to be marital property.

For example, in *Grasty v. Grasty*, 125 NC App 736 (1997), defendant wife established that a business titled in the name of plaintiff husband was a marital asset. However, the trial court found her evidence of value of the business to be “wholly incredible and without reasonable basis,” and plaintiff offered no evidence of value. The court of appeals held that it was defendant’s burden to prove the business marital and to prove its value on the date of separation. Without credible evidence of value, defendant did not meet her burden. Therefore, according to the court, the business “is not subject to distribution ... [and] [a]ny interest the parties have in Grasty Service will necessarily pass outside the Act and be determined by alternative means of property distribution ...”.

The result was the same when wife failed to offer a date of separation value of husband’s military pension in *Johnson v. Johnson*, 230 NC App 280 (2013).

### **The burden to show property is separate property**

Just as a party seeking a marital classification of an asset has the burden of showing that the asset fits within the definition of marital property, a party seeking a separate classification has the burden of showing the asset fits within one of the categories of property defined as separate by G.S. 50-20(b)(2). *Watkins v. Watkins*, 228 NC App 548 (2013)(asset is not separate property simply because other party failed to prove it is marital property). Even if the other party has met the burden required to invoke the marital property presumption, if the party seeking the separate classification proves by the greater weight of the evidence that the property falls within one of the categories of separate property, “then under the statutory scheme of N.C.G.S. 50-20(b)(1) and (b)(2), the property is excepted from the definition of marital property and is, therefore, separate property.” *Finney v. Finney*, 225 NC App 13 (2013). This is why cases say that if both parties meet their respective burdens of proof, the property is separate property. *Atkins; Finney*.

### **Mixed Assets (such as joint accounts)**

The significance of the marital property presumption is especially apparent in the classification of mixed assets, meaning assets that have some amount of both marital and separate value. The presumption often is cited by the appellate courts to support the principle that once a party shows that an asset was physically acquired by one party or both parties during the marriage and before the date of separation and owned on the date of separation, the entire value of the asset is presumed marital. The burden then shifts to the party seeking a partial separate classification to trace the separate component of the asset. As such tracing can be difficult, if not impossible, the presumption often means that such assets will be classified as entirely marital property.

For example, in *Minter v. Minter*, 111 NC App 321 (1993), the parties owned, among other things, substantial investment accounts and checking accounts on the date of separation which had been opened during the marriage. Earnings from these accounts had been used to purchase other property during the marriage. Evidence showed that defendant had commingled assets he received from three separate inheritances during the marriage with the marital assets in these accounts. There also was evidence that defendant had deposited stock he owned before the marriage into these accounts. Defendant argued that because both inherited property and property owned before marriage is separate property, a portion of the date of separation value of the accounts and of other assets purchased with funds from these accounts should be classified as his separate property. However, both defendant and his expert admitted during the trial that “dollar for dollar” tracing of the separate components of these assets was a “practical impossibility” because of the number of transactions within these accounts during the marriage. Plaintiff did not dispute that defendant had contributed substantial separate property to these accounts. However, the trial court classified all of the assets owned on the date of separation as marital property after finding that defendant failed to meet his burden of proving the value of his separate interest in the accounts and other assets.

The court of appeals upheld the trial court, stating since “there was no dispute that the contested properties were acquired during the marriage and before the date of separation and presently owned,” the burden was on defendant to prove that the “source of the property was separate property, ...”. The admission by defendant and his expert that it



was impossible to identify the value of the separate component of the assets on the date of separation was sufficient to support the trial court's conclusion that defendant had failed to meet his burden of proof.

The court reached the same conclusion in *Holterman v. Holterman*, 127 NC App 109 (1998). In that case, plaintiff received two significant inheritances during the marriage. The inherited funds were commingled with marital assets to purchase various stocks, bonds, and bank accounts. The parties owned those stocks bonds and accounts on the date of separation. The trial court classified all of the property owned on the date of separation as marital property, finding that plaintiff had not produced sufficient evidence to trace the separate component of the assets. Citing *Minter*, the court of appeals upheld the trial court, stating:

... the contested assets in the present case were acquired during the marriage. There is competent evidence to support the court's determination that the plaintiff failed to carry her burden of proof to show that the investments were her separate property. Plaintiff was unable to trace her inheritances to the present assets owned joined by the parties at the time of separation.

For similar holdings regarding mixed accounts, see *Carpenter v. Carpenter*, 781 SE2d 828 (2016); *Comstock v. Comstock*, 771 SE2d 602 (2015); and *Clark v. Dyer*, SE2d (2014).

### **Appreciation of Separate Property**

While GS 50-20(b)(2) states that an increase in value of separate property is separate property, case law tells us that an increase in value that occurs as the result of marital effort (an active increase) is marital property. *Wade v. Wade*, 72 NC App 372 (1985). As with other mixed assets such as joint accounts, the marital property presumption applies to place the burden of proving that an increase in value of separate property that occurs during the marriage is passive rather than active falls on the person seeking to have the increase classified as separate. *Conway v. Conway*, 131 NC App 609 (1998); *O'Brien v. O'Brien*, 131 NC App 411 (1998). In other words, any increase in value of separate property during the marriage is presumed to be marital (active). The owner of the separate property has the burden to prove the increase was not the result of marital effort (passive), which frequently is very difficult to do. For recent application of this rule, see *Porter v. Porter*, 798 SE2d 400 (2017)(husband failed to show any passive appreciation of his investment of separate funds in an LLC so entire increase in the value of his investment was classified as marital).

### **Marital Debt**

The marital property presumption does not apply to the classification of marital debt. The party seeking a marital classification for a debt has the burden to prove the debt was incurred by one or both spouses during the marriage and before the date of separation, the amount of debt owed on the date of separation, and that the debt was incurred for the joint benefit of the parties. See blog post [Equitable Distribution: The Classification of Marital Debt](#), June 19, 2015.



## Equitable Distribution: Divisible Property and Burdens of Proof

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**Categories :** [Family Law](#)

**Tagged as :** [equitable distribution](#); [classification](#); [divisible property](#); [burdens of proof](#)

**Date :** September 22, 2017

In [my last post](#), I wrote about the marital property presumption and the significance of that presumption in the classification of marital property. Divisible property is not marital property, so the marital property presumption does not apply to help with the classification of property, value or debt acquired after the date of separation. So when there is evidence that marital property has increased in value between separation and the ED trial, does one party have to prove the cause of the increase before the court can distribute the increased value? Or, when one party has received income from a marital asset, like a rental house or an LLC, does one party have to prove that the income was not received as the result of the actions of a party before the court can divide the income between the parties?

### Divisible Property

Because the marital estate ‘freezes’ on the date of separation, *see Becker v. Becker*, 88 NC App 606 (1988), an increase or decrease in the value of marital property occurring after the date of separation, property received after separation, or income received from marital property after the date of separation, is not included in the marital estate. The category of divisible property was created to allow a court to distribute these postseparation assets along with the marital property in some circumstances. If the change in value, new property or income received is classified as divisible, it can be distributed. If it is not divisible property, the court can do nothing more than consider the property, income or change in value as a distribution factor.

### Increases and Decreases in Value of Marital Property

[GS 50-20\(b\)\(4\)a](#) defines as divisible property:

“[a]ll appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property.”

The court of appeals has held that the “plain language” of this definition creates a presumption that any increase or decrease in the value of marital property after the date of separation and before the date of distribution is divisible property. *Wirth v. Wirth*, 193 NC App 661 (2008). This means that a party who wants the trial court to distribute the increase or decrease between the parties only has to show that marital property increased or decreased in value and the amount of that change. Once the amount of increase/decrease is established, the entire change is subject to distribution unless the other party proves the change in value was caused by the efforts of one of the spouses. *See also Lund v. Lund*, 779 SE2d 175 (2015)(wife met her burden of proof simply by testifying that, in her opinion, the value of the marital home increased in value by \$35,000 since the date of separation. The increase must be classified as divisible property unless husband can show the increase was caused by the efforts of one of the spouses).

The significance of this presumption is illustrated by the result in *Romulus v. Romulus*, 215 NC App 495 (2011). Husband was a dentist and his dental practice was classified as marital property. Evidence showed that the value of the practice increased during separation and wife argued the increased value was divisible property and subject to distribution. Husband argued that his daily work in the practice caused the increase. The trial court made the following

findings of fact:

“As to the change in value of John M. Romulus, PA after the separation of the parties, the Court finds that such increase was passive and is thus divisible property. In support of this conclusion, the Court finds that Dr. Romulus’ efforts to grow the business were essentially unchanged from DOS until DOT. The Defendant did not invest substantially more time working at his practice than on the DOS, and in fact continued to work “dentist’s hours”, which included taking at least one weekday afternoon out of the office or otherwise away from work. There was no evidence of other substantial efforts to grow the business by Dr. Romulus, by increasing advertising, adding new services, new patient recruitment, patient retention efforts or the like.

Even though Dr. Romulus undoubtedly actively worked in the business by going to the office and doing dentistry, that does not lead to the conclusion that the increase in value of his practice is active and his separate property. Take the example of a shopkeeper who runs a corner store. He works from Monday to Friday, 9am to 5pm. A 20 story residential complex is completed across the street and his receipts increase greatly. Contrast that situation with a similar shopkeeper who expands his hours to nights and weekends, increases advertising to capture new customers, and establishes a website offering online shopping and delivery. This shopkeeper sees a similar increase in receipts, without the benefit of the new apartment building across the street. Although both shopkeepers were actively involved in the business of running the store, the increase in the value of the business itself is passive in the first case and active in the other.

Dr. Romulus has not presented sufficient evidence to rebut the presumption that the increase in value of marital property post separation is divisible property, and thus such increase will be classified as divisible property and distributed as set out in this order.”

The court of appeals affirmed the trial court’s conclusion, stating:

“Essentially, the trial court found that it could not determine the cause of the postseparation increase in value, and because of the statutory presumption, it must be considered divisible.”

### **Other categories of Divisible Property**

In addition to increases and decreases in the value of marital property not caused by the actions of one spouse, divisible property also includes:

All property, property rights, or any portion thereof received after the date of separation but before the date of distribution that was acquired as a result of the efforts of either spouse during the marriage and before the date of separation, including, but not limited to, commissions, bonuses, and contractual rights.

Passive income from marital property received after the date of separation, including, but not limited to, interest and dividends, and

Passive increases and passive decreases in marital debt and financing charges and interest related to marital debt.

[GS 50-20\(b\)\(4\)b-d.](#)

There is no statute or case identifying a presumption relating to the classification of any of these other categories of divisible property. In a footnote in *Walter v. Walter*, 149 NC App 723, fn 2 (2002), the court stated that the party claiming property to be divisible has the burden of proving “that it is so.” This appears to mean that the party asking the court to distribute the property or debt has the burden of proving that the property or debt falls within one of these three definitions and the party must do so without the aid of any presumption.

## Passive Income Received From Marital Property

Most appellate cases reviewing the classification of divisible property have involved the first category, increases and decreases in value of marital property. However, there also have been several appellate cases involving one spouse's receipt of income from a marital asset after separation and the question of whether the court had the authority to distribute some or part of that income to the other spouse. Although the appeal was resolved on other grounds, the trial court order reviewed in *Montague v. Montague*, 238 NC App 61 (2014), shows how difficult it can be to differentiate passive shareholder distributions from an employee spouse's compensation for work performed after separation. The burden clearly is on the spouse asking the court to distribute the income to prove the income was completely or at least in part passive. *See also Binder v. Binder, unpublished*, 231 NC App 514 (2013)(evidence was sufficient to support trial court's conclusion that part of cash withdrawals from a marital LLC were compensation for husband's postseparation work but that rest were passive shareholder distributions that were divisible property).

While there are no presumptions to help with the classification of income received after separation, the court of appeals has made a couple of broad statements that should be helpful to litigants seeking to have funds classified as divisible property. In *Montague v. Montague*, 238 NC App 61, 65-66 (2014), the court stated that shareholder distributions from an LLC generally are passive income that should be classified as divisible property, and in *Lund v. Lund*, 779 SE2d 175 (2015), the court of appeals stated that rental income generated from marital property after separation is passive income that should be classified as divisible.



## Equitable Distribution: Classification of a Lawyer's Contingency Fee

**Author :** Cheryl Howell

**Categories :** [Family Law](#)

**Tagged as :** [classification](#), [Divisible Property](#), [equitable distribution](#), [marital property](#)

**Date :** October 27, 2017

In the recent case of [Green v. Green, \(N.C. App., Oct. 3, 2017\)](#), the court of appeals held that a fee received by a lawyer as the result of the resolution of a case his firm took on a contingency basis before the lawyer separated from his wife was not marital or divisible property. The court based this decision on the fact that the lawyer did not receive the fee until after the date of separation and did not have a right to receive the fee on the date of separation because the agreement provided that no fee would be received if there was no recovery in the case. The appellate court reversed the trial court decision that a portion of the fee was 'deferred compensation' for work the husband performed before the date of separation. The trial court had classified this portion of the fee as divisible property pursuant to [GS 50-20\(b\)\(4\)\(b\)](#) which provides that divisible property includes property received "as the result of the efforts of either spouse during the marriage and before the date of separation."

This decision by the court of appeals is significant because it is the first time the court of appeals actually reviewed a decision by a trial court interpreting this particular category of divisible property and because the holding of the appellate court seems to say this category is much more limited than the language of the statute indicates.

### **Background: property received after separation can be marital property**

It is fundamental that only property 'acquired' during the marriage and owned on the date of separation is marital property. This generally means that property, such as a large cash payment, received by a spouse after the date of separation is not marital property.

However, sometimes property actually received after the date of separation is marital property because the right to receive it was 'acquired' before the date of separation. In *Smith v. Smith*, 111 NC App 460 (1993), the court explained:

"[O]ur appellate courts have recognized that funds received after the date of separation may appropriately be classified as marital property under certain circumstances when the right to receive those funds is acquired during the marriage and before separation. .... In [Johnson \[v. Johnson, 317 N.C. 437, 346 S.E.2d 430 \(1986\)\]](#), our Supreme Court expressly refused to hold that the personal injury settlement received by the husband had to be classified as his separate property because it was received after the date of separation, explaining as follows:

"To summarily classify the \$95,000 as separate property of the plaintiff-husband merely because a check in that amount was received by him after separation of the parties would ignore the classification scheme of our Equitable Distribution Act. In order to classify the \$95,000 for equitable distribution purposes, the trial court was required to determine the nature of the asset. Was it a gift? An inheritance? Earnings of a spouse? Proceeds from the sale of marital property? ... Only after determining the nature of the asset received by one spouse *after separation*, yet claimed by the other to be "marital property," may a classification be made of that asset as between "marital" or "separate" property.

The court in *Smith* relied on *Johnson* to hold that the proceeds from the sale of stock received by husband after the date of separation were marital property because the sale occurred and husband acquired the right to receive the proceeds before the date of separation. Because he had the unconditional right to the funds on the date of separation,

the property actually received after the date of separation was property acquired during the marriage and before the date of separation and therefore was marital property. See also [Talent v. Talent, 76 N.C. App. 545, 334 S.E.2d 256 \(1985\)](#) (where a loan was made during the marriage from marital funds and collected by one of the spouses after the date of separation, the funds collected should be considered marital property), and *Allen v. Allen*, 168 NC App 368 (2005)(tax refund for taxes paid before separation was marital property).

However, if a spouse did not have the right to receive the funds on the date of separation, funds received after separation are not marital property. See e.g., *Godley v. Godley*, 110 NC App 99 (1993)(commissions, not vested or certain on the date of separation, but received by husband after separation not marital property even though the commission was paid for work performed during the marriage); *Edwards v. Edwards*, 110 NC App 1 (1993)(where husband's right to receive bonus for work performed during the marriage was not certain on the date of separation, bonus he received after the date of separation was not marital property).

### **Background: property received after separation can be divisible property**

The results in both *Godley* and *Edwards* were perceived by many to be inequitable because the effort that led to the receipt of the money clearly was marital effort. The General Assembly responded to this concern and others arising out of post-separation occurrences in equitable distribution cases by creating the classification of divisible property in 1997. One category of divisible property, the one at issue in [Green](#), provides that divisible property includes:

“All property, property rights, or any portion thereof received after the date of separation but before the date of distribution that was acquired as a result of the efforts of either spouse during the marriage and before the date of separation, including, but not limited to, commissions, bonuses, and contractual rights”.

#### [GS 50-20\(b\)\(4\)\(b\)](#).

The only appellate case before the recent decision in *Green* to discuss this category of divisible property was *Ubertaccio v. Ubertaccio*, 359 NC 175 (2004), adopting concurring opinion in 161 NC App 352 (2003). In that case, the trial court concluded that stock grants received by wife after the date of separation were not marital property because she did not have the right to receive them on the date of separation. However, the trial court held the grants were divisible property pursuant to [GS 50-20\(b\)\(4\)\(b\)](#) because the stock grants were given as compensation for work wife performed before the date of separation. While this issue in the case was not raised on appeal, the appellate court stated that the focus in the classification of this type of post-separation asset should be on the “source” from which the property was generated and not on whether a spouse's rights in the property were “vested” on the date of separation.

### **[Green v. Green](#): Contingency fee received after separation**

Evidence in the trial court established that 78% percent of the total hours worked by husband's law firm on the case that eventually led to the contingency fee occurred before the separation of the parties. The trial court used that percentage as a basis for concluding that a portion of the fee received by husband when the case settled during separation was divisible property pursuant to [GS 50-20\(b\)\(4\)\(b\)](#). The court described that conclusion by stating that evidence showed a portion of the fee was ‘deferred compensation’ for the work performed by husband before the date of separation.

The court of appeals reversed the trial court. First, the court held that the fee was not the type of ‘deferred compensation’ properly classified as marital property pursuant to [GS 50-20\(b\)\(1\)](#), which states that “marital property includes all vested and nonvested pension, retirement, and other deferred compensation rights.” Relying on rules of statutory construction, the court of appeals held that the contingency fee received by husband in this case did not fall within this category of marital property because it was not in the nature of a pension or retirement plan. The court also cited the decision by the Oklahoma Supreme Court in *Musser v. Musser*, 909 P.2d 37 (1995), to support the general idea that a spouse's interest in a contingency fee contract is not marital property when the case is not resolved by the

time the marriage ends.

**Not a bonus or a contract, so not divisible property**

Significantly, the court of appeals also rejected the trial court's conclusion that a portion of the fee was divisible property. The court cited the language of [GS 50-20\(b\)\(4\)](#) and concluded that the fee received by husband after the date of separation did not fall within this category of divisible property because it did not represent a contract right of either party or a bonus. Without discussing whether the fee was "acquired as the result of the efforts of either spouse during the marriage and before the date of separation," the court of appeals held that the entire fee was husband's separate property because it was "compensation [husband] received by virtue of his ownership interest in the firm." The fact that a large percentage of the work that resulted in husband receiving this compensation was performed by husband during the marriage and before the separation of the parties was not sufficient to support the trial court's conclusion that a portion of the fee was divisible property.



## Military Disability Pay: It's not marital property but it is income

Author : Cheryl Howell

Categories : [Family Law](#)

Tagged as : [Military disability](#); [equitable distribution](#); [child support](#); [incomemilitary retirement](#)

Date : January 17, 2018

In an opinion issued yesterday, the NC Court of Appeals reaffirmed that while military disability pay cannot be distributed by a court in equitable distribution, it is income that can be considered when the trial court is looking for a source of payment for a distributive award. [Lesh v. Lesh, NC App \(Jan. 16, 2018\)](#). In reaching this decision, the court rejected the argument that this rule was changed by the recent decision by the US Supreme Court in [Howell v. Howell, 137 S. Ct. 1400 \(2017\)](#), wherein the Court reiterated that federal law prohibits the distribution of military disability in equitable distribution.

[Lesh](#) and [Howell](#) present a good opportunity to review the law regarding military disability pay in domestic relations cases.

### Military Disability Pay Cannot be Distributed in ED

The federal Uniformed Services Former Spouses' Protection Act authorizes states to treat veterans' "disposable retired pay" as property divisible upon divorce, [10 U. S. C. §1408](#), but the definition of disposable retired pay does not include disability benefits. Therefore, federal law prohibits the distribution of military disability benefits in equitable distribution proceedings. *Mansell v. Mansell*, 490 US 581 (1989). Military disability pay is the separate property of the veteran. [Lesh](#); *Hillard v. Hillard*, 223 N.C. App. 20 (2012); *Halstead v. Holstead*, 164 NC App 543 (2004); *Bishop v. Bishop*, 113 NC App 725 (1994).

### Retirement Can Be Converted to Disability and There's Not Much A Trial Court Can Do About It

Unless a retired service member qualifies for concurrent pay pursuant to [10 U.S.C. § 1414\(a\)\(1\)](#) (most retirees with at least 20 years qualifying service and a service-related disability of at least 50%), a service member cannot receive both disability pay and retirement pay. This means that many service members must waive retirement pay in order to receive disability pay. Many disabled service members decide to "convert" their retirement pay to disability pay when they become eligible to do so because disability pay is not taxed and cannot be distributed in divorce proceedings.

A service member can waive retirement for disability at any point in time after a service member becomes entitled to receive disability pay. If the conversion occurs before a court enters an order for equitable distribution, the court can consider the disability payments as a distributional factor but cannot give dollar-for-dollar "credit" in distribution to make up for any retirement pay lost due to conversion to disability. *Halstead v. Halstead*, 164 N.C. App. 543(2004).

A service member retains the right to convert retirement to disability even after a state court has awarded a portion of the member's retirement pay to the member's former spouse in an equitable distribution judgment. When this conversion occurs, the amount of retirement pay received by the former spouse of the service member generally is reduced. A trial court may not prohibit a service member from converting retirement pay to disability in the future. *Cunningham v. Cunningham*, 171 N.C. App. 550, 558 (2005).

However, North Carolina appellate courts as well as appellate courts in other states have held that federal law does not restrict the ability of a state court to enforce a judgment dividing military retirement pay entered before a service



member converted the retirement pay to disability pay. Therefore, amendments to retirement distribution orders made by trial courts to “effectuate” the terms of the original court order have been upheld. In *White v. White*, 152 N.C. App. 588 (2002), the court of appeals held that the trial court had authority to hear wife’s motion to amend a qualified domestic relations order (QDRO) to seek an increase in her share of husband’s remaining retired pay to offset the amount of retirement waived by the serviceman. And, in *Hillard v. Hillard*, 223 N.C. App. 20, 24 (2012), the court of appeals affirmed the trial court’s decision to amend the ED order after the service member waived retired pay to receive disability pay to require the service member to pay wife “the portion of his retirement required by the previous order.” According to the court of appeals, this order did not impermissibly distribute disability pay, as the service member could fund payments from source of his choice.

The recent decision by the US Supreme Court in *Howell v. Howell* rejected this reasoning by state courts and effectively overruled both *White* and *Hillard*.

### [Howell v. Howell](#)

An Arizona trial court awarded Sandra Howell 50% of John Howell’s future Air Force retirement pay, which she began to receive when John retired the following year. About 13 years later, John elected to waive about \$250 of his retirement pay per month in order to receive that amount in disability pay. This election resulted in a reduction in the value of Sandra’s 50% share of his retirement pay. Sandra petitioned the Arizona court to enforce the original divorce decree and restore the value of her share of John’s total retirement pay. The state court held that the original divorce decree gave Sandra a vested interest in the pre-waiver amount of John’s retirement pay and ordered John to ensure that she receive her full 50% without regard for the disability waiver. The Arizona Supreme Court affirmed, holding that federal law did not pre-empt the family court’s order.

The Supreme Court reversed and held that a state court may not order a veteran to indemnify a divorced spouse for the reduction in the value of the divorced spouse’s portion of the veteran’s retirement pay caused by the veteran’s waiver of retirement pay to receive disability benefits. The Court held that federal law completely prohibits states courts from treating waived military retirement pay as divisible property because the waived retirement becomes disability pay. The fact that the waiver occurred after entry of the division order and the state court was attempting to “indemnify” or “reimburse” Sandra for the “vested right” she received when the division order was entered did not change the basic nature of the trial court order. According to the Court, a state court cannot “vest [a right in a party] which [that court] lack(s) the authority to give.”

The Court explained that since there is nothing a state court can do to prohibit the conversion or to compensate the non-military spouse after a conversion, the contingency of a conversion is something a state court should consider when valuing the retirement account in the property distribution proceeding. In addition, the court suggested that the loss to the non-military spouse resulting from a conversion may be the basis for a reconsideration of alimony.

### **But Disability Pay is Income**

In [Lesh](#), the trial court classified husband’s military disability pay as separate property but considered the disability pay as a source of income available to husband to pay a distributive award. Husband argued on appeal that this judgment violated [Howell](#) because it effectively required him to “reimburse” or “indemnify” wife for the retirement she lost when he accepted the disability pay.

The court of appeals disagreed, pointing to another decision by the US Supreme Court. In *Rose v. Rose*, 481 US 619 (1987), the Court explained that the fact that disability pay must be classified as separate property does not mean that it is not income to the receiving party and held that a veteran’s disability income could be considered as a source of income from which he could pay his child support obligation. According to the Court, there is nothing in federal law indicating “that a veteran’s disability benefits are provided solely for that veteran’s support.” *See also Comstock v. Comstock*, 240 NC App 304 (2015)(U.S. Trust IRA was separate property due to federal law but was a liquid asset the

court could consider as a source of payment of a distributive award); and *Halstead v. Halstead*, 164 N.C. App. 543(2004)(military disability pay is separate property that can be considered as a distribution factor in ED proceeding).

## **Equitable distribution: Classification of Life Insurance Policies and Proceeds**

In *Crago v. Crago*, 268 NC App 154 (2019), the court of appeal rejected a request to apply the analytic approach to classify life insurance proceeds received by wife before the date of separation. The analytic approach is the classification approach adopted by the appellate court to classify personal injury settlement proceeds, see *Johnson v. Johnson*, 317 NC 437 (1986), and workers compensation payments, see *Freeman v. Freeman*, 107 NC App 644 (1992). The analytic approach classifies the proceeds according to what the payments were intended to compensate. So, to the extent a personal injury settlement replaces economic loss to the marriage, it is marital. To the extent it compensates a spouse for future lost wages or personal pain and suffering, it is separate.

In rejecting the analytic approach, the court in *Crago* held that prior case law established that life insurance policies and the proceeds from life insurance policies are classified using fundamental principles of classification, meaning by applying the statutory definition of marital property and the source of funds doctrine. The court of appeals in *Crago* referred to this as the “mechanistic approach.” In an opinion issued shortly after *Crago*, *Richter v. Richter*, 271 NC App 644 (2020), the court of appeals further explained that application of fundamental classification principles means the court must first determine the property interest owned by one or both parties on the date of separation. If not owned on the date of separation, proceeds from life insurance policies cannot be marital property but the policy itself may be marital property.

### **Life Insurance Policies**

While every opinion issued by the court of appeals regarding life insurance in equitable distribution to date has involved a dispute over the classification of proceeds paid from a life insurance policy, the court has made it clear in these cases that the policy itself should be classified if owned by the parties on the date of separation.

In *Foster v. Foster*, 90 N.C. App. 265 (1988), the parties owned whole life insurance policies covering the lives of their children on the date of separation. Evidence showed the policy at issue had a value of \$20 on the date on the date of separation. The child covered by that policy died during separation and wife argued the proceeds should be classified as marital property because until the date of separation, the premiums for the policy were paid with marital funds. As discussed in more detail below, the court of appeals held that the proceeds received after the date of separation were not marital property. However, the court held that the cash value of the whole life policy on the date of separation was marital because all premiums up until the date of separation had been paid with marital funds. Because any value of the policy on the date of separation had been acquired using marital funds, the policy itself was marital. See also *Edwards v. Edwards*, 110 NC App 1 (1993)(remanding case to trial court to determine the date of separation value of a policy

and holding that all value established would be marital because all premiums up until the date of separation had been paid with marital funds), and *Richter v. Rickter*, 271 NC App 644 (2020)(noting that while whole life policies generally have value, term life policies generally do not).

### Life Insurance Proceeds

*Foster v. Foster*, 90 N.C. App. 265 (1988), was the first appellate case in North Carolina to address the classification of life insurance proceeds. The court held in that case that because the parties had no vested right to receive the proceeds until the death of the child and the child did not die until after the date of separation, the proceeds could not be marital property. See GS 50-20(b)(1)(marital property is property owned by either or both parties on the date of separation). The only property interest owned by the parties on the date of separation was the policy itself. The court held that because all premiums after the date of separation had been paid by father, the proceeds were his property.

The result in *Crago* was different because wife received the proceeds from the life insurance policy before the date of separation and continued to own the proceeds on the date of separation. Wife had purchased the life insurance policy on the life of her former husband before she married Mr. Crago. She continued to pay the premiums for the policy after her marriage to Mr. Crago and shortly before their separation, the former husband died and wife received the proceeds.

Wife urged the court to use the analytic approach in this situation to classify the proceeds according to the intended use of the proceeds. She argued that because the policy had been purchased and maintained to provide support for the children of wife and her first husband should their father pass away, public policy should support a classification that would honor that intention. Both the trial court and the court of appeals rejected wife's argument and held that the proceeds were marital because they were acquired during the marriage, owned by a party on the date of separation, marital funds had been used to pay the premiums during the marriage and wife was not able to show that her separate funds had been used to pay any portion of the premiums.

In *Richter v. Richter*, 271 NC App 644 (2020), husband received life insurance proceeds from a policy on the life of his former wife and owned those proceeds on the date of separation. Unlike the situation in *Crago*, no marital funds had been used to pay the premiums on that policy. Instead, the former wife purchased the policy, paid all premiums and designated Mr. Richter the sole beneficiary. Both the trial court and the court of appeals concluded that while the proceeds were acquired during the marriage and owned by a party on the date of separation, husband established that he acquired the proceeds as the result of a gift from a third party to him alone. GS 50-20(b)(2)(gifts to a spouse during the marriage is the separate property of that spouse).

## Equitable Distribution: Classification of Student Loans as Marital Debt

Marital debt is debt incurred during the marriage by either or both spouses for the joint benefit of the parties. *Huguelet v. Huguelet*, 113 N.C. App. 533 (1994). The party asking that the debt be classified as marital has the burden of proving the value of the debt on the date of separation and that the debt was incurred during the marriage for the joint benefit of the parties. *Miller v. Miller*, 97 N.C. App. 77 (1990).

In 2015, I wrote about the classification of marital debt in this blog post, <https://civil.sog.unc.edu/equitable-distribution-classification-of-marital-debt/>. I discussed the decision of the North Carolina Court of Appeals in the case of *Warren v. Warren*, 241 N.C. App. 634 (2015), wherein the appellate court affirmed the trial court's classification of wife's student loan debt as marital debt. In doing so, the court held that to establish that the loans were incurred for the joint benefit of the parties, the party seeking the marital classification has the burden of proving that the loans resulted in a tangible benefit to the marriage. The court in *Warren* stated:

"In order for the court to classify student loan debt as marital debt, the parties must present evidence regarding whether the marriage lasted long enough after incurring the debt and receiving the degree for the married couple to substantially enjoy the benefits of the degree or higher earnings."

The North Carolina Court of Appeals recently revisited the classification of student loans, this time student loans incurred in the name of the husband during the marriage for the education of the adult daughter of the parties. In *Purvis v. Purvis*, (November 16, 2021), the court of appeals again affirmed the trial court's classification of the debt as marital but this time the court held that no tangible benefit to the marriage is required to establish joint benefit.

### [\*Purvis v. Purvis\*](#)

During the marriage, the daughter of the parties attended Sweet Brier College. To pay for the expense of her education, the daughter incurred student loans in her name and husband incurred student loans in his name. The loan proceeds were used by the daughter for tuition, books and living expenses. The parties made a joint decision to incur the loans to help the daughter, but they decided that the loans would be in the sole name of the husband due to discrepancies in the credit scores of the parties. The parties made payments on the loan during the marriage using funds from their joint checking account. On the date of separation, the outstanding debt for the loans incurred by husband was \$164,163.00.

In the equitable distribution proceeding, wife moved for summary judgment on the issue of the classification of the loan debt, arguing that the loans were the separate debt of husband. The trial

court denied her motion and ruled that the loan balance was a marital debt. Wife appealed, arguing that husband failed to establish that the debt was incurred for the joint benefit of the parties.

### **Joint Benefit**

The court of appeals affirmed the trial court after concluding that the student loan debt was incurred for the joint benefit of the parties. The court explained:

“Here, the parties do not dispute that there was a joint agreement to incur the debt. Nor do the parties dispute that [wife] actively participated in obtaining the loans. The parties’ affidavits demonstrate there was a joint benefit, in that their daughter’s tuition, books, and living expenses were covered by the loan rather than out-of-pocket expenses. Further, providing [their] daughter with a formal education was something that [they] both wanted and agreed, to do.”

The court distinguished appellate decisions from Nebraska and Rhode Island that classified student loan debt for adult children as separate debt, explaining that those cases involved situations where one spouse did not know about the debts at the time they were incurred and did not consent to the loans at the time they were incurred.

The court in *Purvis* also explicitly addressed the issue of the lack of a tangible benefit to the marriage, stating:

“Although this is not a tangible benefit in that the [student] loans were not deposited in the parties’ account, a tangible benefit is not required under North Carolina law. *Warren v. Warren*, 241 N.C. App. 634, 637, 773 S.E.2d 135, 137-38 (2015) (“Although our Courts have not specifically defined what constitutes a joint benefit in the context of marital debt, this Court has never required that the marital unit actually benefited from the debt incurred.”).”

Despite citing the *Warren* decision, the court of appeals in *Purvis* offers no explanation for the seemingly contradictory statement in that earlier decision regarding the need to show that the marriage benefited from the higher educational degree received by wife as the result of her student loans.

**On the Civil Side**

A UNC School of Government Blog

<https://civil.sog.unc.edu>

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1	RETIREMENT ACCOUNTS AND DEFERRED COMPENSATION  Equitable Distribution
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2	<b>G.S. 50-20(b)(1)</b>
<div style="border: 1px solid #4a7ebb; border-radius: 10px; padding: 5px; background-color: white; width: 80%; margin: 0 auto;"> <p>Marital property includes all real and personal property acquired during the marriage and before the date of separation</p> </div>	<div style="border: 1px solid #4a7ebb; border-radius: 10px; padding: 5px; background-color: white; width: 80%; margin: 0 auto;"> <p>Marital property includes all vested and nonvested pension, retirement and other deferred compensation rights to the extent those rights were earned during the marriage</p> </div>

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3	<b>G.S. 50-20.1</b>
<p>Regulates the classification and distribution of a all pension, retirement and deferred compensation rights</p> <p><i>"Applies to all plans, programs, and systems of funds, specifically including but not limited to uniformed services retirement programs, federal government plans, State government plans, local government plans, Railroad Retirement Act pensions, executive benefit plans, church plans, charitable organization plans, individual retirement accounts within the definitions of Internal Revenue Code sections 408 and 408A, and accounts within the definitions of Internal Revenue Code section 401(k), 403(b), or 457."</i></p>	

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<b>Excluded due to federal law</b>	<b>Social Security Benefits</b>
	<b>Military Disability Benefits</b>

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<b>Three examples</b>	

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<b>North Carolina State Employees Retirement Account</b>	<b>A Pension</b>
	<b>A Defined Contribution Plan</b> GS 50-20.1(d)(1)(amount of the benefit is determined in whole or in part by the length of time of the participant-spouse's employment)

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<h2 style="margin: 0;">401(k) account</h2>	
<p>A Retirement Account A Defined Contribution Account G.S. 50-20.1(d)(2)(amount of benefit is not determined by length of employment but is based on contributions held in one or more accounts with readily attainable balances)</p>	

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<h2 style="margin: 0;">Stock Options</h2>	
<p><b>Deferred Compensation</b></p> <p>the right or option to buy stock at a certain price in the future</p>	<p><b>A salary substitute</b></p>
<p><b>Probably a defined contribution benefit</b></p>	<p><b>Fountain v. Fountain, 148 NC App 329 (2002)</b></p>

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<p><b>GS 50-20.1(d):</b></p> <p>When the amount of the benefit payable by the plan, program, system, or fund to the participant-spouse is determined in whole or part by the length of time of the participant-spouse's employment, the marital portion shall be determined using the proportion of time the marriage existed (up to the date of separation of the parties) simultaneously with the total time of the employment which earned the benefit subject to equitable distribution, to the total amount of time of employment that earned the benefit subject to equitable distribution.</p> <p>The "coverture fraction"</p>	<h2 style="margin: 0;">Defined Benefit Plan</h2>
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<p><b>State Employees Retirement Account</b></p> <p>1. Wife begins working for the state two years after the date of marriage and she is still working for the state on the date of separation. On date of separation, she has worked for the state for 20 years</p> <p>What is the coverture fraction?</p> <p>2. Wife begins working for the state two years before the date of marriage and she is still working for the state on the date of separation. On the date of separation, she has worked for the state for 20 years.</p> <p>What is the coverture fraction?</p>	

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	<p><b>Defined Contribution Benefit</b></p>
<p><b>GS 50-20.1(d1):</b></p> <p>... the court shall not determine the award using the fraction described in subsection (d) of this section. The court instead shall determine the marital portion of the benefit by determining the amount of the account balance that is due to contributions made or earned during the marriage and before separation, together with the income, gains, losses, appreciation, and depreciation accrued on those contributions. (tracing)</p> <p>If sufficient evidence is not presented to the court to allow the court to make this determination, the court shall then determine the marital portion of the benefit by using the fraction described in subsection (d) of this section (the coverture fraction)</p>	

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	<p><b>401K Plan</b></p> <p>1. Wife begins working and earning/contributing to the 401K two years after the date of marriage and she is still working and contributing to the 401K on the date of separation. On date of separation, she has worked for 20 years</p> <p>How much of the account is marital?</p> <p>2. Wife begins working and earning/contributing to the 401K two years before the date of marriage and she is still working and contributing to the 401K on the date of separation. On the date of separation, she has worked for the state for 20 years.</p> <p>How much of the account is marital?</p>

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	<b>Valuation</b>
	<p>Subject to <u>one exception found in GS 50-20.1(d)</u>, all marital pension, retirement benefits, or deferred compensation benefits <b>must be valued as of the date of separation</b></p> <p>If there is no date of separation value, the benefits fall out of equitable distribution</p>

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HOW DO WE VALUE A DEFINED CONTRIBUTION ACCOUNT??

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<b>HOW DO WE VALUE A DEFINED BENEFIT PLAN?</b>	5-step process set out in <i>Bishop v. Bishop</i> 113 NC App 725 (1994)

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	<h1>METHODS OF DISTRIBUTION</h1>
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<p><b>All pension, retirement and deferred comp benefits (vested and nonvested)</b></p>	<p><u>As a lump sum by agreement</u></p> <p><u>Over a period of time in fixed amounts by agreement, and</u></p> <p><u>By the "fixed percentage method" by court order or by agreement</u></p>
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<p><b>Fixed Percentage Method</b></p>	<p><b>GS 50-20.1(a)(3):</b></p> <p>As a prorated portion of the benefits made to the designated recipient, if permitted by the plan, program, system, or fund (i) at the time the participant-spouse is eligible to receive the benefits, (ii) at the time the participant-spouse actually begins to receive the benefits, or (iii) at the participant-spouse's earliest retirement age.</p> <p>Sometimes requires a QDRO (ERISA plans) or a DRO</p> <p>Court can allocate all costs assessed by plan equally between the parties. GS 50-20.1(f4)</p>

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	<b>Exception to Value Requirement</b>
	<p><b>Fixed percentage method of distribution:</b></p> <p>"if the court makes the award payable (by the fixed percentage method) and the court divides the marital portion of the benefit equally between the participant-spouse and nonparticipant spouse, the court shall not be required to determine the total value of the marital benefits before classifying and distributing the benefits.</p> <p>However, neither party shall be prohibited from presenting evidence of the total value of any marital benefits or of any benefits that are separate property of either spouse."</p> <p>GS 50-20.1(d)</p>

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	<b>All <u>vested</u> pension, retirement and deferred compensation benefits</b>
	<ul style="list-style-type: none"> <li><input type="checkbox"/> As a lump sum by agreement</li> <li><input type="checkbox"/> Over a period of time in fixed amounts by agreement</li> <li><input type="checkbox"/> By the fixed percentage method by court order or by agreement</li> <li><input type="checkbox"/> By the immediate offset method by court order or by agreement</li> </ul>

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<p><b>Immediate Offset Method (also called present value method)</b></p> <p><b>GS 50-20.1(a)(4):</b></p> <p>By awarding a larger portion of other assets to the party not receiving the benefits and a smaller share of other assets to the party entitled to receive the benefits.</p>	

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	<p><b>Vested defined contribution accounts and benefits</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> <u>As a lump sum by court order</u> or agreement</li> <li><input type="checkbox"/> <u>Over a period of time in fixed amounts by court order</u> or agreement</li> <li><input type="checkbox"/> By the fixed percentage method by court order or by agreement</li> <li><input type="checkbox"/> By the immediate offset method by court order or by agreement</li> </ul>
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<p><b>Distribution</b></p>	<div style="border: 1px solid blue; background-color: #e6f2ff; padding: 5px; margin-bottom: 5px;"> <p>A court cannot order anything not authorized by the account or fund.</p> </div> <div style="border: 1px solid blue; background-color: #e6f2ff; padding: 5px; margin-bottom: 5px;"> <p>A court cannot distribute more than 50% of the benefits unless the plan does not prohibit an award of more than 50% and:</p> <ul style="list-style-type: none"> <li>• other assets subject to equitable distribution are insufficient; or</li> <li>• there is difficulty in distributing any asset or any interest in a business, corporation, or profession; or</li> <li>• it is economically desirable for one party to retain an asset or interest that is intact and free from any claim or interference by the other party; or</li> <li>• more than one pension or retirement system or deferred compensation plan, program, system, or fund is involved, but the benefits award may not exceed fifty percent (50%) of the total benefits of all the plans added together; or</li> <li>• both parties consent.</li> </ul> </div>
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<p><b>Procedure</b></p>	<p><b>GS 50-20.1(j):</b></p> <p>Notwithstanding any other provision of this Chapter, a claim may be filed, either as a separate civil action or as a motion in the cause in an action brought pursuant to this Chapter, for an order effectuating the distribution of pension, retirement, or deferred compensation benefits provided for in a valid written agreement, as defined in G.S. 50-20(d), whether or not a claim for equitable distribution has been filed or adjudicated. The court may enter an order effectuating the distribution provided for in the valid written agreement.</p>
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<b>Procedure</b>	<p><b>GS 50-20.1(i):</b></p> <p>If a plan, program, system, or fund deems unacceptable an order providing for a distribution of pension, retirement, or deferred compensation benefits, then the court may upon motion of a party enter a subsequent order clarifying or correcting its prior order, as may be necessary to comply with the specific technical requirements of the plan, program, system, or fund.</p>
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<b>More about the fixed percentage order</b>	<p><b>GS 50-20.1(f1)</b></p> <p>"Whenever the award is made payable [by the fixed percentage method], and the pension or retirement or deferred compensation plan, program, system, or fund permits the use of a "separate interest" approach in the order, there shall be a presumption, rebuttable by the greater weight of the evidence, that the "separate interest" approach shall be used to divide the benefit in question.</p> <p>For purposes of this section, the phrase "separate interest" approach means any method of dividing pension or retirement system or deferred compensation benefits in which the nonparticipant spouse, the spouse not a participant in the plan, program, system, or fund in question, receives an interest that allows the nonparticipant spouse to receive benefits in a manner independent, in whole or part, of the benefits received by the participant-spouse, or to make elections concerning the receipt of benefits independently of the elections made by the participant-spouse."</p>
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<b>More about the fixed percentage order.....</b>	
<p><b>GS 50-20.1(f2)</b></p> <p>Whenever the pension or retirement or deferred compensation benefit is distributed [by the fixed percentage method] in an order that does not employ the "separate interest" approach, the court may, considering the length of the marriage and the ages of the parties:</p> <ul style="list-style-type: none"> <li>(i) award all or a portion of a survivor annuity to the nonparticipant spouse or former spouse and</li> <li>(ii) allocate the cost of providing the survivor annuity between the parties. The survivor annuity awarded by the court, if any, shall be allocated in accordance with the terms of the retirement plan, program, system, or fund.</li> </ul>	

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	<b>Last thing about fixed percentage orders</b>
	<p><b>GS 50-20.1(f3)</b></p> <p>Whenever the pension or retirement or deferred compensation plan, program, system, or fund does not automatically provide <b>pre-retirement survivor annuity protection</b> for the nonparticipant spouse, the court shall order <b>pre-retirement survivor annuity protection</b> for the nonparticipant spouse if permitted by the plan, program, system, or fund.</p>

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## Equitable Distribution: significant legislative amendments regarding retirement accounts and other forms of deferred compensation

[North Carolina S.L. 2019-172 \(H 469\)](#) made substantial revisions to GS 50-20.1 governing the classification, valuation and distribution of pension, retirement and deferred compensation benefits. The changes apply to distributions made on or after October 1, 2019.

**Types of benefits subject to the provisions in GS 50-20.1.** The legislation changes the title of [GS 50-20.1](#) from “Pension, retirement and *other* deferred compensation benefits to “Pension, retirement and deferred compensation benefits” to clarify that the provisions in the statute apply to all forms of deferred compensation plans rather than only to those deferred compensation benefits that are in the nature of a retirement account. In addition, [GS 50-20.1\(h\)](#) is amended to specify that the statute applies to all vested and nonvested pension, retirement and deferred compensation plans, programs, systems of funds, specifically including but not limited to “uniformed services retirement programs, federal government plans, State government plans, local government plans, Railroad Retirement Act pensions, executive benefit plans, church plans, charitable organization plans, individual retirement accounts within the definitions of Internal Revenue Code sections 408 and 408A, and accounts within the definitions of Internal Revenue Code section 401(k), 403(b), or 457.”

**Classification.** Until this amendment, the statute required that all accounts and benefits subject to [GS 50-20.1](#) be classified by the coverture fraction. The coverture fraction is a simplistic formula that conclusively defines the marital portion of the date of separation value of an account by applying a fraction to the total value of the benefits on the date of separation; the numerator of that fraction being the total time married while earning the pension and the denominator being the total amount of time earning the pension up to the date of separation. So for example, if a spouse worked for state government for 5 years before marriage and 5 years during marriage with a total of 10 years of employment by the date of separation, the coverture fraction provides that one half of the value of the government pension on the date of separation is marital and one half is separate.

The legislation amends [GS 50-20.1\(d\)](#) and adds [new section \(d1\)](#) to distinguish the classification methodologies for defined benefit plans from defined contribution plans.

**Defined benefit plans.** The statute continues to provide that a defined benefit plan will be classified by the coverture fraction.

- A defined benefit plan is a plan wherein the benefits payable to the participant are determined in whole or in part based upon the length of the participant's employment. An example of a defined benefit plan is a government or military pension.

**Defined contribution plans.** [New section GS 50-20.1\(d1\)](#) requires that a defined contribution plan be classified through tracing rather than by application of the coverture fraction. A defined contribution account is an account wherein the benefit payable to the participant spouse is determined by the contributions contained in an account with a readily determinable balance. Examples of defined contribution accounts include 401(k) plans and 403(b) plans.

- Tracing means classifying an account by establishing through evidence how much of the account balance on the date of separation was the result of marital contributions and growth on marital contributions and how much of the account balance on the date of separation was the result of separate contributions and growth on separate contributions. If insufficient evidence is presented to allow the court to classify the marital portion of the account by tracing, the court is required to determine the marital portion of the defined contribution plan by application of the coverture fraction.

## **Valuation**

- **Defined benefit plan.** The legislation changes the requirement that a defined benefit plan be valued as of the date of separation in all cases. [GS 50-20.1\(d\)](#) was amended to specify that if the marital portion of a defined benefit plan (for example, a military or other government pension) is divided equally between the parties and the benefits are distributed by an order that directs the payment of benefits to each party in the future when the plan participant is eligible to receive benefits, begins to receive the benefits, or reaches the earliest retirement age, the court is not required to identify the date of separation value of the pension before classifying it and entering a distribution order.
- **Defined contribution plan.** The statute continues to require that defined contribution plans be valued by the account balance on the date of separation.

## **Distribution**

**Benefits vested on the date of separation.** The legislation amends [GS 50-20.1\(a\)](#) to allow the court to distribute vested defined contribution accounts:

- as a lump sum from the account (agreement of the parties is no longer required), or
- by ordering the payment of fixed amounts payable over time (also no longer requires

agreement of the parties).

Both a vested defined benefit plan and a vested defined contribution plan can be distributed:

- as a prorated portion of the benefits payable at the time the plan participant is eligible to receive the benefits, begins to receive the benefits, or at the participant's earliest retirement age, or
- by awarding a larger portion of other marital assets to the party not receiving the benefits and a smaller portion to the party receiving the benefits, or
- if the parties agree, as a lump sum, or over a period of time in fixed amounts.

**Benefits not vested on the date of separation.** Both a nonvested defined benefit plan and a nonvested defined contribution plan can be distributed:

- as a prorated portion of the benefits payable at the time the plan participant is eligible to receive the benefits, begins to receive the benefits, or at the participant's earliest retirement age, or
- if the parties agree, as a lump sum, or over a period of time in fixed amounts.

**Military Retirement Benefits.** The legislation addresses the application of the "frozen benefit rule" to the division of military retirement benefits. The "frozen benefit rule" was created by an amendment to federal law in 2016. That amendment and the effects of that amendment on the distribution of military benefits is discussed in this blog post: [Equitable Distribution: Change in Federal Law Regarding Military Pensions Part 1.](#)

The new legislation addresses the federal law by amending [GS 50-20.1](#) to specify that the fraction included in a military retirement account division order will direct the payment of a percentage of the benefit that is:

"determined using the proportion of time the marriage existed (up to the date of separation of the parties) simultaneously with the total time of the employment which earned the benefit subject to equitable distribution to the total time of employment, *as limited or restricted by the plan, program, system, fund, or statute that earned the benefit subject to equitable distribution.*"

**Deferred Distribution and Survivor Annuities** (deferred distribution is when the plan is distributed by the award of a prorated portion of the benefits payable at the time in the future when the plan participant is eligible to receive the benefits, begins to receive the benefits, or at the participant's earliest retirement age):

The legislation adds [new sections GS 50-20.1\(f1\), \(f2\), \(f3\) and \(f4\)](#) to:

- Require that when deferred distribution is used to distribute marital benefits and the plan

permits the use of a “separate interest” approach, there is a rebuttable presumption that the “separate interest” approach will be used. A separate interest approach is a method of dividing the benefits in a way that gives the spouse who is not the plan participant an interest in the plan that allows the nonparticipant spouse to receive benefits in a manner independent from the participant spouse, or to make elections concerning the receipt of benefits independently of any elections made by the participant spouse.

- Give the court the discretion to award all or a portion of a survivor annuity to the nonparticipant spouse and to allocate the cost of the survivor benefit between the parties when the plan does not permit the “separate interest” approach.
- Require that whenever a plan does not automatically provide preretirement survivor annuity protection for the nonparticipant spouse, the court must order the protection if permitted by the plan; and
- Allow the court to allocate equally between the parties any fees assessed by the plan in processing any domestic relations order.

### **Jurisdiction of the trial court to correct division orders**

The legislation also adds new section [GS 50-20.1\(i\)](#) to allow the court, upon motion of a party, to enter a “subsequent order clarifying or correcting its prior order” when a plan has deemed a division order to be unacceptable to divide the plan benefits.

### **Jurisdiction of the court to enter division order without an ED claim being filed**

The legislation adds new section [GS 50-20.1\(j\)](#) to authorize the filing of a claim, either as a separate civil action or as a motion in the cause in an action brought pursuant to Chapter 50, requesting an order effectuating the distribution of a retirement, pension or deferred compensation account in accordance with a valid written agreement between the parties. The new legislation specifies that the court has the authority to enter a distribution order “effectuating the distribution provided for in the valid written agreement” and specifies that the court can enter the distribution order regardless of whether a claim for ED has been filed or adjudicated.

- 228 N.C. App. 548, 746 S.E.2d 394 (2013) (coverture fraction applicable only to pensions and retirement accounts that are deferred compensation), *review denied*, 367 N.C. 290, 753 S.E.2d 670 (2014).] For a discussion of *Watkins*, see Cheryl Howell, *Equitable Distribution Update: Tenancy by the Entirety, Postseparation Payment of Debt, and Defined Contribution Retirement Accounts*, FAM. L. BULL. No. 26 (UNC School of Government, Mar. 2014) (hereinafter 2014 Howell Bulletin), <http://www.sogpubs.unc.edu/electronicversions/pdfs/flb26.pdf>. See also Section III.C.2, below, and *Valuation*, Part 3 of this Chapter.
3. Because the marital property component of an award of a vested pension, retirement, or other deferred compensation benefit was to be determined using the coverture fraction in G.S. 50-20.1(d), a trial court was prohibited from using a source of funds approach to determine the portion of an account's date of separation value attributable to the spouse's employment before marriage. [*Robertson v. Robertson*, 167 N.C. App. 567, 605 S.E.2d 667 (2004); *Watkins v. Watkins*, 228 N.C. App. 548, 746 S.E.2d 394 (2013), *review denied*, 367 N.C. 290, 753 S.E.2d 670 (2014).] For a discussion of the source of funds approach, see *Classification*, Part 2 of this Chapter, Section VIII.C.
  4. For distributions made on or after October 1, 2019, S.L. 2019-172 amended G.S. 50-20.1 to distinguish the classification of defined benefit plans from the classification of defined contribution plans. [G.S. 50-20.1(d) (defined benefit plans), (d1) (defined contribution plan).]
    - a. A defined benefit plan is a plan wherein the benefits payable are determined in whole or in part based on the length of the participant's employment. Benefits are based on factors such as years of service and compensation received. [*Herring v. Herring*, 231 N.C. App. 26, 29 n.2, 752 S.E.2d 190, 193 n.2 (2013) (quoting *Cochran v. Cochran*, 198 N.C. App. 224, 679 S.E.2d 469 (2009), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010)); *Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675 (2005); *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994).] Examples of defined benefit plans include government and military pensions. See Section III. B., below.
    - b. A defined contribution plan or account is a plan or account wherein the benefits payable are determined by the contributions contained in an account with a readily determinable balance. [*Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994).] Examples of a defined contribution plan or account include a 401K plan and a 403(b) plan. See Section III.B., below.
  5. G.S. 50-20.1(d), applicable to distributions made on or after October 1, 2019, continues to require that the coverture fraction be used to classify defined benefit plans. However, G.S. 50-20.1(d1) provides that the court "shall determine the marital portion of the benefit [in a defined contribution plan or account] by determining the amount of the account balance that is due to contributions made or earned during the marriage and before separation, together with the income, gains, losses, appreciation, and depreciation accrued on those contributions. If sufficient evidence is not presented to the court to allow the court to make this determination, the court shall then determine the marital portion of the benefit by using the [coverture] fraction described in subsection (d) of this section." [G.S. 50-20.1(d), *amended by* S.L. 2019-172, § 1, effective Oct. 1, 2019.]
  6. A distribution of any retirement benefits or deferred compensation may not include contributions, years of service, or compensation that may accrue after the DOS.

[G.S. 50-20.1(d), (d1); *Wall v. Wall*, 140 N.C. App. 303, 536 S.E.2d 647 (2000) (error when court distributed postseparation increases in profit-sharing plan).]

7. A stipulation as to the classification of a plan is binding. [*Helms v. Helms*, 191 N.C. App. 19, 661 S.E.2d 906 (no abuse of discretion in awarding wife half of husband's 401(k) account when 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), *review denied*, 362 N.C. 681, 670 S.E.2d 233 (2008).] For more on stipulations, see *Equitable Distribution Overview and Procedure*, Part 1 of this Chapter, Section V, and *Valuation*, Part 3 of this Chapter, Section III.A.

## B. Examples of Retirement Plans and Benefits Subject to Equitable Distribution

1. All plans qualified under the federal Employee Retirement Income Security Act of 1974 (ERISA) are subject to equitable distribution. ERISA plans include most private, nongovernmental pension and retirement plans.
  - a. However, all ERISA qualified plans must be distributed by a Qualified Domestic Relations Order (QDRO). [29 U.S.C. § 1056(d)(3); 26 U.S.C. § 414(p)(1).] See Section IV, below.
  - b. Survivor benefits in ERISA-qualified plans also are subject to distribution by the court. [See *Workman v. Workman*, 106 N.C. App. 562, 418 S.E.2d 269 (1992) (QDRO awarding wife a share of plan's pre-retirement survivor benefit as well as a share of plan's postretirement joint and survivor annuity benefit upheld).] For further discussion of the distribution of survivor benefits, see Section IV.A.6, below.
2. Plans such as IRAs, 401(k)s, and Keogh plans (whether ERISA-qualified or not) are subject to equitable distribution. [*Bodie v. Bodie*, 221 N.C. App. 29, 727 S.E.2d 11 (2012) (trial court erred in failing to classify, value, and distribute postseparation passive increase in the value of the marital portion of husband's 401(k)); *Allen v. Allen*, 118 N.C. App. 455, 455 S.E.2d 440 (1995) (distributing marital portion of a 401(k) plan).]
3. State retirement plans. [See *Cochran v. Cochran*, 198 N.C. App. 224, 679 S.E.2d 469 (2009), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010); *Patterson ex rel. Jordon v. Patterson*, 137 N.C. App. 653, 529 S.E.2d 484, *review denied*, 352 N.C. 591, 544 S.E.2d 783 (2000).] Examples include the following plans and funds:
  - a. Relief and Pension Funds for Firefighters and Rescue Squad Workers; [G.S. Chapter 58, Articles 84 through 88.]
  - b. Legislative Retirement System; [G.S. 120-4.8 *et seq.*]
  - c. North Carolina National Guard Pension; [G.S. 127A-40.]
  - d. Retirement System for Employees of Counties, Cities, and Towns; [G.S. 128-21 *et seq.*]
  - e. Retirement System for Teachers and State Employees; [G.S. Chapter 135.]
  - f. Consolidated Judicial Retirement System of North Carolina; [G.S. 135.50 *et seq.*]
  - g. Optional Retirement Program for University of North Carolina Employees; [G.S. 135-5.1.]

- h. Retirement Benefits for State and Local Governmental Law Enforcement Officers; [G.S. 143-166.30 *et seq.*; 143-166.50 *et seq.*]
    - i. Sheriffs' Supplemental Pension Fund; [G.S. 143-166.80 *et seq.*]
    - j. North Carolina Public Employee Deferred Compensation Plan; [G.S. 143B-426.24 and 147-9.4.]
    - k. Annuity Contracts for Employees of Nonprofit Organizations and Certain Employees of Education Institutions. [G.S. 147-9.3.]
4. Federal civil service retirement programs.
  - a. Federal civil service employees hired before January 1, 1984, are participants in the Civil Service Retirement System (CSRS).
  - b. Employees hired after December 31, 1983, are members of the Federal Employees Retirement System (FERS). (Employees hired before December 31, 1983, may voluntarily move from CSRS to FERS.)
  - c. All civil service retirement benefits have been subject to division by courts since 1978. [Pub. L. No. 95-366, 92 Stat. 600 (1978).]
    - i. In 1984, the Civil Service Spouse Equity Act made survivor benefits subject to division. [Pub. L. No. 98-615, 98 Stat. 3195 (1984).]
    - ii. The current provision authorizing payment of civil service retirement benefits to another person pursuant to certain court orders is found in 5 U.S.C. § 8345(j).
  - d. All civil service retirement pensions, to the extent earned during the marriage, are marital property. [*Rowland v. Rowland*, 175 N.C. App. 237, 623 S.E.2d 287 (2005) (plain language of G.S. 50-20(b)(1) makes all pensions marital property; wife's civil service retirement pension earned during marriage was marital property).]
5. Vested and nonvested military pensions eligible under the federal Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C. § 1408. [G.S. 50-20.1(h); 50-20(b)(1).]
6. Military pensions eligible under the USFSPA, 10 U.S.C. § 1408, as well as most state-administered retirement plans, are subject to classification and distribution. [G.S. 50-20.1(h); *Johnson v. Johnson*, 230 N.C. App. 280, 750 S.E.2d 25 (2013) (military pension eligible under USFSPA is marital property).]
  - a. Since passage of the USFSPA, for pay periods after June 25, 1981, a state court is authorized to treat a servicemember's disposable retired pay as property subject to division upon divorce. [See 10 U.S.C. § 1408(c)(1) ("a court may treat disposable retired pay . . . as property of the member and his spouse . . ."); *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994) (only "disposable retired pay" may be treated as marital property).]
    - i. "Disposable retired pay" is defined as "the total monthly retired pay to which a member is entitled less [certain specific amounts as set out in 10 U.S.C. § 1408(a)(4)]." Amounts excluded from total retired pay include amounts owed to the United States, federal and state income taxes, forfeitures resulting from a court-martial, amounts waived to receive veterans' disability benefits pursuant to 38 U.S.C. § 5305, survivor benefit plan premiums, National Service life insurance, and other amounts required by law to be deducted. [See, *in part*, 10 U.S.C.



§ 1408(a)(4), *amended by S. 2943, 114th Cong. (2015–16)* (defining “disposable retired pay”).] For more on the treatment in divorce of retired pay waived by the servicemember to receive disability benefits from the U.S. Department of Veterans Affairs (VA), see Section II.D.3, below.

- ii. The definition of “disposable retired pay” was amended by Section 641 of the National Defense Authorization Act for Fiscal Year 2017 [Pub. L. No. 114-328, 130 Stat. 2000, § 641].] to limit the amount of total retired pay used to calculate “disposable retired pay” by state courts. This amendment was effective December 23, 2016, and specified that for purposes of property division orders entered pursuant to divorce, “total monthly retired pay” meant:
  - (a) the amount of basic pay payable to the member for the member’s pay grade and years of service at the time of the court order [dividing the pension], as increased by
  - (b) each cost-of-living adjustment that occurs under section 1401a(b) of this title between the time of the court order and the time of the member’s retirement using the adjustment provisions under that section applicable to the member upon retirement.
- iii. The amendment adopted by Section 641 of the National Defense Authorization Act for Fiscal Year 2017, discussed immediately above, was replaced by a subsequent amendment in 2017, made effective December 23, 2016, to apply to property divisions final on or after December 23, 2016. [National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283, § 624.]
- iv. The subsequent amendment changed the definition of “total monthly retired pay” to provide that the retired pay base used to calculate the amount subject to state court division for servicemembers who have not yet retired at the time the property division becomes final is:
  - (a) the amount of base retired pay the member would have been entitled to receive had he/she retired on the date of divorce, annulment, or legal separation (rather than the date of the entry of the court order dividing the pension as specified in the original amendment),
  - (b) as increased by (1) cost-of-living adjustments that would have occurred between the date of divorce, annulment, or legal separation and the date the servicemember actually retires and (2) all cost-of-living adjustments that occur after the member retires. [*See* 10 U.S.C. § 1408(a)(4)(B).]
- v. For servicemembers already retired at the time the property division becomes final, “disposable retired pay” is defined as “the total monthly retired pay to which a member is entitled less [certain specific amounts as set out in 10 U.S.C. § 1408(a)(4)(A)].” (See list of exclusions in Section II.B.6.a.i, above.)
- vi. The 2016 and 2017 amendments were intended to prohibit state courts from distributing any portion of retirement pay resulting from a member’s service following divorce, annulment, or legal separation.
- vii. For distributions made on or after October 1, 2019, G.S. 50-20.1(d) was amended to reflect the federal definition of disposable retired pay. The statute

provides: “When a pension, retirement, or deferred compensation plan, program, system, or fund, or an applicable statute limits or restricts the amount of the benefit subject to equitable distribution by a State court, the award shall be determined using the proportion of time the marriage existed (up to the date of separation of the parties) simultaneously with the total time of the employment which earned the benefit subject to equitable distribution to the total time of employment, as limited or restricted by the plan, program, system, fund, or statute that earned the benefit subject to equitable distribution.” [S.L. 2019-172, § 1, effective Oct. 1, 2019.]

- viii. For further discussion of the impact of this amendment on military pension distribution orders, see Cheryl Howell, *Equitable Distribution: Change in Federal Law Regarding Military Pensions Part 1*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Mar. 3, 2017), <https://civil.sog.unc.edu/equitable-distribution-change-in-federal-law-regarding-military-pensions-part-1>, and Cheryl Howell, *Equitable Distribution: Change to Federal Law Regarding Military Pensions Part 2*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Mar. 24, 2017), <https://civil.sog.unc.edu/equitable-distribution-change-to-federal-law-regarding-military-pensions-part-2>.
- ix. A trial court erred when it used a definition of “disposable retired pay” that is different from the definition provided in 10 U.S.C. § 1408(a)(4). [*Halstead v. Halstead*, 164 N.C. App. 543, 596 S.E.2d 353 (2004) (trial court erred when it defined military retired pay to include amount of retired pay waived in order to receive VA disability payments, in contravention of the definition in § 1408(a)(4)).]
- x. Where an incorporated separation agreement provided that wife was the owner of, and would receive one-half of, husband’s disposable retirement pay, receipt of her share of husband’s retirement pay constituted taxable income to her. [*Pfister v. Comm’r of Internal Revenue*, 359 F.3d 352 (4th Cir. 2004) (rejecting wife’s argument that USFSPA’s definition of “disposable retirement pay” entitled her to her portion of husband’s military retirement pay without any tax liability).]
- b. 10 U.S.C. § 1408(c)(4) prohibits a court from distributing disposable military retirement pay unless the court has jurisdiction over the servicemember by reason of (1) the servicemember’s residence in the state, other than because of military assignment, (2) the servicemember’s domicile in the state, or (3) the servicemember’s consent to the jurisdiction of the court. [*See Judkins v. Judkins*, 113 N.C. App. 734, 441 S.E.2d 139 (1994) (where defendant made a general appearance, jurisdictional requirements of § 1408 were met), *review denied*, 336 N.C. 781, 447 S.E.2d 424 (1994); *Poindexter v. Everhart*, 270 N.C. App. 45, 840 S.E.2d 844 (2020) (citing *Judkins*) (holding that 10 U.S.C. § 1408(c)(4) is a personal jurisdiction statute and that where defendant consented to N.C. courts’ personal jurisdiction in a separation agreement and stipulated that the trial court had personal jurisdiction in the current action, trial court had jurisdiction to adjudicate plaintiff’s breach-of-contract claim regarding division of defendant’s military pension).]
- c. The military retirement system is noncontributory, funded by annual contributions from Congress and administered by the Department of Defense. Therefore,

military plans are generally defined benefit plans. [*Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675 (2005); *Seifert v. Seifert*, 82 N.C. App. 329, 346 S.E.2d 504 (1986), *aff'd*, 319 N.C. 367, 354 S.E.2d 506 (1987).] See *Valuation*, Part 3 of this Chapter.

- d. 38 U.S.C. § 5301(a)(1) protects benefits administered by the VA, including VA disability pay, from “attachment, levy, or seizure” pursuant to any legal or equitable process, either before or after receipt by the beneficiary.
  - i. A trial court violated this provision when it required a husband to pay his former spouse any amount withheld from her share of his military retirement benefit due to future elections or to any act on his part causing a future deduction in disposable retirement pay. [*Halstead v. Halstead*, 164 N.C. App. 543, 596 S.E.2d 353 (2004) (as federal law governs state action regarding military retirement pay or disability benefits, the trial court could not use a definition of “disposable retirement pay” that is different from the definition provided in 10 U.S.C. § 1408(a)(4)).] Note that the definition of “disposable retired pay” was amended by Section 641 of the National Defense Authorization Act for Fiscal Year 2017. [S. 2943, 114th Cong. (2015–16).]
  - ii. For more on the treatment in divorce of retired pay waived by the servicemember to receive VA disability benefits, see Section II.D.3, below.
7. Railroad retirement system. [Railroad Retirement Act of 1974, 45 U.S.C. § 231m (U.S. Code Title 45, Chapter 9, Subchapter IV).] Only “Tier II” benefits are subject to distribution. See Section II.D.2.c, below.

### C. Benefits Not in the Nature of Retirement Benefits Subject to Equitable Distribution

1. For distributions made on or after October 1, 2019, G.S. 50-20.1(h) clarifies that “all vested and nonvested . . . deferred compensation plans, programs, systems, or funds, including, but not limited to, . . . executive benefit plans” are subject to equitable distribution and covered by the provisions in G.S. 50-20.1.
2. Stock options.
  - a. A stock option is “the right, or option, to buy a certain number of shares of corporate stock within a specified period at a fixed price.” [Clarence E. Horton, Jr., *Principles of Valuation in North Carolina Equitable Distribution Actions*, Special Series No. 10, at 35 (UNC Institute of Government, Apr. 1993) (hereinafter *Principles of Valuation*) (also discussing methods of valuing stock options). See also 3 Lee’s North Carolina Family Law § 12.71b (“stock options are either marital or divisible property” to which “general principles on valuation” apply).]
  - b. Like retirement benefits, stock options are a salary substitute or a deferred compensation benefit. [*Fountain v. Fountain*, 148 N.C. App. 329, 559 S.E.2d 25 (2002). *But see Ubertaccio v. Ubertaccio*, 359 N.C. 175, 604 S.E.2d 912 (2004) (disagreeing with the implication in *Fountain* that all forms of salary substitutes or compensation, the receipt of which is deferred, such as stock options, must be classified and distributed pursuant to G.S. 50-20.1), *aff’g per curiam for reasons stated in concurring opinion in* 161 N.C. App. 352, 588 S.E.2d 905 (2003) (Levinson, J., concurring in result only).]
  - c. Marital property. Stock options received during the marriage and before the date of separation (DOS) and acquired as a result of the efforts of either spouse during

the marriage and before the DOS are marital property. [*Fountain v. Fountain*, 148 N.C. App. 329, 559 S.E.2d 25 (2002) (options were vested on the DOS because the right to exercise the options could not be canceled).]

- d. Divisible property.
  - i. Stock options acquired as a result of the efforts of either spouse during the marriage and before the DOS and received after the DOS but before the date of distribution are divisible property. [*Fountain v. Fountain*, 148 N.C. App. 329, 559 S.E.2d 25 (2002).]
  - ii. Trial court properly classified as divisible property proceeds from the sale of stock grants acquired as the result of the efforts of wife during marriage and before the date of separation, and received by wife before the date of distribution. [*Ubertaccio v. Ubertaccio*, 359 N.C. 175, 604 S.E.2d 912 (2004), *aff'g per curiam for reasons stated in concurring opinion in* 161 N.C. App. 352, 588 S.E.2d 905 (2003) (Levinson, J., concurring in result only).]
- e. For valuation of stock options, see Section III.E, below. For distribution of stock options, see Section IV.D, below.

## D. Benefits Not Subject to Equitable Distribution

1. Social Security benefits. Social Security benefits cannot be treated as marital property and distributed in an equitable distribution proceeding. [42 U.S.C. § 407(a) (U.S. Code Title 42, Chapter 7, Subchapter II); *Cruise v. Cruise*, 92 N.C. App. 586, 374 S.E.2d 882 (1989).]
  - a. The court in *Cruise v. Cruise*, 92 N.C. App. 586, 374 S.E.2d 882 (1989), did not address whether the receipt of Social Security benefits by a spouse can be considered as a distributional factor but cited favorably a case which allowed such consideration, *In re Swan*, 74 Or. App. 616, 704 P.2d 136 (1985) (noting that while federal law did not allow a court to award one spouse's Social Security benefits to the other spouse, federal law did not preclude a court from considering those benefits when dividing the parties' property), *order withdrawn*, 715 P.2d 1112 (1986), *on remand*, 301 Or. 167, 720 P.2d 747 (1986) (Oregon Supreme Court holding that value of Social Security benefits of either spouse may not be considered in making division of marital property). [See also *Sloan v. Hitt*, 163 N.C. App. 611, 594 S.E.2d 259 (**unpublished**) (citing *Cruise* and stating that Social Security benefits can be considered in an equitable distribution proceeding when dividing the parties' real or personal property if doing so is fair and equitable when considering all the circumstances), *cert. denied*, 358 N.C. 545, 599 S.E.2d 408 (2004). *But see Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802 (1979) (railroad retirement benefits that replace Social Security benefits are not subject to distribution or consideration when distributing marital assets), *partially superseded by statute*, 45 U.S.C. § 231m(b)(2).]
  - b. One authority has counseled against considering receipt of Social Security benefits as a distributional factor due to the opinion in *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802 (1979), *partially superseded by statute*, 45 U.S.C. § 231m(b)(2). [CLARENCE E. HORTON, JR., PENSION, RETIREMENT, AND DEFERRED COMPENSATION RIGHTS UNDER THE NORTH CAROLINA EQUITABLE DISTRIBUTION ACT (date not available).]
  - c. Social Security benefits may be awarded as alimony or child support. [42 U.S.C. § 659(a) (U.S. Code Title 42, Chapter 7, Subchapter IV, Part D) (allowing Social

Security benefits to be subject to legal process for claims of alimony and child support); *Evans v. Evans*, 111 N.C. App. 792, 434 S.E.2d 856, *review denied*, 335 N.C. 554, 439 S.E.2d 144 (1993).]

2. Tier I railroad retirement benefits.
  - a. Tier I benefits are designed to take the place of Social Security by providing generally comparable benefits. Tier II benefits are comparable to those in a private defined benefit pension. [Kevin Whitman, U.S. SOC. SEC. ADMIN., OFFICE OF RET. & DISABILITY POLICY, *An Overview of the Railroad Retirement Program*, 68(2) SOC. SEC. BULL. (2008), <http://www.ssa.gov/policy/docs/ssb/v68n2/v68n2p41.html>.] For a case discussing both benefits and distributing Tier II benefits upon divorce, see *Schoenwald v. Schoenwald*, 593 N.W.2d 350 (N.D. Sup. Ct. 1999).
  - b. A court may not distribute Tier I benefits, award other marital property as an offset, or in any way consider the Tier I benefits, in dividing marital property. [45 U.S.C. § 231m(a) (U.S. Code Title 45, Chapter 9, Subchapter IV) (generally prohibiting the assignment of Tier I benefits); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802 (1979), *partially superseded by statute*, 45 U.S.C. § 231m(b)(2) (dealing with Tier II benefits); *Larkin v. Larkin*, 415 N.W.2d 924 (Minn. Ct. App. 1987).]
  - c. Tier II benefits may be distributed upon divorce. [45 U.S.C. § 231m(b)(2); 20 C.F.R. § 295.1.]
3. Military disability benefits.
  - a. Disability pay is separate property and is not subject to distribution in equitable distribution. [*Howell v. Howell*, 581 U.S. \_\_\_, 137 S. Ct. 1400 (2017); *Hillard v. Hillard*, 223 N.C. App. 20, 733 S.E.2d 176 (2012), *review denied*, 366 N.C. 432, 736 S.E.2d 490 (2013).]
  - b. While not subject to distribution in equitable distribution, military disability pay can be considered:
    - i. As income from which a veteran can make payments on a distributive award. [*Lesh v. Lesh*, 257 N.C. App. 471, 809 S.E.2d 890 (2018).]
    - ii. As a distributional factor, but a court cannot give dollar-for-dollar “credit” in a distribution to make up for any retirement pay lost due to conversion to disability. [*Halstead v. Halstead*, 164 N.C. App. 543, 546, 596 S.E.2d 353, 355 (2004) (agreeing with servicemember that trial court erred by providing “a dollar for dollar compensation to the non-military spouse”); *Williams v. Williams*, 167 N.C. App. 373, 605 S.E.2d 266 (2004) (**unpublished**) (applying *Halstead* to a consent order).]. For further discussion of military disability and equitable distribution, see Cheryl Howell, *Military Disability Pay: It’s Not Marital Property but It Is Income*, UNC SCH. OF GOV’T: ON THE CIVIL SIDE BLOG (Jan. 17, 2018), <https://civil.sog.unc.edu/military-disability-pay-its-not-marital-property-but-it-is-income>.
  - c. Disability payments to a servicemember receiving retirement pay.
    - i. A servicemember receiving disposable retired pay (“military retiree”) also may be eligible for disability compensation from the U.S. Department of Veterans Affairs (VA) pursuant to Title 38, Part IV, Chapter 53 of the U.S. Code (“VA disability pay”).

- ii. Before 2004, to receive VA disability pay, any military retiree had to waive the amount of retired pay, dollar for dollar, that he would receive as VA disability pay. [38 U.S.C. § 5305.] Some retirees are still required to waive retirement pay in order to receive disability pay. See discussion in Sections II.D.3.c.iii, iv, and v, immediately below.
- iii. If forced to choose between the two benefits, a military retiree generally will elect VA disability pay (and waive a corresponding amount of disposable retired pay), as VA disability pay:
  - (a) Is not subject to taxation [38 U.S.C. § 5301(a).] and
  - (b) Is the separate property of the disabled spouse and is not subject to equitable distribution. [*Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989) (the USFSPA does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive VA disability pay); *Howell v. Howell*, 581 U.S. \_\_\_, 137 S. Ct. 1400 (2017) (same); *Hillard v. Hillard*, 223 N.C. App. 20, 733 S.E.2d 176 (2012) (disability payments are treated as the retiree's separate property), *review denied*, 366 N.C. 432, 736 S.E.2d 490 (2013); *Halstead v. Halstead*, 164 N.C. App. 543, 596 S.E.2d 353 (2004) (citing *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994)) (military disability payments cannot be classified as marital property subject to equitable distribution); *Bishop* (military disability payments are the retiree's separate property and treated as a distributional factor).]
- iv. A military retiree's election of VA disability pay will result in a former spouse receiving less or none of the military retiree's retirement benefit.
- v. **EXCEPTION:** Federal laws effective on or after January 1, 2004, provide limited relief from the waiver requirement for certain qualified servicemembers.
  - (a) A servicemember eligible for concurrent retirement and disability pay (CRDP), discussed in Section II.D.4.a, below, may concurrently receive VA disability compensation and military retired pay as set forth in 10 U.S.C. § 1414(a). [38 U.S.C. § 5305 (excepting 10 U.S.C. § 1414).] A servicemember who is not eligible for CRDP still must waive the amount of retired pay that is equal to the amount of VA disability pay to receive the VA disability pay. [38 U.S.C. § 5305.]
  - (b) A servicemember eligible for Combat-Related Special Compensation (CRSC), discussed in Section II.D.5, below, may receive a special type of compensation for that portion of waived VA disability pay resulting from combat-related disabilities.
  - (c) A servicemember who is not eligible for CRSC is not entitled to special compensation that would reimburse the servicemember in full or in part for combat-related disabilities as provided in 10 U.S.C. § 1413a.
  - (d) For a resource on these developments, see Mark E. Sullivan and Charles R. Raphun, *Dividing Military Retired Pay: Disability Payments and the Puzzle of the Parachute Pension*, 24 J. AM. ACAD. MATRIM. LAWS. 147 (2011), [https://cdn.ymaws.com/aaml.org/resource/collection/E5733800-B918-4F23-AF1F-0B30B2903482/MAT104\\_3.pdf](https://cdn.ymaws.com/aaml.org/resource/collection/E5733800-B918-4F23-AF1F-0B30B2903482/MAT104_3.pdf).]

#### 4. Concurrent Retirement and Disability Pay.

- a. On January 1, 2004, Concurrent Retirement and Disability Pay (CRDP) went into effect. CRDP permits a servicemember with at least twenty years of qualifying military service and a service-connected disability rated by the VA at 50 percent or higher to concurrently receive both VA disability pay and military retired pay. [10 U.S.C. § 1414(a)(1) (a qualified retiree is entitled to be paid retired pay and veterans' disability compensation without regard to Sections 5304 and 5305 of U.S. Code Title 38).]
- b. Phase-in period.
  - i. Full concurrent receipt of the benefits was phased in over a period beginning January 1, 2004, and ending December 31, 2013. [10 U.S.C. § 1414(a)(1).]
  - ii. During the phase-in period, qualified disabled veterans still were required to waive military retired pay to receive disability compensation. During the phase-in period, a qualified disabled veteran's monthly amount of military retired pay gradually increased based on a mathematical formula. Effective January 1, 2014, a veteran eligible for concurrent receipt is no longer required to waive military retired pay in exchange for disability pay, except as provided in 38 C.F.R. § 3.750(c) (when disability pay exceeds retired pay). [38 C.F.R. §§ 3.750(b) and (c).]
  - iii. Retirees with a disability rating of 100 percent were not subject to the phase-in requirement after December 31, 2004. [10 U.S.C. § 1414(a)(1).]
- c. CRDP is compensation subject to distribution under the USFSPA. [10 U.S.C. § 1408(a)(4) (definition of "disposable retired pay"), *amended by* S. 2943, 114th Cong. (2015–16); 10 U.S.C. § 1408(c)(1).]
- d. Where a military retiree eligible for CRDP receives a combination of military retired pay and VA disability payments, after January 1, 2014, there is no waiver of military retired pay, so the full amount of military retired pay is subject to equitable distribution. [See definition of "disposable retired pay" in 10 U.S.C. § 1408(a)(4), *amended by* S. 2943, 114th Cong. (2015–16).]

#### 5. Combat-Related Special Compensation.

- a. Combat-Related Special Compensation (CRSC) is a new category of compensation available to a member of the uniformed service who is entitled to retired pay and who has a combat-related disability as defined in 10 U.S.C. § 1413a(e). [10 U.S.C. §§ 1413a(c)(1)–(2).]
- b. The purpose of CRSC is to provide special compensation to members of the uniformed services who have retired pay reduced because of receipt of VA disability compensation where a portion of the VA compensation is the result of disabilities that are combat-related. [DEP'T OF DEFENSE, FIN. MGT. REG. vol. 7B ("Military Pay Policy and Procedures—Retired Pay"), ch. 63, § 630101 (Mar. 2013) (see the April 2020 version at page 63-6: [http://comptroller.defense.gov/Portals/45/documents/fmr/Volume\\_07b.pdf#page=668](http://comptroller.defense.gov/Portals/45/documents/fmr/Volume_07b.pdf#page=668)).]
- c. A servicemember may qualify for both CRDP and CRSC but may only receive one. [10 U.S.C. §§ 1414(d)(1), 1413a(f).]

- d. CRSC payments are not retired pay, [10 U.S.C. § 1413a(g).] and thus are not subject to equitable distribution.
6. Servicemember's election of disability pay and waiver of disability payments.
    - a. Treatment of election in equitable distribution action.
      - i. While a trial court may consider a party's receipt of disability payments as a distributional factor and can consider disability pay as a source of payment of a distributive award [*Lesh v. Lesh*, 257 N.C. App. 471, 809 S.E.2d 890 (2018).], a trial court may not distribute disability payments or give dollar-for-dollar "credit" in distribution to make up for any retirement pay lost due to conversion to disability. [*Halstead v. Halstead*, 164 N.C. App. 543, 596 S.E.2d 353 (2004); *Williams v. Williams*, 167 N.C. App. 373, 605 S.E.2d 266 (2004) (**unpublished**).]
      - ii. A trial court may not prohibit a servicemember from electing disability pay and waiving retirement pay in the future. [*Cunningham v. Cunningham*, 171 N.C. App. 550, 558, 615 S.E.2d 675, 681-82 (2005).] In *Cunningham*, the trial court had to revise a judgment that ordered husband not to take any steps to diminish or reduce his military retired pay "to the end that the plaintiff's portion of his retirement is reduced," as this provision foreclosed husband's right to forego pension payments in favor of disability payments should he become eligible to do so.
    - b. Treatment of election of disability after equitable distribution judgment entered.
      - i. The North Carolina Court of Appeals has held that because a trial court has authority to enforce an equitable distribution judgment, a trial court can modify an order dividing a military pension to effectuate the terms of the original equitable distribution judgment. [*Cf. Hillard v. Hillard*, 223 N.C. App. 20, 24, 733 S.E.2d 176, 180 (2012) (relying on the decision in *White v. White*, 152 N.C. App. 588, 568 S.E.2d 283 (2002), the court of appeals held that after servicemember waived retired pay to receive disability pay, amended equitable distribution order that required servicemember to pay wife "the portion of his retirement required by the previous order" did not impermissibly distribute disability pay, as servicemember could fund payments from source of his choice), *review denied*, 366 N.C. 432, 736 S.E.2d 490 (2013), and *White* (trial court had authority to hear wife's motion to amend a qualified domestic relations order (QDRO) to seek an increase in her share of husband's retired pay after servicemember elected to receive disability pay), *aff'd per curiam*, 357 N.C. 153, 579 S.E.2d 248 (2003), with *Williams v. Williams*, 167 N.C. App. 373, 605 S.E.2d 266 (2004) (**unpublished**) (trial court properly concluded that wife was not entitled to reimbursement for losses arising from servicemember's election of disability benefits; denial of wife's motion to amend QDRO upheld).]
      - ii. However, in *Howell v. Howell*, 581 U.S. \_\_\_, 137 S. Ct. 1400 (2017), the U.S. Supreme Court held that a state court may not order a veteran to indemnify a divorced spouse for the loss in the divorced spouse's portion of the veteran's retirement pay caused by the waiver of retirement pay to receive service-related disability benefits, effectively overruling the reasoning in *White* and *Hillard*, discussed immediately above.



- iii. For further discussion of military disability and equitable distribution, see Cheryl Howell, *Military Disability Pay: It's Not Marital Property but It Is Income*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Jan. 17, 2018, <https://civil.sog.unc.edu/military-disability-pay-its-not-marital-property-but-it-is-income>).
- iv. Other disability payments are subject to classification and distribution. See *Classification*, Part 2 of this Chapter, Section XI.D.

### III. Valuation

#### A. Generally

1. All marital interest in a pension, retirement, or other deferred compensation plan must be valued as of the date of separation (DOS), regardless of the method of distribution. [*Seifert v. Seifert*, 319 N.C. 367, 354 S.E.2d 506 (1987) (valuation is necessary to determine the percentage of benefits the nonemployee spouse is equitably entitled to receive); *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994).] Unless subject to the exception set out immediately below, a pension, retirement account, or deferred compensation that is not valued as of the date of separation is not subject to equitable distribution. [*Grasty v. Grasty*, 125 N.C. App. 736, 482 S.E.2d 752 (1997).]
  - a. Effective for distributions made on or after October 1, 2019, G.S. 50-201(d) was amended to provide that, under certain circumstances, a defined benefit plan can be distributed without determining a date of separation value.
  - b. If the court makes the award payable “[a]s a prorated portion of the benefits made to the designated recipient . . . (i) at the time the participant-spouse is eligible to receive the benefits, (ii) at the time the participant-spouse actually begins to receive the benefits, or (iii) at the participant-spouse’s earliest retirement age” [G.S. 50-20.1(a)(3); G.S. 50-20.1(b)(3).] and it “divides the marital portion of the benefit equally between the participant-spouse and nonparticipant spouse, the court shall not be required to determine the total value of the marital benefits before classifying and distributing the benefits. However, neither party shall be prohibited from presenting evidence of the total value of any marital benefits or of any benefits that are separate property of either spouse.” [G.S. 50-20.1(d).]
2. The requirement that the trial court value the marital interest in a pension, retirement, or other deferred compensation plan exists only when evidence is presented to the trial court that supports the claimed valuation. [*Johnson v. Johnson*, 230 N.C. App. 280, 750 S.E.2d 25 (2013) (citing *Albritton v. Albritton*, 109 N.C. App. 36, 426 S.E.2d 80 (1993)) (trial court did not err when it did not value or distribute defendant’s military pension when there was no competent evidence as to the value of the pension as of the DOS); *Washburn v. Washburn*, 228 N.C. App. 570, 749 S.E.2d 111 (2013) (**unpublished**) (not paginated on Westlaw) (citing *Grasty v. Grasty*, 125 N.C. App. 736, 482 S.E.2d 752 (1997), and *Albritton*) (error to order that a percentage of plaintiff’s future retirement payments be distributed to defendant when trial court failed to value plaintiff’s military pension; on remand, pension was to “be removed and excluded” from equitable distribution because defendant, the party claiming an interest, had failed to provide any evidence of the pension’s value).]

3. The value of pension and retirement benefits is calculated as of the DOS and shall not include contributions, years of service, or compensation that may accrue after the DOS. [G.S. 50-20.1(d).]
4. A significant decrease in the value of a retirement account from the DOS to the date of distribution did not warrant setting aside a qualified domestic relations order under G.S. 1A-1, Rule 60(b). [*Lee v. Lee*, 167 N.C. App. 250, 258, 605 S.E.2d 222, 227 (2004) (“[a] change in the value of the stock market over the course of five years does not amount to an extraordinary or even unforeseeable circumstance” warranting review of the lump sum distribution originally ordered).]
5. The method of valuation will depend on the type of pension, retirement, or deferred compensation plan at issue. [*Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994).]
6. A stipulation as to the value of a plan is binding. [*Wall v. Wall*, 140 N.C. App. 303, 536 S.E.2d 647 (2000) (when parties and their counsel stipulated to the value of husband’s profit-sharing plan as of the DOS, husband was bound by that stipulation and estopped from questioning the value used by the trial court, even though the value obviously included some gains on plan assets after the DOS).] For more on stipulations, see *Equitable Distribution Overview and Procedure*, Part 1 of this Chapter, Section V, and *Valuation*, Part 3 of this Chapter, Section III.A.
7. When interest in a pension, retirement, or other deferred compensation plan is separate property.
  - a. If a pension, retirement, or other deferred compensation right is classified as one spouse’s separate property, it must be considered as a distributional factor under G.S. 50-20(c)(5). [*Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994).]
  - b. Trial court did not have to find present value of the portion of husband’s pension that was his separate property. Court’s finding of annual sum husband was to receive was sufficient under G.S. 50-20(c)(1) and (5). [*Dewey v. Dewey*, 77 N.C. App. 787, 336 S.E.2d 451 (1985) (prior version of statute), *review denied*, 316 N.C. 376, 344 S.E.2d 1 (1986).]
8. Competent evidence of value.
  - a. Neither plaintiff’s post-trial memorandum requesting the trial court to take judicial notice of documents not offered at trial and suggesting internet sites to assist the court with valuation, nor defendant’s unsubstantiated estimates during “very limited” cross-examination as to amount of his monthly retirement benefit or possible date of retirement, constituted competent evidence as to the value of defendant’s military pension. [*Johnson v. Johnson*, 230 N.C. App. 280, 750 S.E.2d 25 (2013) (without competent evidence of value, trial court did not err when it did not value or distribute defendant’s military pension).]
  - b. Defendant’s testimony at a 2011 trial that he had to retire “anywhere from July of 2012 to August of 2017” and “the earliest I can retire is 2012” was not sufficient to establish the “earliest retirement age” for valuation purposes. [*Johnson v. Johnson*, 230 N.C. App. 280, 289, 750 S.E.2d 25, 31, 32 (2013) (trial court did not err when it did not value or distribute defendant’s military pension when there was no competent evidence as to the value of the pension as of the DOS).]

- c. N.C. R. EVID. 703 allows an expert to give an opinion based on evidence not otherwise admissible if the information is of the type generally relied upon by experts in the particular field. [*Lund v. Lund*, 244 N.C. App. 279, 779 S.E.2d 175 (2015) (expert was properly allowed to rely on an affidavit provided by the Retirement Systems Division of the Department of State Treasury for information needed to perform the valuation methodology required by *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994), even though the affidavit was not introduced into evidence).]
- d. Expert's opinion as to the DOS value of a pension was not rendered incompetent by the fact that the expert based his opinion on an affidavit containing information regarding the pension as of a date that was twenty-seven days after the DOS. [*Lund v. Lund*, 244 N.C. App. 279, 779 S.E.2d 175 (2015).]

## B. Types of Plans

1. Defined contribution plan.
  - a. A defined contribution plan is a plan that provides an individual account for each participant. Benefits are based solely on (1) the amount contributed to the participant's account and any income, expenses, gains and losses; and (2) any forfeitures of accounts of other participants that may be allocated to such participant's account. [26 U.S.C. § 414(i) (definition applicable to Part 1, Subtitle A, Chapter 1, Subchapter D).]
  - b. A defined contribution plan is "essentially an annuity funded by periodic contributions. At retirement the funds purchase an annuity for the rest of the employee's life or an actuarially reduced pension for the lives of the employee and spouse." [*Seifert v. Seifert*, 82 N.C. App. 329, 332, 346 S.E.2d 504, 505 (1986), *aff'd*, 319 N.C. 367, 354 S.E.2d 506 (1987).]
2. Defined benefit plan.
  - a. A defined benefit plan is any plan that is not a defined contribution plan. [26 U.S.C. § 414(j) (definition applicable to Part 1, Subtitle A, Chapter 1, Subchapter D); *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994); *Johnson v. Johnson*, 230 N.C. App. 280, 750 S.E.2d 25 (2013) (citing *Bishop*) (any pension, such as military retirement, that is not a defined contribution plan is considered to be a defined benefit plan).]
  - b. Future benefits are determined by the terms of the plan and are not based upon actual contributions by either the employer or the employee. Benefits are based on factors such as years of service and compensation received. [*Herring v. Herring*, 231 N.C. App. 26, 29 n.2, 752 S.E.2d 190, 193, n.2 (2013) (citing *Cochran v. Cochran*, 198 N.C. App. 224, 679 S.E.2d 469 (2009), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010)); *Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675 (2005); *Cochran*; *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994).]
  - c. The North Carolina Teachers' and State Employees' Retirement System (TSERS) pension is a defined benefit plan and, as such, is valued under the five-step method set out in *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994), and not by the total contribution method. [*Herring v. Herring*, 231 N.C. App. 26, 752 S.E.2d 190 (2013) (citing *Cochran v. Cochran*, 198 N.C. App. 224, 679 S.E.2d 469 (2009), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010)) (TSERS pension to be valued using *Bishop* five-step method); *Cochran*.] The *Bishop* five-step method is set out in Section III.D.2, below.

### C. Valuation of a Defined Contribution Plan

1. Since an employee has an individual account, and the retirement benefits are based solely on the value of contributions to the account, valuation of such a plan merely requires that the court determine the value of the participant's account on the date of separation (DOS). [*Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994).]
2. For distributions made before October 1, 2019, the coverture fraction, discussed in Section II.A.2, above, was applied to the DOS value of the defined contribution plan to determine what portion of the total value was marital property. [See *Robertson v. Robertson*, 167 N.C. App. 567, 605 S.E.2d 667 (2004) (rejecting husband's contention that use of a coverture fraction was limited to defined benefit plans); see also *Curtis v. Curtis*, 220 N.C. App. 415, 725 S.E.2d 472 (2012) (**unpublished**) (trial court erred when it did not apply the coverture fraction to the 401(k)'s DOS value to determine the marital portion).]
3. Use of the coverture fraction to determine the percentage of the retirement benefit that is marital was held proper, even though it may have taken into account benefits earned before marriage. [See *Gagnon v. Gagnon*, 149 N.C. App. 194, 560 S.E.2d 229 (2002) (affirming trial court's award of 26 percent of the retirement benefits to wife even though a portion of husband's military retirement was directly attributable to benefits husband earned before marriage).] For distributions made on or after October 1, 2019, the portion of the DOS value of a defined contribution account that is marital party is determined by "determining the amount of the account balance that is due to contributions made or earned during the marriage and before separation, together with the income, gains, losses, appreciation, and depreciation accrued on those contributions." [G.S. 50-20.1(d1), *added by* S.L. 2019-72, § 1, effective Oct. 1, 2019.]
4. If sufficient evidence is not presented to the court to allow the court to determine the value of the contributions made during the marriage and before the DOS, "the court shall then determine the marital portion of the benefit by using the [coverture] fraction described in [G.S. 50-20.1(d)], namely, by using the proportion of time the marriage existed (up to the date of separation of the parties) simultaneously with the employment which earned the benefit subject to equitable distribution to the total amount of time of employment." [G.S. 50-20.1(d1), *added by* S.L. 2019-172, § 1, effective Oct. 1, 2019.]
5. When the percentage found to be marital property is divided between the parties, one case has upheld an order in which the nonemployee spouse's share was rounded up. [*Gagnon v. Gagnon*, 149 N.C. App. 194, 198 n.1, 560 S.E.2d 229, 232 n.1 (2002) (when husband and wife were married for 51.25 percent of the time husband served in the military, no error when trial court rounded up wife's equal share of 25.625 percent to 26 percent).]
6. Although most funds in defined contribution accounts cannot be withdrawn without tax penalty, the DOS value should not be reduced to reflect the tax consequences of an early withdrawal when there is no evidence that the employee spouse planned or would be required to withdraw funds from the account as a result of the equitable distribution order. [*Smith v. Smith*, 104 N.C. App. 788, 411 S.E.2d 197 (1991) (error for trial court to reduce value of 401(k) retirement account); *Principles of Valuation*, at 31.]

### D. Valuation of a Defined Benefit Plan

1. Because future benefits are not based upon contributions to the account of a particular employee, using the "withdrawal value" of a defined benefit plan does not "reasonably

approximate” the values of the interests of the parties. [*Stiller v. Stiller*, 98 N.C. App. 80, 389 S.E.2d 619 (1990).]

2. In *Bishop v. Bishop*, 113 N.C. App. 725, 731, 440 S.E.2d 591, 595–96 (1994), the court set forth the following five-step process for valuing a defined benefit plan:
  - a. “First, the trial court must calculate the amount of monthly pension payment the employee, assuming he retired on the date of separation, will be entitled to receive at the later of the earliest retirement age or the date of separation.” This calculation is made as of the date of separation and “shall not include contributions, years of service, or compensation which may accrue after the date of separation.” The calculation will include “gains and losses on the prorated portion of the benefit vested at the date of separation.” [*Bishop*, 113 N.C. App. at 731, 440 S.E.2d at 595 (quoting former G.S. 50-20(b)(3)) (trial court erred by determining value of the pension on the basis that husband would not retire until age 65 when plan provided that he could retire with reduced benefits at age 50).] **NOTE:** The new statutory reference for the language quoted above is G.S. 50-20.1(d).
  - b. “Second, the trial court must determine the employee-spouse’s life expectancy as of the date of separation and use this figure to ascertain the probable number of months the employee-spouse will receive benefits under the plan.” [*Bishop*, 113 N.C. App. at 731, 440 S.E.2d at 595–96.]
  - c. “Third, the court must use an “acceptable discount rate” to determine the “then-present value of the pension as of the later of the date of separation or the earliest retirement date.” [*Bishop*, 113 N.C. App. at 731, 440 S.E.2d at 596.]
  - d. “Fourth, the trial court must discount the then-present value to the value as of the date of separation. In other words, determine the value as of the date of separation of the sum to be paid at the later of the date of separation or the earliest retirement date. This calculation requires mortality and interest discounting.” [*Bishop*, 113 N.C. App. at 731, 440 S.E.2d at 596 (the court noted that the mortality and interest tables of the Pension Benefit Guaranty Corporation, a corporation within the United States Department of Labor, are “well suited for this purpose.”)] The tables and other information can be obtained by writing to the Pension Benefit Guaranty Corporation, PO Box 151750, Alexandria, VA 22315-1750, or are available at <https://www.pbgc.gov/prac/mortality-retirement-and-pv-max-guarantee/erisa-mortality-tables>. The phone number is (800) 400-7242 or (202) 326-4000. *But see Cochran v. Cochran*, 198 N.C. App. 224, 679 S.E.2d 469 (2009) (trial court can use updated and more sophisticated tables), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010).
  - e. “Finally, the trial court must reduce the present value to account for contingencies such as involuntary or voluntary employee-spouse termination and insolvency of the pension plan. This calculation cannot be made with reference to any table or chart and rests within the sound discretion of the trial court.” [*Bishop*, 113 N.C. App. at 731, 440 S.E.2d at 596.]
3. In *Surette v. Surette*, 114 N.C. App. 368, 442 S.E.2d 123 (1994), the court approved of the five-step process provided in *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994), and emphasized that valuation is to be made on the assumption that the employee retired on the date of separation (DOS) and began receiving benefits either on the date of separation or the earliest retirement date, whichever is later. In *Seifert v. Seifert*, 319

- N.C. 367, 354 S.E.2d 506 (1987), the trial court used valuation methodology similar to that described in *Bishop*. The court of appeals approved of the method established in *Bishop* in *Cochran v. Cochran*, 198 N.C. App. 224, 679 S.E.2d 469 (2009), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010), and in *Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675 (2005).
4. The first four steps set out in *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994), provide a method for determining a lump sum present value of the stream of payments that the employee spouse will likely receive under the pension plan from the earliest date of his retirement through his prolonged life expectancy (determined as of the date of separation). The fifth step allows the trial court to further reduce this figure “to account for contingencies such as involuntary or voluntary employee-spouse termination and insolvency of the pension plan.” [*Cochran v. Cochran*, 198 N.C. App. 224, 229, 679 S.E.2d 469, 473 (2009) (quoting *Bishop*, 113 N.C. App. at 731, 440 S.E.2d at 595–96), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010).]
  5. Specific steps set out in *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994).
    - a. Step one: calculating amount of monthly pension employee spouse, assuming retirement on the DOS, will be entitled to receive at the later of the earliest retirement age or the DOS.
      - i. The determination of the “earliest retirement age” in step one is critical to subsequent steps. [*Cochran v. Cochran*, 198 N.C. App. 224, 679 S.E.2d 469 (2009), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010).]
      - ii. Without the amount of the monthly pension as of the DOS, the *Bishop* computation cannot be completed. [*Johnson v. Johnson*, 230 N.C. App. 280, 750 S.E.2d 25 (2013).]
      - iii. Defendant’s testimony at a 2011 trial that he had to retire “anywhere from July of 2012 to August of 2017” and “the earliest I can retire is 2012” was not sufficient to establish the “earliest retirement age” for valuation purposes. [*Johnson v. Johnson*, 230 N.C. App. 280, 289, 750 S.E.2d 25, 31, 32 (2013) (trial court did not err when it did not value or distribute defendant’s military pension when there was no competent evidence as to the value of the pension as of the DOS).]
    - b. Step two of *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994): determining life expectancy as of the DOS.
      - i. Life expectancy is used to ascertain the probable number of months the employee spouse will receive benefits under the plan. [*Cochran v. Cochran*, 198 N.C. App. 224, 679 S.E.2d 469 (2009) (citing *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994)), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010).]
      - ii. In determining the employee spouse’s life expectancy as of the DOS, the trial court is not required to express its finding in a specific number of months but may determine life expectancy on a year-by-year basis. [*Cochran v. Cochran*, 198 N.C. App. 224, 679 S.E.2d 469 (2009), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010).]
      - iii. No error when wife’s expert determined “probable life expectancy” rather than “average life expectancy.” [*Cochran v. Cochran*, 198 N.C. App. 224, 232, 679 S.E.2d 469, 475 (2009) (nothing in *Bishop v. Bishop*, 113 N.C. App. 725, 440

- S.E.2d 591 (1994), precludes use of “probable life expectancy”), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010).]
- iv. Similarly, no error when the trial court approved the use of mortality tables currently mandated for use under the Employee Retirement Income Security Act of 1974 (ERISA) to value pensions. [*Cochran v. Cochran*, 198 N.C. App. 224, 231, 679 S.E.2d 469, 474 (2009) (*Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994), does not mean, for purposes of pension valuation, that North Carolina is “frozen in 1994” and precluded from using updated and more sophisticated tables), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010).]
  - v. A court may take judicial notice of the mortality tables contained in G.S. 8-46. [*Chandler v. Chem. Co.*, 270 N.C. 395, 154 S.E.2d 502 (1967); *Thomas v. Dixon*, 88 N.C. App. 337, 363 S.E.2d 209 (1988).] The statute requires that the court consider the tables as well as “other evidence as to the health, constitution, and habits,” of the person at issue.
  - vi. In *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994), the trial court used the Statistical Abstract of the United States rather than G.S. 8-46 to find life expectancy. The trial court made findings to support a conclusion that the Abstract was more accurate because it took into account more details about the race and gender of the person. The court of appeals did not address that issue.
- c. Steps three and four of *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994): reducing the pension benefit to present value.
- i. The discount rate used to reduce a pension benefit to present value may be reduced by an annual cost of living adjustment. [*Cochran v. Cochran*, 198 N.C. App. 224, 679 S.E.2d 469 (2009) (the cost of living adjustment is a gain on the benefit vested at the time of separation that G.S. 50-21.1(d) requires the court to take into account and not a contribution to the plan that the statute prohibits the court from including), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010).]
  - ii. If the appropriate date to use in step three of *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994), is the date of separation (DOS), step four of *Bishop* (reducing the figure determined after step three to present value as of the DOS) is not required. If, however, the appropriate date to use in step three is the earliest retirement date, step four is required to determine the present value of the pension as of the DOS. [*See Cochran v. Cochran*, 198 N.C. App. 224, 679 S.E.2d 469 (2009) (because husband’s earliest retirement date was later than the DOS, *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994), required that the trial court perform both steps three and four), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010).]
  - iii. If the appellate court is unable to determine, as in *Cochran v. Cochran*, 198 N.C. App. 224, 679 S.E.2d 469 (2009), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010), that both steps three and four were performed when both were required, the matter will be remanded. [*Cochran* (remanding for further findings).]

- d. Step five: further reduction in present value to account for contingencies.
  - i. The calculation in step five “cannot be made [by the use of] any table or chart and rests within the sound discretion of the trial court.” [*Cochran v. Cochran*, 198 N.C. App. 224, 234, 679 S.E.2d 469, 476 (2009) (quoting *Bishop v. Bishop*, 113 N.C. App. 725, 731, 440 S.E.2d 591, 596 (1994)), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010).]
  - ii. A trial court in its discretion may decide not to reduce the present value due to contingencies. [*Cochran v. Cochran*, 198 N.C. App. 224, 679 S.E.2d 469 (2009) (no abuse of discretion when trial court elected not to further reduce the pension value when there was no evidence in the record of contingencies of the type discussed in step five of *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994), that could affect the value of husband’s pension), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010).]
6. Determining a reasonable rate of return.
  - a. A rate must be “reasonably in keeping with the fair market value of the money. Reasonable rates of comparison, for example, might include the rate used by the Internal Revenue Service in determining assessments and refunds, Treasury bill rates, or the prime rates charged by banks.” [*Weaver v. Weaver*, 72 N.C. App. 409, 415, 324 S.E.2d 915, 919 (1985) (finding that a 4.5 percent rate was too low in 1983), *disapproved of on other grounds by Armstrong v. Armstrong*, 322 N.C. 396, 368 S.E.2d 595 (1988). *See also Seifert v. Seifert*, 82 N.C. App. 329, 331, 346 S.E.2d 504, 505 (1986) (trial court used a 10 percent rate of return), *aff’d*, 319 N.C. 367, 354 S.E.2d 506 (1987); *Bishop v. Bishop*, 113 N.C. App. 725, 727, 440 S.E.2d 592, 594 (1994) (trial court used a 7.5 percent rate of return).]
  - b. For a thorough discussion of finding and using a reasonable rate of return, see *Principles of Valuation*, at 32–34.
7. The coverture fraction is applied to the DOS value of the defined benefit plan to determine what portion of the total value is marital property. See Section II.A.3, above. [G.S. 50-20.1(d), *amended by* S.L. 2019-172, § 1, effective Oct. 1, 2019.] *But cf. Embler v. Embler*, 159 N.C. App. 186, 582 S.E.2d 628 (2003) (pension classified as completely marital because defendant failed to produce evidence of value of pension on date of marriage). *See also Helms v. Helms*, 191 N.C. App. 19, 661 S.E.2d 906 (no abuse of discretion in awarding wife half of husband’s 401(k) account when 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), *review denied*, 362 N.C. 681, 670 S.E.2d 233 (2008).
8. Consideration of tax consequences upon receipt of benefits.
  - a. In valuing retirement benefits not yet distributed, a trial court cannot deduct taxes that would be payable upon receiving benefits. [*See Wilkins v. Wilkins*, 111 N.C. App. 541, 432 S.E.2d 891 (1993) (early withdrawal of benefits considered “speculative” and could not have been made on the DOS under the terms of the plan). *But compare Mishler v. Mishler*, 90 N.C. App. 72, 367 S.E.2d 385 (wife’s employer terminated pension plan and distributed lump sum benefit; court did not err when it valued benefit after deduction of taxes that had already been paid), *review denied*, 323 N.C. 174, 373 S.E.2d 111 (1988).]



- b. Findings as to tax consequences are not required when no tax consequences result from the distribution the court actually ordered. [*Cochran v. Cochran*, 198 N.C. App. 224, 679 S.E.2d 469 (2009) (findings were not required about the tax consequences of husband's future receipt of pension benefits when fact that husband's pension, when received, would constitute taxable income to husband was not the result of the ordered distribution), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010).]

## E. Valuation of Stock Options

1. The court of appeals has not adopted any single approach for valuing stock options.
2. The court of appeals will uphold a valuation if it appears that the trial court reasonably approximated the net value of the option based on competent evidence and on a sound valuation method or methods. [*Fountain v. Fountain*, 148 N.C. App. 329, 339, 559 S.E.2d 25, 33 (2002) (upholding trial court's valuation of options by "intrinsic value method").]

## IV. Distribution

### A. Generally [G.S. 50-20.1(a) and (b).]

1. For distributions made on or after October 1, 2019, the court may order that vested defined contribution accounts and benefits be made payable:
  - a. As a lump sum from the account or
  - b. Over a period of time in fixed amounts.
2. For distributions made before October 1, 2019, the statute allowed the court to order payments via lump sum or in fixed amounts only by agreement of the parties.
3. For distributions made on or after October 1, 2019, the court also may order that any vested marital pension, retirement, or deferred compensation benefits be payable as a prorated portion of the benefits made to the designated recipient, if permitted by the plan, program, system, or fund (i) at the time the participant-spouse is eligible to receive the benefits, (ii) at the time the participant-spouse actually begins to receive the benefits, or (iii) at the participant-spouse's earliest retirement age. For purposes of this section, "participant-spouse" means the spouse who is a participant in the plan, program, system, or fund. [G.S. 50-20.1(a)(3), *amended by* S.L. 2019-172, § 1, effective Oct. 1, 2019.]
4. Before October 1, 2019, the statute specified that this distribution method is made payable "by appropriate domestic relations order as a prorated portion of the benefits made to the designated recipient at the time the party against whom the award is made actually begins to receive the benefits." [G.S. 50-20.1(a), *amended by* S.L. 2019-172, § 1, effective Oct. 1, 2019.]
  - a. This method is referred to as the "fixed percentage method" [*Seifert v. Seifert*, 319 N.C. 367, 370, 354 S.E.2d 506, 509 (1987).] and as a "deferred distribution." [3 Lee's Family Law § 12.68 (5th ed. 2002).] [G.S. 50-20.1(a), *amended by* S.L. 2019-172 § 1, effective Oct. 1, 2019.] See Section IV.C, below.

- b. All vested marital pension, retirement, and deferred compensation benefits also can be payable by awarding a larger portion of other marital assets to the party not receiving the benefits and a smaller portion to the party receiving the benefits. [G.S. 50-20.1(a)(4).] This method has been referred to as the “present value method.” [*Seifert v. Seifert*, 319 N.C. 367, 370, 354 S.E.2d 506, 509 (1987).] and as the “immediate offset method.” [3 Lee’s Family Law § 12.68 (5th ed. 2002).]
  - c. If the parties agree, a distribution of any vested marital pension, retirement, or deferred compensation benefits can be made payable as a lump sum or over a period of time in fixed amounts. [G.S. 50-20.1(a)(5), *added by* S.L. 2019-172, § 1, effective Oct. 1, 2019.]
5. Vested benefits.
- a. Benefits are “vested” when an employee “has completed the minimum terms of employment necessary to be entitled to receive retirement pay at some point in the future.” [*George v. George*, 115 N.C. App. 387, 389, 444 S.E.2d 449, 450 (1994) (quoting *Milam v. Milam*, 92 N.C. App. 105, 107, 373 S.E.2d 459, 460 (1988), *review denied*, 324 N.C. 247, 377 S.E.2d 755 (1989)), *cert. denied*, 342 N.C. 192, 463 S.E.2d 236 (1995).]
  - b. Military retirement vests at twenty years for a commissioned officer and thirty years for an enlisted member. [*See Seifert v. Seifert*, 82 N.C. App. 329, 346 S.E.2d 504 (1986), *aff’d*, 319 N.C. 367, 354 S.E.2d 506 (1987).]
  - c. Army and Air Force.
    - i. Air Force and Army members with more than twenty years of service are all classified as retired and receive retired pay.
    - ii. A regular or reserve commissioned Army officer with at least twenty years of service, at least ten of which have been active service as a commissioned officer, may be retired. [10 U.S.C. § 3911(a).]
    - iii. An enlisted member of the Army who has at least twenty, but less than thirty, years of service may, upon request, be retired. [10 U.S.C. § 3914.]
    - iv. A regular or reserve commissioned officer of the Air Force with at least twenty years of service, at least ten of which have been active service as a commissioned officer, may be retired. [10 U.S.C. § 8911.]
    - v. An enlisted member of the Air Force who has at least twenty, but less than thirty, years of service may, upon request, be retired. [10 U.S.C. § 8914.]
  - d. Navy and Marine Corps.
    - i. An officer of the Navy or the Marine Corps who applies for retirement after completing more than twenty years of active service, of which at least ten years was as a commissioned officer, may, in the discretion of the President, be retired. [10 U.S.C. § 6323(a)(1).]
    - ii. An officer of the Regular Navy or the Regular Marine Corps holding a permanent appointment in the grade of warrant officer, W-1 or above who applies for retirement after completing thirty or more years of active service may, in the discretion of the Secretary of the Navy, be retired. [10 U.S.C. § 6322(a).]

- iii. An enlisted member of the Regular Navy or the Regular Marine Corps who applies for retirement after completing thirty or more years of active service in the armed forces shall be retired. [10 U.S.C. § 6326(a).]
  - e. Temporary Early Retirement Authority (TERA).
    - i. The National Defense Authorization Act for fiscal year 2012 [Pub. L. No. 112-81, enacted Dec. 31, 2011.] authorized an offer of early retirement to all Department of Defense Armed Forces who have completed at least fifteen years but less than twenty years of total active duty service. [See Defense Finance and Accounting Service, “2012-2025 Temporary Early Retirement Authority,” [www.dfas.mil/retiredmilitary/plan/retirement-types/2012-18tera.html](http://www.dfas.mil/retiredmilitary/plan/retirement-types/2012-18tera.html) (updated May 15, 2017).]
- 6. Benefits not vested on the date of separation: G.S. 50-20.1(b) provides that nonvested marital pension, retirement, or deferred compensation benefits may be distributed:
  - a. “As a lump sum by agreement”; [G.S. 50-20.1(b)(1).]
  - b. “Over a period of time in fixed amounts by agreement”; [G.S. 50-20.1(b)(2).] or
  - c. “As a prorated portion of the benefits made to the designated recipient, if permitted by the plan, program, system, or fund: (i) at the time the participant-spouse is eligible to receive the benefits, (ii) at the time the participant-spouse actually begins to receive the benefits, or (iii) at the participant-spouse’s earliest retirement age” (the fixed-percentage method). [G.S. 50-20.1(b)(3), *amended by* S.L. 2019-172, § 1, effective Oct. 1, 2019.]
- 7. A trial court may use more than one of the distribution methodologies authorized by G.S. 50-20.1 when distributing a single pension. [*Lund v. Lund*, 244 N.C. App. 279, 779 S.E.2d 175 (2015) (trial court did not err by using the fixed percentage method to distribute 10 percent of the marital portion of wife’s pension to husband when she begins to receive payments in the future while also awarding husband a larger share of other marital property to offset the value of the marital portion of the pension distributed to wife).]
- 8. A court may not distribute more than 50 percent of the benefits payable under a plan or benefit unless the plan or benefit does not prohibit an award of more than 50 percent and:
  - a. Other assets subject to distribution are insufficient; or
  - b. There is difficulty in distributing any asset or any interest in a business, corporation, or profession; or
  - c. It is economically desirable for one party to retain an asset or interest that is intact and free from any claim or interference by the other party; or
  - d. More than one pension or retirement system or deferred compensation plan, program, system, or fund is involved, but the benefits award may not exceed 50 percent of the total benefits of all plans added together; or
  - e. Both parties consent. [G.S. 50-20.1(e).]
- 9. *But cf. Comstock v. Comstock*, 240 N.C. App. 304, 771 S.E.2d 602 (2015) (limitation in G.S. 50-20.1(e) did not prohibit judge from finding that a distributive award could be paid from a retirement account even though the amount to be paid exceeded 50 percent of the value of the account. While G.S. 50-20.1(e) prohibits the distribution of more than 50

- percent of a pension, retirement, or other deferred compensation account in some circumstances, considering the account as a source of payment for a distributive award was not a distribution of the account by the court).
10. An award of pension, retirement, or other deferred compensation benefits may not include contributions, years of service, or compensation which may accrue after the date of separation (DOS). [G.S. 50-20.1(d) (*added by* S.L. 2019-172, § 1, effective Oct. 1, 2019), (d1) (*added by* S.L. 2019-172, § 1, effective Oct. 1, 2019); *Wall v. Wall*, 140 N.C. App. 303, 536 S.E.2d 647 (2000).]
  11. The award must include gains and losses on the prorated portion of the benefit vested on the DOS and cost-of-living adjustments and similar enhancements to the participant's benefit. [G.S. 50-20.1(d) (*added by* S.L. 2019-72, § 1, effective Oct. 1, 2019), (d1) (*added by* S.L. 2019-172, § 1, effective Oct. 1, 2019). *See Allen v. Allen*, 118 N.C. App. 455, 455 S.E.2d 440 (1995) (awarding defendant postseparation gains and losses on her portion of husband's 401(k) even though parties' agreement did not speak to gains and losses after the DOS); *compare Harvey v. Harvey*, 112 N.C. App. 788, 437 S.E.2d 397 (1993) (there is no requirement that the court account for postseparation gains and losses when the retirement account is distributed immediately).]
    - a. The requirement that gains and losses be included applies when a retirement account is divided between the spouses, i.e., when one party is awarded an interest in the other party's retirement account, and not when a party is directed to pay a distributive award to the other spouse from his retirement plan. [*See Harris v. Harris*, 162 N.C. App. 511, 591 S.E.2d 560 (2004) (rejecting wife's argument that gains and losses were to be included in a distributive award to be paid from husband's retirement account; origin of the money did not transform an ordinary distributive award into a division of a retirement plan).]
    - b. See Section III.B, below, on the present value method of distribution.
  12. G.S. 50-20.1(g) authorizes the court to order an administrator of the plan, program, system or fund to certify the total contributions, years of service, and pension, retirement, or other deferred compensation payable. [*See Workman v. Workman*, 106 N.C. App. 562, 418 S.E.2d 269 (1992) (letters from employer concerning a proposed qualified domestic relations order (QDRO) were admissible pursuant to N.C. R. EVID. 401 and N.C. R. EVID. 705).]
  13. The expectation of nonmarital pension, retirement, or other deferred compensation benefits is a distributional factor. [G.S. 50-20(c)(5); *Wall v. Wall*, 140 N.C. App. 303, 536 S.E.2d 647 (2000). *See Distribution*, Part 4 of this Chapter.]
  14. Death after entry of equitable distribution judgment. [G.S. 50-20.1(f), *amended by* S.L. 2019-72, § 1, effective Oct. 1, 2019].
    - a. If the person receiving the award dies (the nonemployee spouse), any unpaid balance of the award passes to his beneficiaries by will, intestate succession, or by beneficiary designation unless the plan prohibits such a designation.
    - b. If the person against whom the award is made (the employee spouse) dies, the award to the recipient remains payable to the extent permitted by the plan.

**B. Present Value (Immediate Offset) Method of Distribution [G.S. 50-20.1(a)(4); *Seifert v. Seifert*, 319 N.C. 367, 354 S.E.2d 506 (1987); *Workman v. Workman*, 106 N.C. App. 562, 418 S.E.2d 269 (1992); *Seifert*, 82 N.C. App. 329, 346 S.E.2d 504 (1986), *aff'd*, 319 N.C. 367, 354 S.E.2d 506 (1987).]**

1. The present value method, also called the immediate offset method, cannot be used if the pension or retirement plan at issue has not vested as of the date of separation (DOS). [G.S. 50-20.1(b) (listing three ways a nonvested marital pension, retirement, or deferred compensation benefit may be made payable but not including G.S. 50-20.1(a)(4)).] See Section III.A.2, above.
2. When a marital estate contains adequate property other than the pension or retirement benefits at issue, an in-kind or monetary distribution can be made which takes into account the future receipt of benefits by the employee spouse. In other words, distribution “involves an ‘immediate offset’ of other dollars to pay the nonemployee spouse for his or her share of the benefits that the other spouse will eventually receive.” [3 Lee’s North Carolina Family Law § 12.68, at 12-227 (5th ed. 2002).]
3. The trial court must calculate, using actuarial evidence, the present value of a vested pension as of the DOS, discounted for interest in the future and taking into account the employee spouse’s life expectancy. See Section III, above (valuation). The court would then determine the marital portion of the total DOS value by use of the coverture fraction, see Section II, above (classification), and determine the appropriate equitable share to which the nonemployee spouse is entitled. [*Seifert v. Seifert*, 82 N.C. App. 329, 334–35, 346 S.E.2d 504, 506–07 (1986), *aff'd*, 319 N.C. 367, 354 S.E.2d 506 (1987).]
4. When the present value (immediate offset) method is used to distribute a pension, the trial court makes an immediate distribution of the pension or benefit to one spouse. The other spouse’s share of the value of the pension can be awarded through an in-kind distribution of other marital property or by a distributive award. [See *Seifert v. Seifert*, 319 N.C. 367, 354 S.E.2d 506 (1987); see also *Lund v. Lund*, 244 N.C. App. 279, 779 S.E.2d 175 (2015) (rejecting wife’s argument that giving husband more of the existing marital assets while awarding her a larger share of the marital portion of her pension was not equitable because it gave him more existing assets while she received only speculative future benefits), and *Kabasan v. Kabasan*, 257 N.C. App. 436, 810 S.E.2d 691 (2018) (rejecting husband’s argument that trial court should have considered that awarding wife a share of his monthly pension, rather than awarding the entire value of the pension to him and other offsetting assets to wife, would have decreased wife’s need for alimony).]
5. When the court actually distributes the pension at the time of the equitable distribution judgment, there is no requirement that the court account for gains and losses accruing to the marital portion after the DOS. [*Harvey v. Harvey*, 112 N.C. App. 788, 437 S.E.2d 397 (1993).]
6. Where husband’s pension constituted just 41 percent of the marital estate, ample assets existed to divide the estate and immediately distribute the pension, and employee spouse was eligible for early retirement and was fully vested in the pension plan at the date of distribution, use of the immediate offset method of distribution was appropriate and authorized by G.S. 50-20.1(a)(4). [*Cochran v. Cochran*, 198 N.C. App. 224, 679 S.E.2d 469 (2009), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010).]

- C. Fixed Percentage (Deferred Distribution) Method of Distribution [Seifert v. Seifert, 319 N.C. 367, 354 S.E.2d 506 (1987); Workman v. Workman, 106 N.C. App. 562, 418 S.E.2d 269 (1992); Seifert, 82 N.C. App. 329, 346 S.E.2d 504 (1986), aff'd, 319 N.C. 367, 354 S.E.2d 506 (1987).]**
1. Under this method, the court awards to the nonemployee spouse a percentage of the marital portion of the benefits to be paid when the employee spouse begins to receive benefits. [See *Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675 (2005).]
  2. The award resulting from application of this method is a fixed percentage of any future benefits the employee spouse receives under the pension or retirement plan. The nonemployee spouse will receive the percentage when and if the employee spouse begins to receive benefits. **NOTE:** The domestic relations order that provides for this method of distribution will contain a formula to be used by the plan administrator when benefits are paid in the future. The order will not set out the specific dollar amount of the future payments. [See *Seifert v. Seifert*, 319 N.C. 367, 354 S.E.2d 506 (1987) (error for trial court to award nonemployee spouse a specified dollar amount of the date of separation value of a pension but defer receipt until plan begins making payments to employee spouse).]
  3. A court may not require the administrator of a plan, program, system, or fund to make any payments or distributions to the nonparticipant spouse, except as permitted by the terms of the plan, program, system, or fund. [G.S. 50-20.1(c), amended by S.L. 2019-172, § 1, effective Oct. 1, 2019. See 26 U.S.C. § 414(p)(4)(B) (ERISA-qualified plans allow payments to be made to the nonemployee spouse beginning at the employee's "earliest retirement age" as that date is defined by the Internal Revenue Code).]
  4. This method does not allow the distribution of contributions made to the plan after separation, but it does provide for the gains and losses on the nonemployee spouse's share as required by G.S. 50-20.1(d). [*Seifert v. Seifert*, 319 N.C. 367, 370–71, 354 S.E.2d 506, 508–09 (1987). See also *Gurganus v. Gurganus*, 252 N.C. App. 1, 796 S.E.2d 811 (2017) (rejecting argument by the employee spouse that application of the distribution formula approved in *Seifert* results in "manifest injustice" because it allows the nonemployee spouse to share in the rewards of the employee spouse's postseparation actions).]
    - a. However, effective December 23, 2016, for property distribution orders entered before a servicemember retires, federal law was amended to prohibit state courts from dividing any portion of military retirement pay above that amount of pay the military member would receive based on the member's pay grade and years of service at the time of divorce, annulment, or legal separation plus cost-of-living adjustments earned (1) between the time of the distribution order and the time the servicemember actually retires and (2) after the date the servicemember retires. [See definition of "disposable retired pay" and discussion of 2016 amendment in Section II.B.6, above.]
    - b. For distributions made on or after October 1, 2019, G.S. 50-20.1 reflects this amendment to federal law by providing that "[w]hen a pension, retirement, or deferred compensation plan, program, system, or fund, or an applicable statute limits or restricts the amount of the benefit subject to equitable distribution by a State court, the award shall be determined using the proportion of time the marriage existed (up to the date of separation of the parties) simultaneously with the total time of the employment which earned the benefit subject to equitable distribution to the total

time of employment, as limited or restricted by the plan, program, system, fund, or statute that earned the benefit subject to equitable distribution.” [G.S. 50-20.1(d), *amended by S.L. 2019-172, § 1, effective Oct. 1, 2019.*]

- c. For further discussion of the impact of this amendment on military pension distribution orders, see Cheryl Howell, *Equitable Distribution: Change in Federal Law Regarding Military Pensions Part 1*, UNC SCH. OF GOV’T: ON THE CIVIL SIDE BLOG (Mar. 3, 2017), <https://civil.sog.unc.edu/equitable-distribution-change-in-federal-law-regarding-military-pensions-part-1>, and Cheryl Howell, *Equitable Distribution: Change to Federal Law Regarding Military Pensions Part 2*, UNC SCH. OF GOV’T: ON THE CIVIL SIDE BLOG (Mar. 24, 2017), <https://civil.sog.unc.edu/equitable-distribution-change-to-federal-law-regarding-military-pensions-part-2>.
5. Separate interest approach. [G.S. 50-20.1(f1), *added by S.L. 2019-172, § 1, effective Oct. 1, 2019.*]
    - a. For distributions made on or after October 1, 2019, G.S. 50-20.1(f1) requires that when the court orders distribution by fixed percentage “and the pension or retirement or deferred compensation plan, program, system, or fund permits the use of a ‘separate interest’ approach in the order, there shall be a presumption, rebuttable by the greater weight of the evidence, that the ‘separate interest’ approach shall be used to divide the benefit in question.”
    - b. G.S. 50-20.1 uses the term *separate interest* to describe “any method of dividing pension or retirement system or deferred compensation benefits in which the nonparticipant spouse, the spouse not a participant in the plan, program, system, or fund in question, receives an interest that allows the nonparticipant spouse to receive benefits in a manner independent, in whole or part, of the benefits received by the participant-spouse, or to make elections concerning the receipt of benefits independently of the elections made by the participant-spouse.” [G.S. 50-20.1(f1).]
  6. Survivor annuities. [G.S. 50-20.1(f2)–(f3), *added by S.L. 2019-172, § 1, effective Oct. 1, 2019.*] For distributions made on or after October 1, 2019:
    - a. G.S. 50-20.1(f2) provides that “[w]henever the pension or retirement or deferred compensation benefit is distributed pursuant to subdivision (a)(3) or (b)(3) of this section [the fixed percentage method] in an order that does not employ the ‘separate interest’ approach, the court may, considering the length of the marriage and the ages of the parties, (1) award all or a portion of a survivor annuity to the nonparticipant spouse or former spouse and (2) allocate the cost of providing the survivor annuity between the parties. The survivor annuity awarded by the court, if any, shall be allocated in accordance with the terms of the retirement plan, program, system, or fund.”
    - b. “Whenever the pension or retirement or deferred compensation plan, program, system, or fund does not automatically provide pre-retirement survivor annuity protection for the nonparticipant spouse, the court shall order pre-retirement survivor annuity protection for the nonparticipant spouse if permitted by the plan, program, system, or fund.” [G.S. 50-20.1(f3).]
    - c. “The court may allocate equally between the parties any fees assessed by a plan, program, system, or fund in order to process any domestic relations order or qualified domestic relations order.” [G.S. 50-20.1(f4), *added by S.L. 2019-172, § 1, effective Oct. 1, 2019.*]

7. For distributions before October 1, 2019, when using the fixed percentage method of distribution, the trial court always was required to find the DOS value of the pension or retirement plan in order to value the marital portion and to determine the appropriate percentage for the nonemployee spouse to receive. [*Seifert v. Seifert*, 319 N.C. 367, 370–71, 354 S.E.2d 506, 508–09 (1987); *Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675 (2005) (citing *Byrd v. Owens*, 86 N.C. App. 418, 358 S.E.2d 102 (1987)) (when record contained evidence of value as of the date of separation, trial court erred when it determined wife was entitled to 25.22 percent of husband’s military pension but failed to value the pension; matter remanded for a new equitable distribution order to include value of the pension).] If, however, the party with the burden of proof fails to present credible evidence as to the value of the pension, the pension is not subject to distribution under the North Carolina Equitable Distribution Act. [*Johnson v. Johnson*, 230 N.C. App. 280, 750 S.E.2d 25 (2013) (citing *Albritton v. Albritton*, 109 N.C. App. 36, 426 S.E.2d 80 (1993)) (trial court did not err when it did not value or distribute defendant’s military pension when there was no competent evidence as to the value of the pension as of the DOS); *Washburn v. Washburn*, 228 N.C. App. 570, 749 S.E.2d 111 (2013) (**unpublished**) (not paginated on Westlaw) (citing *Grasty v. Grasty*, 125 N.C. App. 736, 482 S.E.2d 752, *review denied*, 346 N.C. 278, 487 S.E.2d 545 (1997), and *Albritton*) (error to order that a percentage of plaintiff’s future retirement payments be distributed to defendant when trial court failed to value plaintiff’s military pension; on remand, pension was to “be removed and excluded” from equitable distribution because defendant, the party claiming an interest, had failed to provide any evidence of the pension’s value).]
8. Effective for distributions made on or after October 1, 2019, G.S. 50-201(d) was amended to provide that under certain circumstances, a defined benefit plan can be distributed without determining a DOS value. That statute provides:
  - a. “Notwithstanding any other provision of this Chapter, if the court makes the award payable pursuant to subdivision (a)(3) or (b)(3) of this section [fixed percentage method] and the court divides the marital portion of the benefit equally between the participant-spouse and nonparticipant spouse, the court shall not be required to determine the total value of the marital benefits before classifying and distributing the benefits.” [G.S. 50-20.1(d), *amended by* S.L. 2019-172, § 1, effective Oct. 1, 2019.]
  - b. “However, neither party shall be prohibited from presenting evidence of the total value of any marital benefits or of any benefits that are separate property of either spouse.” [*Id.*]
9. Trial court did not abuse its discretion when it awarded wife half of husband’s 401(k) account, citing the presumption of an equal distribution in G.S. 50-20(c) as support. [*Helms v. Helms*, 191 N.C. App. 19, 661 S.E.2d 906 (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; wife’s testimony at an earlier equitable distribution 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).]



## D. Distribution of Stock Options

1. Stock options are distributed pursuant to G.S. 50-20.1. [*Fountain v. Fountain*, 148 N.C. App. 329, 559 S.E.2d 25 (2002).]
2. When stock options are vested, unless the parties agree otherwise, an award of stock options may be made payable by either the deferred distribution method or immediate offset method. [*Fountain v. Fountain*, 148 N.C. App. 329, 559 S.E.2d 25 (2002); G.S. 50-20.1(a).]
  - a. Under the deferred distribution method, the trial court orders that a prorated portion of the benefit be distributed to the nonowner spouse when and if the owner spouse receives the benefit in the future. [*Fountain v. Fountain*, 148 N.C. App. 329, 559 S.E.2d 25 (2002).]
  - b. Under the immediate offset method, the trial court awards a larger portion of the other marital and divisible assets to the party not receiving the benefit and allows the owner spouse to retain full ownership of the benefit. [*Fountain v. Fountain*, 148 N.C. App. 329, 559 S.E.2d 25 (2002).]
3. When stock options are not vested, unless the parties agree otherwise, an award of stock options may be made payable only by the deferred distribution method. [*Fountain v. Fountain*, 148 N.C. App. 329, 559 S.E.2d 25 (2002); G.S. 50-20.1(b)(3).]

## E. The Distribution Order

1. The court may require distribution of the award of pension or retirement benefits by means of a qualified domestic relations order (QDRO), as defined in 26 U.S.C. § 414(p), or by other appropriate order. [G.S. 50-20.1(g); *Patterson ex rel. Jordan v. Patterson*, 137 N.C. App. 653, 529 S.E.2d 484 (only ERISA-qualified plans are required to be distributed by QDROs, but it is not error for court to distribute other plans by a QDRO), *review denied*, 352 N.C. 591, 544 S.E.2d 783 (2000).]
2. For a discussion of the definition of the term “domestic relations order,” see Cheryl Howell, *So Someone Forgot to Draft That QDRO. Now What?* UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (July 24, 2015), <http://civil.sog.unc.edu/so-someone-forgot-to-draft-that-qdro-now-what>.
3. For distributions made on or after October 1, 2019, G.S. 50-20.1(j) authorizes the court to enter a distribution order effectuating a distribution made by agreement of the parties when no claim for equitable distribution has been filed. The statute provides, “Notwithstanding any other provision of this Chapter, a claim may be filed, either as a separate civil action or as a motion in the cause in an action brought pursuant to this Chapter, for an order effectuating the distribution of pension, retirement, or deferred compensation benefits provided for in a valid written agreement, as defined in G.S. 50-20(d), whether or not a claim for equitable distribution has been filed or adjudicated. The court may enter an order effectuating the distribution provided for in the valid written agreement.” [G.S. 50-20.1(j), *added by* S.L. 2019-172, § 1, effective Oct. 1, 2019.]
4. When an equitable distribution judgment has been appealed, the trial court has no subject matter jurisdiction to enter a distribution order until the court of appeals returns jurisdiction back to the trial court by issuing the mandate. [*Henson v. Henson*, 261 N.C. App. 157, 820 S.E.2d 101 (2018) (QDRO void where judge signed the order after the court

of appeals filed an opinion resolving the case on appeal but before the mandate issued from the appellate court).]

5. Qualified domestic relations order (QDRO).
  - a. All ERISA-qualified plans (includes most private, nongovernmental plans) must be distributed by a QDRO. [29 U.S.C. § 1056(d)(3); 26 U.S.C. § 414(p)(1).]
  - b. Definition of a “domestic relations order.” “[A]ny 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 to a spouse, former spouse, child, or other dependent of a participant, and . . . is made pursuant to a State domestic relations law (including a community property law).” [29 U.S.C. § 1056(d)(3)(B)(ii); 26 U.S.C. § 414(p)(1)(B).]
  - c. The order must contain:
    - i. The name and last known mailing address of the participant and each alternate payee covered by the order;
    - ii. The amount or percentage of the participant’s benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined;
    - iii. The number of payments or period to which the order applies; and
    - iv. Each plan to which the order applies. [29 U.S.C. § 1056(d)(3)(C).]
  - d. A domestic relations order becomes “qualified” when accepted by the plan administrator as an order that either creates or recognizes the right of an “alternate payee”—meaning a nonemployee—to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan. [29 U.S.C. § 1056(d)(3)(B)(i).] Once the order is qualified, the alternate payee receives payments directly from the plan administrator in accordance with the order. The order cannot be qualified if it:
    - i. Requires a plan to provide any type of form or benefit, or any option, not provided under the plan;
    - ii. Requires the plan to provide greater benefits to the alternate payee than the participant would be entitled to receive; or
    - iii. Requires the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a QDRO. [29 U.S.C. § 1056(d)(3)(D).]
  - e. Other provisions in a QDRO.
    - i. QDROs can include provisions requiring the distribution of pre-retirement survivor benefits and postretirement joint and survivor annuity benefits. [*See Workman v. Workman*, 106 N.C. App. 562, 418 S.E.2d 269 (1992).]
    - ii. There was no error when a QDRO required wife to pay all fees and penalties associated with the lump sum transfer of funds from former husband’s retirement account. [*Lee v. Lee*, 167 N.C. App. 250, 605 S.E.2d 222 (2004).]
  - f. Effect of a waiver in a divorce decree on an interest in a retirement account.
    - i. Wife’s waiver in a divorce decree that was not a QDRO of her right to any interest in husband’s savings and investment plan was inconsistent with plan

document in which she was named as beneficiary. After employee spouse's death, plan administrator properly distributed benefits to wife in accordance with the plan documents pursuant to bright-line requirement to follow plan documents in distributing benefits. [*Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 129 S. Ct. 865 (2009) (husband never removed wife as beneficiary and there was no contingent beneficiary; distribution to wife did not constitute an assignment or alienation rendered void under ERISA's anti-alienation provision, 29 U.S.C. § 1056(d)(1); case did not address waiver's effect in circumstances in which a waiver is consistent with plan documents).]

- g. Effect of a waiver in a separation agreement on interest in a retirement account.
  - i. Parties to a divorce may provide for division of retirement benefits as part of a separation agreement. [G.S. 50-20(d); *Gilmore v. Garner*, 157 N.C. App. 664, 580 S.E.2d 15 (2003).] See *Equitable Distribution and Overview*, Part 1 of this Chapter, Section VI for general discussion of agreements in bar of equitable distribution.
  - ii. Unambiguous language in premarital agreement providing that the parties' retirement accounts were to remain their separate property was a valid waiver under state law, as well as under ERISA, of wife's interest in husband's retirement account. [*Stewart v. Stewart*, 141 N.C. App. 236, 541 S.E.2d 209 (2000) (holding that ERISA's spousal waiver restrictions apply to waivers of survivor benefits but do not apply to waivers of an interest in a spouse's retirement account); *Herring v. Herring*, 231 N.C. App. 26, 752 S.E.2d 190 (2013) (separation agreement that provided that wife was to retain her state retirement accounts as her separate property precluded trial court from valuing and distributing those accounts). *But cf. Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 129 S. Ct. 865 (2009) (even if rights are waived, ex-spouse will receive death benefits if ex-spouse is designated as the beneficiary in plan documents at time benefits are paid).]
- h. Modification of a QDRO.
  - i. For distributions made on or after October 1, 2019, G.S. 50-20.1(i) allows the court, upon motion of a party, to enter a "subsequent order clarifying or correcting its prior order" when a plan has deemed a division order to be unacceptable to divide the plan or benefit. [G.S. 50-20.1(i), *added by* S.L. 2019-172, § 1, effective Oct. 1, 2019.]
  - ii. Trial court erred in entering a second QDRO that changed the terms of the original QDRO entered by a different trial judge when second order contained no findings or statements by the trial judge that indicated a material change of circumstances between the parties that warranted modification. [*Morris v. Gray*, 181 N.C. App. 552, 640 S.E.2d 737 (2007).]
  - iii. Even if a change to the original QDRO was warranted because of the bankruptcy of the employee spouse's employer, amendment would have been more appropriately made pursuant to a G.S. 1A-1, Rule 59 or Rule 60 motion. [*Morris v. Gray*, 181 N.C. App. 552, 640 S.E.2d 737 (2007).]

- i. Amending a QDRO pursuant to G.S. 1A-1, Rule 60(a).
    - i. When two of the three QDRO's distributing various retirement accounts of the parties provided for an assignment of taxes, the trial court did not err in amending the other QDRO to require wife to pay all fees and penalties associated with the lump sum transfer of funds from former husband's retirement account. [*Lee v. Lee*, 167 N.C. App. 250, 605 S.E.2d 222 (2004) (exclusion was an "oversight or omission" under G.S. 1A-1, Rule 60(a)).]
  - j. Setting aside a QDRO pursuant to G.S. 1A-1, Rule 60(b).
    - i. A significant decrease in the value of the retirement account from the date of separation (DOS) to the date of distribution did not warrant setting aside the QDRO pursuant to G.S. 1A-1, Rule 60(b). [*Lee v. Lee*, 167 N.C. App. 250, 258, 605 S.E.2d 222, 227 (2004) ("[a] change in the value of the stock market over the course of five years does not amount to an extraordinary or even unforeseeable circumstance" warranting review of the lump sum distribution originally ordered).]
    - ii. A QDRO was properly modified under G.S. 1A-1, Rule 60(b)(6) when the QDRO, entered to implement parties' agreement for husband to pay wife a distributive award of \$81,000 from husband's retirement account, inadvertently ordered payment of \$81,000 plus gains and losses from the DOS. [*Harris v. Harris*, 162 N.C. App. 511, 591 S.E.2d 560 (2004) (modification of QDRO appropriate when evidence supported conclusion that both parties intended that wife only receive a set amount of \$81,000).]
  - k. For a discussion about entering a QDRO years after the entry of the equitable distribution judgment, see Cheryl Howell, *So Someone Forgot to Draft That QDRO. Now What?* UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (July 24, 2015), <http://civil.sog.unc.edu/so-someone-forgot-to-draft-that-qdro-now-what>.
6. Non-ERISA orders.
- a. Federal military retirement plans.
    - i. Guidance on the procedures to divide military retired pay is provided in DEFENSE FIN. & ACCOUNTING SERV., GARNISHMENT OPERATIONS DIRECTORATE, GUIDANCE ON DIVIDING MILITARY RETIRED PAY (rev. Jan. 29, 2012). For further discussion of procedures and samples of form orders, see GARY A. SHULMAN & DAVID I. KELLEY, DIVIDING PENSIONS IN DIVORCE Ch. 23, § 23.11 (3d ed. 2009, rev. 2016) (hereinafter DIVIDING PENSIONS).
    - ii. Pursuant to the USFSPA, 10 U.S.C. § 1408(e), the total amount of the disposable retired pay of a servicemember payable under all court orders may not exceed 50 percent of such disposable retirement pay.
    - iii. Also pursuant to USFSPA, a court cannot order that a plan administrator make direct payments to the nonparticipant spouse unless the servicemember has at least ten years of service (the 10/10 Rule). [10 U.S.C. § 1408(d)(2); DIVIDING PENSIONS § 23.11.]
  - b. Railroad retirement benefits. Tier II benefits can be distributed by an order complying with regulations found in Title 20, Chapter II, Subchapter B, Part 295 of the Code

of Federal Regulations. For discussion of procedures and samples of form orders, see DIVIDING PENSIONS ch. 25.

- c. Federal civil service retirement systems. Guidelines for orders created by the federal Office of Personnel Management can be found in volume 50, number 92 of the Federal Register (May 23, 1985) at page 20,081 and in Title 5, Part 838 of the Code of Federal Regulations. For discussion of procedures and samples of form orders, see DIVIDING PENSIONS ch. 24.
- d. North Carolina state retirement plan.
  - i. A participant's interest under the North Carolina Retirement System may be divided pursuant to a court-ordered equitable distribution under G.S. 50-20 by a domestic relations order. [See G.S. 135-9.]
  - ii. "For [domestic relations] orders entered on or after January 1, 2015, payment to a member's former spouse [from the North Carolina Retirement System] pursuant to any such domestic relations order shall be limited to the lifetime of that former spouse and, upon the death of that former spouse, the former's spouse's share shall revert to the member." [G.S. 135-9(a), amended by S.L. 2014-112, § 5. (a), effective Oct. 1, 2014.]
  - iii. Plan benefits of a University of North Carolina (UNC) System participant were validly assigned by a consent order entered in an equitable distribution case. [*Patterson ex rel. Jordan v. Patterson*, 137 N.C. App. 653, 664, 529 S.E.2d 484, 490 (consent order signed and entered by the trial court became a "court-ordered equitable distribution" for purposes of G.S. 135-9; former spouse acquired an interest in the UNC retirement plan upon entry of the consent order), review denied, 352 N.C. 591, 544 S.E.2d 783 (2000).]

# Classification Presumptions and Burdens of Proof

## Marital Property Presumption

All property acquired during the marriage by either or both parties and owned by either or both parties on the date of separation (DOS) is presumed to be marital property.

## Burden of Proof for Classification of Marital Property

Party seeking marital classification of any property interest must establish by a preponderance of the evidence:

- That the property was owned by either or both parties on the DOS,
- That the property was acquired by either or both parties after the date of marriage and before the DOS, and
- The value of the property on the DOS.

If party meets that burden, the entire DOS value of the property is presumed to be marital property.

The burden then shifts to party seeking separate classification to show by a preponderance of the evidence that:

- Property owned on the DOS is all or partially separate property.

If both parties meet the burden of proof, property is all or partially separate.

If neither party meets the burden of proof, property falls out of equitable distribution (ED) (court cannot distribute the property).

## Application of Marital Property Presumption to “Mixed” Assets

The party claiming a separate interest in mixed property always has the burden of tracing out his/her separate interest in the DOS value of the property.

- Party must show portion of DOS value that is separate property.

Appreciation in value of separate property that occurs during the marriage is presumed to be entirely marital. Party seeking separate classification can rebut presumption by showing appreciation was NOT caused by the actions of either spouse during the marriage.

## Burden of Proof for Classification of Marital Debt

Party seeking marital classification must show by a preponderance of the evidence:

- That debt was owed by either or both parties on the DOS,
- That debt was incurred by either or both parties after the date of marriage and before the DOS,
- That debt was incurred for the joint benefit of the parties, and
- The amount owed on the debt on the DOS.

If that burden of proof is not met, debt falls out of ED (court cannot distribute the debt).

## Other Classification Presumptions

- Tenancy by the entirety property is presumed to be marital.
  - Rebutted by a preponderance of the evidence.

- Property acquired by one spouse during the marriage by gift from the other spouse is presumed to be marital property, unless a contrary intention was expressly stated in the conveyance.
  - Rebutted by showing no gift was made or by an express statement in the conveyance.
- Separate property exchanged for real property held as tenants by the entirety is presumed to be a gift to the marriage.
  - Rebutted by showing that separate property was not gifted to the marriage or by an express statement in the conveyance.
- Property conveyed to one spouse from the parents of that spouse during the marriage is presumed to be a gift to the child of those parents.
  - Rebutted by showing no gift was made or that gift was to other spouse or to both spouses.
- All increase/decrease in value of marital property occurring after the DOS and before the date of distribution is presumed to be divisible property.
  - Rebutted by showing increase or decrease was caused by the actions of one spouse after the DOS.

## DISTRIBUTION<sup>1</sup>

### A. Philosophy

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

Smith v Smith  
111 NC App 460 (1993)

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

White v White  
312 NC 770 (1985)

Smith v Smith  
111 NC App 460 (1993)

Carpenter v. Carpenter  
245 NC App 1 (2016)

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  
209 NC App 492 (2011)

Carpenter v. Carpenter  
245 NC App 1 (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.

Bodie v. Bodie  
221 NC App 29 (2012)

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<sup>1</sup> Original manuscript written by Judge L. Stanley Brown and Chief District Court Judge Beth Keever in 2003. Updated by Cheryl Howell, April 2017 and July 2022.



Barlowe v. Barlowe  
113 NC App 797 (1994)

The court must make an equitable distribution of the marital property by balancing the evidence presented by the parties in light of the legislative policy that favors equal division.

Khajanchi v. Khajanchi  
140 NC App 552 (2000)

## **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)

Khajanchi v. Khajanchi  
140 NC App 552 (2000)

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)

Brackney v. Brackney  
199 NC App 375 (2009)

“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)

Khajanchi v. Khajanchi  
140 NC App 552 (2000)

Shope v. Pennington, *unpublished*, 249  
NC App 464(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 NC App 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 (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  
222 NC App 784 (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)

Troutman v. Troutman  
193 NC App 395 (2008)

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 (1985)

Hinkle v. Hinkle  
227 NC App 252 (2013)

“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 (1985)

Alexander v Alexander  
68 NC App 548 (1984)

Smith v Smith  
71 NC App 242 (1984)

Greer v Greer  
84 NC App 471 (1987)

Taylor v Taylor  
92 NC App 413 (1988)

Fox v Fox  
103 NC App 13 (1991)

Haywood v Haywood  
106 NC App 91 (1992)

Freeman v Freeman  
107 NC App 644 (1992)

Surette v Surette  
114 NC App 368 (1994)

Burnett v Burnett  
122 NC App 712 (1996)

Collins v. Collins  
125 NC App 113 (1997)

Plummer v. Plummer  
198 NC App 538 (2009)

Warren v. Warren  
175 NC App 509 (2006)

Power v. Power  
236 NC App 581 (2014)

“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 (1992)

Cushman v. Cushman  
244 NC App 555 (2016)

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  
222 NC App 94 (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)

Rosario v. Rosario  
139 NC App 258 (2000)

Peltzer v. Peltzer  
222 NC App 784 (2012)

Lucas v. Lucas  
209 NC App 492 (2011)

## 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, Chapter 6, Equitable Distribution, section 4.

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)

Eason v. Taylor  
245 NC App 16 (2016)

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)

Mrozek v. Mrozek  
129 NC App 43 (1998)

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.

Stowe v. Stowe  
272 NC App 423 (2020)

Power v. Power  
236 NC App 581 (2014)

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  
222 NC App 784 (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  
222 NC App 784 (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.

Shope v. Pennington  
231 NC App 569 (2014)

Bodie v. Bodie  
221 NC App 29 (2012)

Williamson v. Williamson  
217 NC App 375 (2011)

See Smith v. Smith,  
111 N.C. App. 460, 510  
(1993).

## **G. Allocation of Specific Property and Debt**

The trial court must distribute all marital and divisible property and marital and divisible debt, even if the property no longer exists or has no value at the time of distribution.

Larkin v. Larkin  
165 NC App 390 (2004)

Hill v. Hill  
229 NC App 511 (2013)

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  
221 NC App 29 (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)

But see Miller v. Miller, 253 NC App 85 (2017) where court of appeal held that trial court must distribute all marital and divisible property and debt, not simply order that it be sold.

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 track than as two separate tracks.

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

249 NC App 18 (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

249 NC App 18 (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)

Glaspy v. Glaspy

143 NC App 435 (2001)

## 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)

Shaw v. Shaw  
117 NC App 552 (1995)

Williams v. Williams  
Unpublished  
213 NC App 219 (2011)

Slaughter v. Slaughter  
254 NC App 430 (2017)

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)

The trial court has no authority to order a party to sell separate property to pay a distributive award.

Crowell v. Crowell  
372 NC App 362 (2018)

“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)

Gould v. Gould  
Unpublished  
225 NC App 264 (2013)

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 (2001)

Ice v. Ice  
136 NC App 787 (2000)

Porter v. Porter  
252 NC App 321 (2017)

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 District Court Bench Book, Volume 1 Family Law, Chapter 6, Equitable Distribution, part 5.

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)

See also GS 50-20.1(f1),(f2),(f3) and (f4)

G.S. 50-20.1(j) authorizes a party to file a complaint or file a motion in the cause in an existing action requesting that the court enter a QDRO to effectuate the distribution of a retirement or other deferred compensation account as provided in a separation agreement or property settlement whether or not an action for equitable distribution has been filed.

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.

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

#### 4. Distribution of Debt

A trial court must distribute marital debt even if it is paid in full by the date of trial and even if the marital estate has no assets.

Loving v. Loving  
118 N.C. App. 501 (1995)

Rawls v. Rawls  
94 N.C. App. 670 (1989)

A trial court can distribute all assets to one spouse and all debt to another.

Conway v. Conway  
131 N.C. App. 609 (1998)

A trial court is not required to order a party to refinance the mortgage on the marital home when it distributed the debt to that party in order to ensure that the other party would not be liable for the debt to the mortgage company.

Green v. Green  
255 N.C. App. 719 (2017)

In distributing marital debt between spouses or former spouses, the trial court cannot affect the rights of creditors.

Branch Banking & Tr. Co. v. Wright  
74 N.C. App. 550 (1985)

Union Grove Mill & Mfg. Co. v. Faw  
103 N.C. App. 166 (1991)

## **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  
199 NC 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.

## Equitable Distribution: Can the court order the sale of marital property?

The duty of the trial court in an equitable distribution proceeding is to identify, value and distribute the marital and divisible property and debt of the parties. There is a presumption in favor of an ‘in-kind’ distribution of marital and divisible assets, meaning the law presumes the court will accomplish an equitable distribution by distributing the actual assets and debts between the parties rather than by distributing assets and debts to one and ordering the receiving party to pay the other a distributive award. Despite this presumption, however, distributive awards are common. The presumption in favor of an in-kind distribution is rebutted by evidence the property “is a closely held business entity or is otherwise not susceptible of division in-kind.” [G.S 50-20\(e\)](#).

If the court can give all of the property to one and order that spouse to buy-out the other’s interest with a cash distributive award, can the court instead order that property be sold with the cash proceeds distributed between the parties? The answer to that question in North Carolina became less clear last week.

### ***Wall v. Wall***

The first time the court of appeals addressed this issue directly, it held without extensive discussion that the trial court has the discretion to order the sale of marital property. In *Wall v. Wall*, 140 N.C. App. 303 (2000), the trial court classified and valued the marital home and ordered that it be sold and that the proceeds be used to pay the costs of the sale and to pay all encumbrances on the home. Any remaining proceeds were ordered to be distributed between the parties. The trial court did not offer any specific explanation for ordering the sale, other than to find that both parties agreed the house was marital but they strongly disagreed over value and both wanted the house in distribution.

The court of appeals affirmed the trial court order, stating:

“The defendant argues that the trial court must distribute the home to one of the parties, rather than ordering it sold. We disagree. ...

While we have never expressly discussed the trial court’s power to order the sale of marital assets as part of an equitable distribution, our prior decisions have implicitly recognized the power of the trial court to do so. See, e.g., *Dorton v. Dorton*, 77 N.C.App. 667, 336 S.E.2d 415 (1985) (trial court did not err in forbidding either party to receive a commission or broker’s fee on the sale of the marital home after ordering the home sold); [Soares v. Soares, 86 N.C.App. 369, 357 S.E.2d 418 \(1987\)](#) (trial court erred in failing to value the marital home before ordering it sold); and [Thomas v. Thomas, 102 N.C.App. 127, 401 S.E.2d 367 \(1991\)](#) (citing *Soares*) for same proposition. We



continue to stress the importance of following the steps of first classifying, then valuing and distributing marital property. Each step is a prerequisite to the performance of the next, and failure to follow the prescribed order will result in a fatally flawed trial court disposition. “[O]nly those assets and debts that are *classified* as marital property and *valued* are subject to *distribution* under the Equitable Distribution Act (Act)...” [Grasty v. Grasty, 125 N.C.App. 736, 740, 482 S.E.2d 752, 755, disc. review denied, 346 N.C. 278, 487 S.E.2d 545 \(1997\)](#) (emphasis added). Here, there was no dispute over the classification of the marital home as marital property. Further, as we discussed above, the trial court properly valued the marital home prior to its distribution. Rather than distributing the home to one of the parties, the trial court ordered the parties to sell the property by 13 January 1998 and use the proceeds to pay off the costs of sale and the encumbrances on the home; any remaining funds from the sale were to be distributed to plaintiff-wife, with defendant-husband receiving a credit equal to one-half of these proceeds. The trial court classified and valued the Country Club Drive residence before distributing it, and we find no abuse of discretion in the trial court's order that the home be sold and proceeds divided between the parties.”

Several appellate cases after *Wall* remanded judgments where the trial court failed to value the marital home before ordering a sale, but until last week, no appellate opinion revisited the question of whether the court has the authority to order a sale as the method of distributing the marital property.

### ***Miller v. Miller***

Unlike the parties in *Wall*, neither party in [Miller v. Miller, N.C. App \(April 18, 2017\)](#), wanted the marital residence or another track of marital real property. The parties were able to stipulate to the value of the properties and wife asked the court to order that both properties be sold. The final ED judgment ordered that the properties be listed for sale at a price agreed upon by the parties with all net proceeds from the sale being distributed equally between the parties.

Husband argued on appeal that the trial court erred in ordering the sale and the court of appeals agreed, stating:

“The trial court’s role is to classify, value and distribute the property, not simply to order that it be sold. ...

The trial court must value and distribute each parcel of real property to a party, and a distributive award may be needed to equalize the division or to make the distribution equitable. Then the party who receives distribution of the real property is free to keep it or sell it.”

The court in [Miller](#) did not mention the opinion in *Wall* and relevant distinctions between the facts of the two cases are not discernable from the published opinions.

### **What do other states do?**

According to the treatise, *Equitable Distribution of Property*, written by Brett Turner and published by Thomson West, “a large majority of states” authorize the court to order the sale of marital assets. 3 *Equitable Distribution of Property* sec. 9:12, p. 49 (3<sup>rd</sup> Edition 2005). However, many of the cases cited by Turner indicate that an order for sale must be supported by findings to show that a distribution of the property to one party is not feasible or not equitable for some reason. See e.g. *In re Marriage of McDermott*, 827 N.W.2d 671, 684 (Iowa 2013) (“a forced sale is not a preferable method to divide marital assets because such a sale tends to bring lower prices,” so should not be done without a good reason); *Handy v. Handy*, 338 S.W.3rd 852 (Mo. Ct. App. W.D. 2011) (sale should not be ordered when house can be distributed to one and offsetting other property to the other). *But cf. Doyle v. Doyle*, 55 So. 3<sup>rd</sup> 1097 (Miss. Ct. App. 2010) (sale was appropriate where there was much dispute over the value of the property and the amount of equity, there was very little equity, many homes in the area were in foreclosure, and neither party could afford an outright purchase of the other’s interest); *Baldwin v. Baldwin*, 905 S.W.2d 521 (Mo. Ct. App. E.D. 1995) (home was most significant asset in the estate, too large for either party, and difficult and expensive to maintain; trial court concluded sale was necessary to protect both parties from extended financial drain).

***Peg v. Andrew***

**Distribution**

**July 2022**

**Distribute the marital and divisible property identified below. Identify all distribution factors and explain your distribution.**

**Parties**

Peg is 49 years old

Andrew is 52 years old

Peg has no health problems at time of trial and no history of health problems.

Andrew is relatively healthy but has chronic back problems because of an injury sustained during his service in the US Army. His back problems limit Andrew's ability to perform physical labor. Andrew also suffers from depression and has been treated twice for addiction to the pain medication he takes due to his back problems. While he is unable to perform much physical labor, he works regularly managing the family businesses. He receives disability pay from the military in the amount of \$200 per month.

Peg is a real estate agent. She was fairly successful earlier in the marriage, but her income dropped significantly during the last several years of the marriage and during separation. During the first three months of the separation, Peg had no income at all. From the fourth month until the time of trial, Peg has earned an average of \$3000 per month. Peg has no retirement account.

22-year marriage at the time of separation. Date of trial is 2 years after DOS. Date of separation was July 2020.

Two children born to the marriage. At time of trial, the oldest child is 17 years-old and is a senior in high school. The younger child is 14 years-old and in 9<sup>th</sup> grade. Both children have lived with Peg in the marital residence since the date of separation. No child support order has been entered and Andrew has not paid any child support to Peg.

Andrew earned an MBA during the early years of the marriage. Peg worked and cared for the children while Andrew attended graduate school.

Peg started college but dropped out when she and Andrew decided to marry. She obtained her real estate license before the marriage.

Interim distribution awarded \$50,000 to Peg out of marital savings account. Peg testified that most of the \$50,000 of the interim distribution was used to pay the mortgage payments described above (\$4500) and other household and child-related expenses during the period of separation but \$10,000 was used to pay part of her attorney fees relating to the ED case.

### **Marital Property and Divisible Property**

#### 1. Former Marital Residence and Mortgage

DOS market value: \$300,000

DOS mortgage: (\$200,000)

DOT market value: \$300,000

DOT mortgage: \$94,000

Peg's postseparation payments related to marital residence:

\$6000 principle reduction (\$1500 from marital savings account)

\$8,400 interest (\$2100 from marital savings account)

\$7,200 homeowners' insurance and property taxes (\$900 from marital savings account)

Andrew's payments related to marital residence:

\$100,000 (paid one year after separation with money gifted to him by his parents)

Neither party has paid for repairs or maintenance to the marital home since the DOS. At present, house needs a new roof, as well as some painting and other minor repairs.

#### 2. The LLC described in Classification Problems, paragraph (g) and (h).

- a. Peg and Andrew each own 50% of LLC
  - i. Shopping center that is the primary asset of the LLC was a gift from Andrew's parents during the marriage
- b. DOS value: \$1.2 million
- c. DOT value \$1.3 million (experts testified would be higher if Andrew would have left more cash in corporate account)
- d. LLC earned \$250,000 between DOS and DOT
  - i. \$75,000 deposited by Andrew into LLC account
  - ii. \$175,000 used by Andrew for personal expenses

- e. Andrew managed the LLC during separation by collecting rent, overseeing maintenance of shopping center and handling the finances of the business; Peg had no involvement
3. Joint Savings Account
- a. Opened during marriage
  - b. DOS value: \$100,000
  - c. Separate funds from Peg in the amount of \$15,000 was deposited during marriage and before DOS but could not be traced out
  - d. Separate funds from Andrew in the amount of \$40,000 was deposited during the marriage and before the DOS but could not be traced out
  - e. Interim distribution to Peg of \$50,000 described above
  - f. DOT value: \$51,000
4. Andrew's military service
- a. Andrew was in the Army when he and Peg married. He had been in the service for 2 years at the time of marriage and remained enlisted until receiving a discharge based on his back injury 10 years after the parties married. He currently receives disability pay based on a disability rating of 20%.
5. Pontoon Boat
- a. Gift from Andrew's parents to Peg and Andrew
  - b. DOS value: \$20,000  
No DOT evidence offered
6. Credit card debt
- a. Peg's Card
    - i. DOS balance \$15,000: incurred for household purchases, medical and dental bills for children, clothing for Peg and children
    - ii. DOT balance \$25,000: Peg has made all required minimum payments of \$25 per month during the separation but also has continued to use the card for household and child-related expenses
  - b. Andrew's card
    - i. DOS balance \$25,000: incurred for household expenses, golf expenses (Andrew and the oldest child of the parties play golf frequently), and medical/treatment expenses related to Andrew's addiction and depression.
    - ii. DOT balance \$0: paid in full during separation by Andrew's parents

7. Vehicles
  - a. 2018 Lexus driven by Andrew
    - i. DOS value: \$15,000
    - ii. No DOT value offered
  - b. 2017 Honda Van driven by Peg
    - i. DOS value: \$20,000
    - ii. DOT value: \$18,000 (passive decrease in value)
  
8. Property shown by evidence to be marital property but no DOS value evidence offered
  - a. Harley Davidson motorcycle and enclosed trailer: Andrew has had possession since DOS and title to both is in Andrew's name. Peg bought the motorcycle and trailer for Andrew as a birthday present during the marriage – using funds she received as commission on the sale of a particularly valuable piece of real estate.
  - b. Andrew's 50% ownership interest in another LLC (also a shopping center; Andrew's father owns other 50%)
  - c. Furniture and other household items contained in the marital residence



## Equitable Distribution

### Post-Trial Issues

- I. **Entry of Judgment.** Rule 58 of NC Rules of Civil Procedure
  - a. See generally discussion of entry of ED judgments in Bench Book, Family Law Volume, Equitable Distribution, Chapter 6.
  - b. Judgment is not entered until reduced to writing, signed by judge and filed with the clerk of court.
    - i. A memorandum of judgment is an entered judgment if signed by judge and filed with clerk of court. *See Buckingham v. Buckingham*, 134 NC App 82 (1999).
    - ii. Until judgment is entered, judge can reopen evidence and hear additional testimony or take additional evidence. *See In re B.S.O.*, 225 NC App 541 (2013); *Wade v. Wade*, 72 NC App 372 (1985).
    - iii. *Nunc pro tunc* does not work to backdate a judgment unless judgment actually was entered at end of trial AND court determines no prejudice will result to either party if judgment is backdated. *Whitworth v. Whitworth*, 222 NC App 771 (2012).
  - c. Rule 52(a)(1) of the Rules of Civil Procedure requires that the trial court make findings of fact, conclusions of law and direct entry of an appropriate judgment.
    - i. All conclusions of law must be supported by findings of fact.
    - ii. The following conclusions of law are required in ED judgments:
      1. List of all marital and divisible property
      2. Net value of all marital and divisible property
      3. Whether an equal division is equitable
      4. If distributive award is ordered, conclusion that presumption in favor of in-kind distribution has been rebutted
  - d. Delay in entry of judgment can result in retrial of distribution stage of ED trial. *Wall v. Wall*, 140 NC App 303 (2000)(30 to 60 day delay is understandable; 19



month delay requires retrial); *Plomaritis v. Plomaritis*, 222 NC App 94 (18 month delay required retrial). See *Nicks v. Nicks*, 241 NC App 365 (2015)(changes in value of marital or divisible property or changes in the circumstances of the parties between the date of trial and the date of entry of judgment can establish prejudice from an unreasonable delay in the entry of judgment).

e. Consent Judgments

- i. Consent judgment is void if consent of the parties does not exist at the time judge signs the consent judgment. *McIntosh v. McIntosh*, 74 NC App 554 (2007); *Chance v. Henderson*, 134 NC App 657 (1999).
- ii. Agreements reached in family financial mediation.
  1. Rules regarding the finalizing of agreements reached during ED and Family Financial Mediations are found in Rules of Court volume of General Statutes.
  2. Rule 4(B)(4) of the Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases provides that no agreement reached during mediation is enforceable unless it is reduced to writing, signed by the parties and acknowledged as required by GS 50-20(d)[must be acknowledged in same manner as separation and property settlement agreements].
  3. Rules do not explicitly provide for entry of judgment based on the written agreement.
  4. While an acknowledged, written agreement is enforceable, it is not clear court is authorized to enter a judgment on the agreement if a party objects to entry of judgment. See *Milner v. Littlejohn*, 126 NC App 184 (1997)(judgment entered based on written agreement signed by parties, their attorneys and the judge had to be set aside where wife objected to agreement before judgment was entered).

**II. Post-Judgment Motions**

- a. Motion to Amend Judgment
  - i. Rule 52(b)

1. If a motion is filed within 10 days of entry of judgment, the court may amend its findings of fact or make additional findings and amend the judgment accordingly.
2. The rule also allows amendment of conclusions of law.

ii. Rule 59

1. If a motion is filed within 10 days of entry of judgment, or on the court's own motion within 10 days of entry of judgment, the court may order a new trial.
2. Since ED is not a jury matter, the court can order a complete new trial or simply reopen the evidence regarding specific issues. Rule 59.

iii. Unlike child and spousal support and custody, a trial court has no authority to modify an equitable distribution judgment, other than as allowed by Rules 52 and 59 discussed above. *See Whitworth v. Whitworth*, 222 NC App 771 (2012).

1. Regarding DROs and QDROs, see section V. below.

iv. Rule 60 motions

1. Rule 60(a) to fix clerical mistakes

1. Used to correct oversights or omissions at any time on court's own motion or on motion of a party.
2. Rule 60(a) cannot be used to affect the substantive rights of the parties or to correct substantive errors in a judgment.
3. Okay to use Rule 60(a) to change QDRO to require wife to pay all fees and penalties associated with the lump sum transfer of sums from husband's retirement account where original order did not address the fees and penalties, but other orders entered at same time showed clearly that failure to include the fee and penalty provision was an oversight and omission. *Lee v. Lee*, 167 NC App 250 (2004).
4. Okay to use Rule 60(a) to change date at which interest began to accrue on a distributive award to the date of the amended ED judgment rather than the original ED judgment. *Ice v. Ice*, 136 NC App 787 (2000).

2. Rule 60(b) to “relieve a party ... from a final judgment, order or proceeding” under circumstances listed in the Rule.
  1. Rule 60(b) cannot be used to correct errors of law.
3. The appellate courts have stated numerous times that Rule 60(b) cannot be used to modify or amend a judgment, *see e.g., White v. White*, 152 NC App 588 (2002), but the court also has upheld a modification of an ED judgment pursuant to Rule 60(b). *See Harris v. Harris*, 162 NC App 511 (2004)(modification of QDRO).
4. A trial court cannot use Rule 60(b) to nullify or avoid one or more of the legal effects of a judgment while leaving the judgment itself intact. Rule 60(b) requires that the entire judgment be set aside. *See Howell v. Howell*, 321 NC 87 (1987)(trial court erred when it tried to set aside “effects” of divorce judgment without actually setting aside the divorce in order to allow party to assert claim for ED).
5. The decision whether to grant relief pursuant to Rule 60(b)(6) always is a discretionary one for the trial court.
6. Okay to use Rule 60(b)(6) to set aside order where after ED judgment entered, wife learned husband had encumbered a marital asset in violation of the injunction entered in the ED case while it was pending and the encumbered asset was awarded to wife in ED judgment. *Sloan v. Sloan*, 151 NC App 399 (2002).
7. Okay to refuse to set aside ED judgment because of significant decline in value of stock market after distribution. *Lee v. Lee*, 167 NC App 250 (2004). Court states there must be extraordinary, unforeseeable circumstances to justify use of Rule 60(b)(6).
8. Okay to use Rule 60(b) to set aside QDRO providing husband would pay a distributive award from husband’s retirement account “plus gains and losses from the date of separation” where parties’ agreement clearly showed intent for wife to receive only the amount of the distributive award. *Harris v. Harris*, 162 NC App 511 (2004).

### III. Remand from Appellate Court

- a. See generally discussion of remand procedure in ED cases in Bench Book, Family Law Volume, Chapter 6, Equitable Distribution.

- b. Trial court should carefully follow remand instruction from appellate court whenever such instructions are given.
- c. Unless specifically ordered otherwise by the appellate court, trial court generally has discretion to determine whether to rely on existing record or to hear additional arguments from parties and/or take additional evidence. *See Smith v. Smith*, 111 NC App 460 (1994).
- d. At least one case has held that anytime a case is remanded for reconsideration of distribution, the trial court should allow parties to present evidence on any distribution factor that has changed since time of original hearing. *See Fox v. Fox*, 114 NC App 125 (1994). *See also Hill v. Hill, unpublished*, 259 NC App 732 (2018)(where marital estate changed on remand, trial court was required to modify distribution even though original distribution had been affirmed on appeal).

IV. **Enforcement of Judgment.** See generally discussion of enforcement remedies in ED cases in Bench Book, Family Law Volume, Chapter 6, Equitable Distribution.

a. Contempt

- i. ED judgment is enforceable by contempt. *Conrad v. Conrad*, 82 NC App 758 (1986).
- ii. Trial court has no authority to order the payment of compensatory damages in a contempt matter. *See Hartsell v. Hartsell*, 99 NC App 380 (1990)(error for trial court to order husband to pay wife damages for repair and clean-up when he failed to deliver home to wife in good condition).
- iii. However, trial court can award attorney fees in a contempt proceeding even though attorney fees are not available in the underlying ED proceeding. *Hartsell v. Hartsell*, 99 NC App 380 (1990).
- iv. Unlike custody, child support and alimony, ED judgments cannot be enforced by contempt while the ED judgment is on appeal. *Guerrier v. Guerrier*, 155 NC App 154 (2002). However, violations of the judgment may be punished by contempt when appeal is complete. *See Joyner v. Joyner*, 256 NC 588 (1962)(One who violates order while appeal is pending does so at his own peril. If order is upheld on appeal, violation may be punished when jurisdiction is returned to trial court).

b. Execution

- i. In *Romulus v. Romulus*, 216 NC App 28 (2011), the court of appeals held that execution is available for the enforcement of a distributive award.

- ii. Execution is not stayed by appeal unless a bond is posted pursuant to GS 1-289.
  - iii. However, appeal does divest trial court of jurisdiction. So if a distributive award is ordered to be paid in periodic payments, the trial court cannot determine the amount presently due and payable and therefore subject to execution, while the appeal is pending. *Romulus*.
- c. Rule 70 of Rules of Civil Procedure
- i. “If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any specific act and the party fails to comply within the time specified, the judge may direct the act to be done at the cost of the disobedient party by some other person appointed by the judge and the act when so done has like effect as if done by the party.” See *Martin v. Roberts*, 177 NC App 415 (2006).
  - ii. For real or personal property located in this state, the judge also may enter a judgment divesting the title of any party and vesting it in others.
  - iii. ED judgment actually can transfer or convey title without the need to use Rule 70, but to do so, the judgment itself must contain everything required for deeds and other instruments of conveyance. *Martin v. Roberts*.
  - iv. A Rule 70 order is not entered until reduced to writing, signed by the judge and filed with the clerk of court. *Dabbondanza v. Hansley*, 249 NC App 18 (2016)(oral directive from judge to the clerk was not sufficient to give clerk the authority to sign the deed).

## V. QDRO Issues

- a. Modification or correction of DRO or QDRO after entry
  - i. Rule 60(a) can be used to correct a clerical mistake in a DRO or QDRO. The key is determining when a mistake is clerical and when it is more substantive.
    - 1. Okay to use Rule 60(a) to change QDRO to require wife to pay all fees and penalties associated with the lump sum transfer of money from husband’s retirement account where original order did not address the fees and penalties. *Lee v. Lee*, 167 NC App 250 (2004). Other QDROs entered in the case included the fees and penalties provision, making it obvious the exclusion was a result of an “oversight or omission”.

2. *Cf. Morris v. Gray*, 181 NC App 552 (2007) where court of appeals held trial court erred in entering a new QDRO when original employer declared bankruptcy and new entity became administrator of plan. Appellate court said trial court may have considered motion pursuant to Rule 59 or 60(b).
- ii. Rule 60(b)
1. The court of appeals has held that a Rule 60(b) motion cannot be used to amend a QDRO because while Rule 60(b) allows a party to seek relief from a judgment, it does not authorize a court to amend a judgment. *White v. White*, 152 NC App 588 (2002). *But cf. Harris v. Harris*, 162 NC App 511 (2004) (modification of QDRO to reflect agreement originally entered between the parties).
  2. Rule 60(b) is the appropriate rule for attacking the validity of a QDRO on the basis of a lack of subject matter jurisdiction. *Hillard v. Hillard*, 733 SE2d 176 (NC App 2012).
- iii. Motion in the Cause to Amend QDRO
1. Generally, the trial court has no subject matter jurisdiction to act in a case after final resolution of all pending claims. *See Whitworth*.
  2. While postjudgment motions allowed by the Rules of Civil Procedure are available in ED cases as in all other civil cases, there is no authorization of continuing jurisdiction after final resolution of the case, as there usually is in custody and support actions where court has statutory authority to modify judgments based on changed circumstances. *Whitworth*.
  3. However, courts always retain jurisdiction to enforce judgments. *Whitworth, citing Wildcat v. Smith*, 69 NC App 1 (1984).
  4. In addition, the court in *White v. White*, 152 NC App 588 (2002), held that the trial court had jurisdiction to consider a motion in the cause filed by party seeking to amend a DRO originally entered approximately 11 years earlier to divide a military pension. According to the court in *White*, the federal law regarding division of military pensions (10 USC sec. 1408(d)) expressly contemplates that military pension division orders may be modified. In addition, the original trial court order had expressly stated that the division order “shall remain in effect until

further orders of the court.” Because the amendment in the *White* case was based on fact that after entry of the original DRO, husband elected to waive his military retirement in order to receive military disability thereby significantly reducing former wife’s share of his monthly payment, the motion in the cause may be considered a method of enforcing the original ED judgment which ordered that wife receive “one-half of the [former husband’s] pension accumulated during the marriage.” See discussion in section V.b. below.

b. Waiver of Military Pension Pay for Disability Pay

- i. The federal Uniformed Services Former Spouses Protection Act, 10 USCA 1408, authorizes the distribution of a service member’s military retirement benefits but does not allow state courts to distribute military disability payments. *Mansell v. Mansell*, 490 US 581 (1989).
- ii. Generally speaking, a retired service member cannot receive both retirement benefits and disability payments. Instead, retirees can receive disability only to the extent they waive receipt of retirement pay. This waiver can occur at any time – before or after a trial court has entered a DRO distributing military retirement – and the election is at the will of the service member, once the service member qualifies for disability. Service members often prefer disability pay over retired pay because disability pay is not taxable income to the service member as is retirement pay. A former spouse’s share of retirement pay will diminish as the retirement pay diminishes. See *Mansell*; *White*.
- iii. Concurrent Pay. Beginning in 2004, federal law allows some retirees to receive both retirement and disability pay. 10 USC sec. 1414. See discussion and citations in Mark Sullivan and Gene Brentley Tanner, *Military Pension Division and Disability: The Hillard Case*, Family Forum, Vol. 33, No. 3, March 2013. The 2004 provisions have been phased in over a 10-year period and by 2014, military retirees eligible for concurrent pay will receive their total retirement pay and their total disability pay.
  1. Concurrent pay is available only to military retirees with at least a 50% disability rating and who had 20 years of service prior to retirement. All other retirees will remain subject to the dollar-for-dollar waiver rules.

2. Also beginning in 2004, Congress created a new form of disability pay for service members called Combat-Related Special Compensation Benefits. This form of disability pay is not subject to the Concurrent pay provisions and will be subject to the dollar-for-dollar waiver requirements. *See Sullivan, id.* This means that if a service member elects to receive Combat-Related Special Compensation Benefits, payments made to a former spouse pursuant to a DRO will be reduced or eliminated.
- c. Authority of Court in ED case regarding waiver of retirement pay for disability pay.
    - i. In an original ED judgment, trial court cannot distribute military disability pay but can consider military disability pay as a distribution factor. Trial court cannot give dollar-for-dollar credit on an unequal division of remaining retirement funds or other assets to account for or offset the disability conversion. *Halstead v. Halstead*, 164 NC App 543 (2004).
    - ii. In original ED judgment, trial court cannot prohibit military spouse from waiving retirement for disability in the future. *Cunningham v. Cunningham*, 171 NC App 550 (2005)
    - iii. After judgment, court cannot amend ED judgment to increase share of retirement pay received by non-military spouse to make up for amount waived for disability pay. *Howell v. Howell*, 137 S.Ct. 1400 (2017). Note: The US Supreme Court opinion in *Howell* reverses the decision in *White v. White*, 152 NC App 588 (2002), *aff'd per curiam*, 357 NC 153 (2003) and significantly impacts the validity of the reasoning in *Hillard v. Hillard*, 733 SE2d 176 (NC App 2012).
    - iv. See blog post *On the Civil Side*, January 17, 2018, [civil.sog.unc.edu/military-disability-pay-its-not-marital-property-but-it-is-income/](http://civil.sog.unc.edu/military-disability-pay-its-not-marital-property-but-it-is-income/)
  - d. Entry of QDRO when no equitable distribution claim has been filed
    - i.



## **Military Disability Pay: It's not marital property but it is income**

In an opinion issued yesterday, the NC Court of Appeals reaffirmed that while military disability pay cannot be distributed by a court in equitable distribution, it is income that can be considered when the trial court is looking for a source of payment for a distributive award. [Lesh v. Lesh, NC App \(Jan. 16, 2018\)](#). In reaching this decision, the court rejected the argument that this rule was changed by the recent decision by the US Supreme Court in [Howell v. Howell, 137 S. Ct. 1400 \(2017\)](#), wherein the Court reiterated that federal law prohibits the distribution of military disability in equitable distribution.

[Lesh](#) and [Howell](#) present a good opportunity to review the law regarding military disability pay in domestic relations cases.

### **Military Disability Pay Cannot be Distributed in ED**

The federal Uniformed Services Former Spouses' Protection Act authorizes states to treat veterans' "disposable retired pay" as property divisible upon divorce, [10 U. S. C. §1408](#), but the definition of disposable retired pay does not include disability benefits. Therefore, federal law prohibits the distribution of military disability benefits in equitable distribution proceedings. *Mansell v. Mansell*, 490 US 581 (1989). Military disability pay is the separate property of the veteran. [Lesh](#); *Hillard v. Hillard*, 223 N.C. App. 20 (2012); *Halstead v. Holstead*, 164 NC App 543 (2004); *Bishop v. Bishop*, 113 NC App 725 (1994).

### **Retirement Can Be Converted to Disability and There's Not Much A Trial Court Can Do About It**

Unless a retired service member qualifies for concurrent pay pursuant to [10 U.S.C. § 1414\(a\)\(1\)](#) (most retirees with at least 20 years qualifying service and a service-related disability of at least 50%), a service member cannot receive both disability pay and retirement pay. This means that many service members must waive retirement pay in order to receive disability pay. Many disabled service members decide to "convert" their retirement pay to disability pay when they become eligible to do so because disability pay is not taxed and cannot be distributed in divorce proceedings.

A service member can waive retirement for disability at any point in time after a service member becomes entitled to receive disability pay. If the conversion occurs before a court enters an order for equitable distribution, the court can consider the disability payments as a distributional factor but cannot give dollar-for-dollar "credit" in distribution to make up for any retirement pay lost due to conversion to disability. *Halstead v. Halstead*, 164 N.C. App. 543(2004).

A service member retains the right to convert retirement to disability even after a state court has awarded a portion of the member's retirement pay to the member's former spouse in an equitable distribution judgment. When this conversion occurs, the amount of retirement pay received by the former spouse of the service member generally is reduced. A trial court may not prohibit a service member from converting retirement pay to disability in the future. *Cunningham v. Cunningham*, 171 N.C. App. 550, 558 (2005).

However, North Carolina appellate courts as well as appellate courts in other states have held that federal law does not restrict the ability of a state court to enforce a judgment dividing military retirement pay entered before a service member converted the retirement pay to disability pay. Therefore, amendments to retirement distribution orders made by trial courts to "effectuate" the terms of the original court order have been upheld. In *White v. White*, 152 N.C. App. 588 (2002), the court of appeals held that the trial court had authority to hear wife's motion to amend a qualified domestic relations order (QDRO) to seek an increase in her share of husband's remaining retired pay to offset the amount of retirement waived by the serviceman. And, in *Hillard v. Hillard*, 223 N.C. App. 20, 24 (2012), the court of appeals affirmed the trial court's decision to amend the ED order after the service member waived retired pay to receive disability pay to require the service member to pay wife "the portion of his retirement required by the previous order." According to the court of appeals, this order did not impermissibly distribute disability pay, as the service member could fund payments from source of his choice.

The recent decision by the US Supreme Court in *Howell v. Howell* rejected this reasoning by state courts and effectively overruled both *White* and *Hillard*.

### [Howell v. Howell](#)

An Arizona trial court awarded Sandra Howell 50% of John Howell's future Air Force retirement pay, which she began to receive when John retired the following year. About 13 years later, John elected to waive about \$250 of his retirement pay per month in order to receive that amount in disability pay. This election resulted in a reduction in the value of Sandra's 50% share of his retirement pay. Sandra petitioned the Arizona court to enforce the original divorce decree and restore the value of her share of John's total retirement pay. The state court held that the original divorce decree gave Sandra a vested interest in the pre-waiver amount of John's retirement pay and ordered John to ensure that she receive her full 50% without regard for the disability waiver. The Arizona Supreme Court affirmed, holding that federal law did not pre-empt the family court's order.

The Supreme Court reversed and held that a state court may not order a veteran to indemnify a divorced spouse for the reduction in the value of the divorced spouse's portion of the veteran's retirement pay caused by the veteran's waiver of retirement pay to receive disability benefits. The Court held that federal law completely prohibits states courts from treating waived military retirement pay as divisible property because the waived retirement becomes disability pay. The fact

that the waiver occurred after entry of the division order and the state court was attempting to “indemnify” or “reimburse” Sandra for the “vested right” she received when the division order was entered did not change the basic nature of the trial court order. According to the Court, a state court cannot “vest [a right in a party] which [that court] lack(s) the authority to give.”

The Court explained that since there is nothing a state court can do to prohibit the conversion or to compensate the non-military spouse after a conversion, the contingency of a conversion is something a state court should consider when valuing the retirement account in the property distribution proceeding. In addition, the court suggested that the loss to the non-military spouse resulting from a conversion may be the basis for a reconsideration of alimony.

### **But Disability Pay is Income**

In [Lesh](#), the trial court classified husband’s military disability pay as separate property but considered the disability pay as a source of income available to husband to pay a distributive award. Husband argued on appeal that this judgment violated [Howell](#) because it effectively required him to “reimburse” or “indemnify” wife for the retirement she lost when he accepted the disability pay.

The court of appeals disagreed, pointing to another decision by the US Supreme Court. In *Rose v. Rose*, 481 US 619 (1987), the Court explained that the fact that disability pay must be classified as separate property does not mean that it is not income to the receiving party and held that a veteran’s disability income could be considered as a source of income from which he could pay his child support obligation. According to the Court, there is nothing in federal law indicating “that a veteran’s disability benefits are provided solely for that veteran’s support.” See also *Comstock v. Comstock*, 240 NC App 304 (2015)(U.S. Trust IRA was separate property due to federal law but was a liquid asset the court could consider as a source of payment of a distributive award); and *Halstead v. Halstead*, 164 N.C. App. 543(2004)(military disability pay is separate property that can be considered as a distribution factor in ED proceeding).

## Equitable Distribution: Change in Federal Law Regarding Military Pensions Part 1

Before 1981, military pensions were not subject to division by state courts in marital dissolution proceedings. However, Congress enacted the [Uniformed Services Former Spouses Protection Act \(USFSPA\)](#) to provide that, for pay periods after July 25, 1981, “disposable retired pay” of military personal is subject to division by a state court in a divorce proceeding. [10 USC 1408\(c\)\(1\)](#). Effective December 23, 2016, Congress has changed the definition of “disposable retired pay” as it relates to property distribution upon divorce in a way that has left family law practitioners and judges across the country struggling to quickly determine how to reconcile existing state law with the new federal definition. In this blog post, I will try to explain the change as it relates to North Carolina equitable distribution law. In my next post, I will discuss some issues and questions arising from the change.

### The Change to Federal Law

Before the effective date of this amendment, the [USFSPA](#) defined “disposable retired pay” as “the total monthly retired pay to which a member is entitled less [certain specified] amounts.”

The 2016 amendment adds that the:

“monthly retired pay to which a member is entitled shall be—

“(i) the amount of basic pay payable to the member for the member's pay grade and years of service at the time of the court order, as increased by

“(ii) each cost-of-living adjustment that occurs under section 1401a(b) of this title between the time of the court order and the time of the member's retirement using the adjustment provisions under that section applicable to the member upon retirement.”.

[National Defense Authorization Act for Fiscal Year 2017](#), sec. 641; PL 114-328, December 23, 2016, 130 Stat 2000.

Before this amendment, state courts had the authority to order a division of any portion of a service member’s disposable retirement pay, even if retirement occurred many years after the property division and the total disposable retired pay reflected years of continued service following the state property division. The new amendment means that state courts now have authority to distribute only that portion of a member’s final retirement pay that would have been paid to the service member had she or he retired on the date of the entry of divorce plus any cost of living adjustments that occur between the time of divorce and the actual retirement of the service member.

## How does this affect North Carolina law?

It appears that this change will not affect either the classification or the valuation of a military pension in a North Carolina equitable distribution proceeding.

[G.S. 50-20.1](#) requires that all pensions be classified using the coverture fraction; the numerator of the fraction represents the number of years of the marriage, up to the date of separation, which occurred simultaneously with the employment that earned the pension, and the denominator represents the total number of years during which the pension accrued up to the date of separation. So for example, if one spouse has been employed by the same company earning a pension for 10 years by the date of separation, and the parties were married for 5 of those years, we know that 5/10ths or one half of the date of separation value of the pension is classified marital property. See *Bishop v. Bishop*, 113 NC App 725 (1994); *Robertson v. Robertson*, 167 NC App 567 (2004). Because classification is determined as of the date of separation and the date of separation always will be before the date of divorce, the federal change to the definition of disposable retired pay will not affect the classification of any pension under North Carolina law.

Similarly, North Carolina law requires that pensions be valued as of the date of separation by assuming that the military service member retired on the date of separation. *Bishop*. So again, because the date of separation always will be before the date of divorce, the change to the federal law will not result in a change in the value of a pension under North Carolina law.

## What about distribution?

In [Seifert v. Seifert, 319 NC 367 \(1987\)](#), the Supreme Court approved of the use of a very common application of the distribution method authorized by [GS 50-20.1\(a\)\(3\) and \(b\)\(3\)](#). Referred to as “the fixed percentage method” or “deferred distribution,” these statutes authorize the court to make an award of pension benefits payable “as a prorated portion of the benefits made payable to the designated recipient at the time the party against whom the award is made actually begins to receive the benefits.” The *Seifert* court approved use of a specific fraction to determine the “prorated portion of benefits” to be paid in the future. The fraction is the total time earning the pension while married up to the date of separation over the total time earning the pension up to the time of actual retirement.

This fraction is applied to the total disposable retired pay of a service member, which until December 2016 was defined to mean the total retirement pay of the service member at the time of actual retirement. Service members have argued that application of a fraction such as the one approved in *Seifert* inappropriately allowed the non-service member spouse to share in increases in retirement benefits earned by the service member spouse after the date of separation. The court in *Seifert* rejected this argument, holding instead that using a fraction that takes into account the total employment time earning the pension makes “deferral of payment ... possible without unfairly reducing the value of the award [to the nonemployee spouse]... and [allows] the nonemployee

spouse [to] share in any growth in the benefits [earned during the marriage].”

The recent change in the federal definition of disposable retired pay will significantly affect the amount of benefits that will be received by a former spouse of a retired service member if the fraction approved in *Seifert* continues to be used. That is because the fraction will be applied to a smaller number, the amount of retirement pay the service member would have received if he or she retired on the date the divorce judgment was entered plus cost of living adjustments that accrued between that date and the actual date of retirement.

Consider an example. Wife joins the military shortly after marriage. Parties separate after 20 years and the court decides the pension is 100% marital and husband should receive 50% of the marital portion. Wife stays in military until she retires with 30 years of service. Her disposable retired pay under the old definition (and the amount she actually will receive even with this new definition applicable only for the purpose of property distribution upon divorce) is \$3000 per month. Application of the *Seifert* fraction to the \$3000 will result in payment to husband of \$1020 per month. [20 years/30 years times 50% times \$3000 = \$1020]

However, application of the fraction to the new definition of disposable retired pay means that, assuming for the sake of a simple illustration that the divorce judgment is entered the same year the parties separate, husband will be awarded a portion of a 20 year retirement benefit plus cost of living adjustments rather than a portion of a 30 year benefit. Let's assume for this example that this amount would be \$2200. When wife retires after 30 years, husband will receive \$748 per month rather than the \$1020 he would have received before the legislative change. [20 years/30 years times 50% times \$2200 = \$748].

### **This Raises Some Questions**

I think the first legal issue to address is the question of whether application of the *Seifert* fraction in light of this change results in distributions that may be inherently unfair to the non-military spouse. If so, does North Carolina law actually require that we use the *Seifert* fraction or are judges and litigants free to determine the “prorated portion of the benefits made payable to the designated recipient at the time the party against whom the award is made actually begins to receive the benefits” in some other way?

I will write about that in the next blog. In the meantime, let me know if you have thoughts about any of this.

## Equitable Distribution: Change to Federal Law Regarding Military Pensions Part 2

[In my last blog post](#), I wrote about a recent change to federal law regarding the portion of a military pension subject to division by a state court in a divorce proceeding. Effective December 23, 2016, the definition of disposable retired pay in the context of a division of a military pension in a marital dissolution proceeding found in 10 USC sec. 1408 was amended to be the amount a service member would have received had he retired on the date of divorce plus cost of living adjustment accruing between the date of divorce and the date of actual retirement. Before amendment, the definition of disposable retired pay was the total amount a service member receives upon actual retirement, regardless of whether that amount reflected years of service and elevations in rank of the service member following the date of divorce.

The change in the definition of disposable retired pay does not appear to impact the way we classify and value a military pension under North Carolina equitable distribution law, but the change does raise issues regarding how military pensions actually are divided between the parties when the fixed percentage, deferred distribution method of division is used.

### Distribution Methods

In [Seifert v. Seifert, 319 NC 367 \(1987\)](#), the Supreme Court explained the difference between the immediate offset method of distributing a pension and the fixed percentage, deferred distribution method. In the immediate offset method, the pension is valued and distributed to the service member whose employment earned the pension. The other spouse receives more marital property to offset the value of that spouse's marital interest in the pension that is distributed to the service member spouse. This method is not the most common distribution method because it requires that there be sufficient other marital property to offset the value of the pension. In most cases, the value of a marital pension far exceeds the rest of the marital estate. If the immediate offset method is used to accomplish an equitable distribution, the recent change to the federal law will not affect the process at all.

The fixed percentage, deferred distribution method is far more common. The division of the marital portion of a pension is accomplished by the entry of an order designating the portion of each future retirement check that must be paid to the non-service member former spouse when the service member retires and begins to receive retirement benefits. The *Seifert* court approved of the use of a fraction to determine the portion of each future pension check payable to the non-service member spouse. In that case, the fraction was to be applied to the total retirement pay received by the service member upon retirement, an amount determined by his rank and years of service at the time of retirement. The recent change in federal law means that the fraction set out in our division orders now will be applied to a lesser amount, the amount the service member would be receiving

had he or she retired on the date of divorce\*\* plus any cost of living adjustments accruing between the date of divorce and the service member's actual retirement date.

### **Do we need to modify the *Seifert* fraction?**

The fraction used in [Seifert](#) had a numerator that was the amount of time earning the pension while married up to the date of separation and a denominator that was the total time the service member spent earning the pension up to the time of his retirement.

While the *Seifert* court decided that application of this fraction to award the non-service member a share of the total pension earned by the service member up to the date of retirement was fair because it protected the non-service member's interest in the growth of the marital interest over time, application of this same fraction to the lesser amount now authorized by federal law will result in a dilution of the non-service member's marital interest. For a discussion of this dilution effect that at least one appellate court concluded is unfair to the non-service member spouse, see [Douglas v. Douglas, 454 SW3d 591 \(Tex. App. 2014\)](#). To avoid this dilution, the denominator of the fraction must be the total time earning the benefits that actually are being divided rather than the total time earning all the benefits the service member will receive. With the change in the federal law, the benefits actually being divided are only those earned by the service member up to the date of the divorce.

### **Can we apply the *Seifert* formula this way?**

I think so. The court in [Seifert](#) defines the denominator of the fraction used in that case as "the total period of participation in the plan." I do not think it is inaccurate to interpret this definition to mean the total period of participation in the plan "earning the amount being divided." That certainly is what the court meant considering the facts in [Seifert](#), but the amount being divided in that case was the member's full retirement pay. If we define the amount being divided in accordance with the new federal law, the denominator should be the total number of years earning the pension up to the date of the divorce.

Returning to the admittedly over simplistic example from my last post, let's assume we have spouse who served in the military 20 years while married up to the date of separation, 22 years up to the date of divorce and 30 years by the time of actual retirement. Also assume the non-service member is awarded 50% of the marital portion of the pension. The fraction as applied in [Seifert](#) was  $20/30$  times 50% times the disposable retired pay received by the service member when he retires. If the disposable retired pay is the service member's full retirement, [Seifert](#) says that is fair. But if the fraction is applied to the reduced disposable retired pay now required by the federal law, using 30 years as the denominator dilutes the share of the non-service member spouse. To accurately account for the marital interest in the amount actually available for division, the denominator should be 22 years rather than 30.



## Other pensions

A change in the fraction may take care of the unfair dilution. However, courts and practitioners also should remember when fashioning distributions that this change in federal law applies only to military pensions. So, if one spouse has a military pension and the other has, for example, a North Carolina state employee pension, the *Siefert* fraction still will be applied to the state employee's full retirement benefits at the time of retirement while the amount of the military pension to be divided will be the reduced disposable retired pay.

Should courts and practitioners somehow adjust the distribution to account for this difference? This is a difficult question to answer because the difference in the two pensions will not be reflected in their valuation within the context of the equitable distribution proceeding. For this reason, we cannot assume that the military pension is somehow less valuable than the state employee's pension. Even if it is less valuable, if we use the correct fraction to designate the portion of the military pension that should be paid to the non-service member spouse, how significant will the difference be between what the military pension would have been before the federal law change and what it is now, especially when we add in the cost of living adjustments? That certainly is not something to be considered without actual evidence in each individual case.

I would love to have comments from those of you with more experience actually drafting division orders. Are there other issues raised by this change in the federal law?

\*\*I use the term divorce judgement because the [Uniformed Services Former Spouses Protection Act, 10 USC 1408](#), defines the term court order as "a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree judgment." The amendment changing the definition of disposable retired pay fixes the pay at the time of "the court order".