

# Family Law for District Court Judges: Part 1

May 1-3, 2023

UNC School of Government, Chapel Hill, N.C.

## Monday, May 1

- 1:00pm**      **Welcome, Class Overview, and Introductions**  
Cheryl Howell, Albert Coates Professor of Public Law and Government, School of Government
- 1:15pm**      **Equitable Distribution: Procedure and Pre-trial Issues** [1.25 CJE]  
Cheryl Howell  
Judge Carrie Vickery, District Court, Winston-Salem
- 2:30pm**      **Break**
- 2:45pm**      **Equitable Distribution continued: The Magnolias** [1.0 CJE]  
Cheryl Howell and Judge Vickery
- 3:45pm**      **Break**
- 4:00pm**      **Equitable Distribution continued** [1.0 CJE]  
Cheryl Howell and Judge Vickery
- 5:00pm**      **Adjourn**

## Tuesday, May 2

- 9:00am**      **Equitable Distribution continued** [1.5 CJE]  
Cheryl Howell and Judge Carrie Vickery
- 10:30am**      **Break**
- 10:45am**      **Equitable Distribution continued** [1.75 CJE]  
Cheryl Howell and Judge Carrie Vickery
- 12:30pm**      **Lunch at School of Government**
- 1:30pm**      **Spousal Support: PSS and Alimony** [1.25 CJE]  
Cheryl Howell

Judge K. Michelle Fletcher, District Court, Greensboro

- 2:45pm**      **Break**
- 3:00pm**      **Spousal Support continued** [1.5 CJE]  
Cheryl Howell and Judge Fletcher
- 4:30pm**      **Adjourn**

### **Wednesday, May 3**

- 9:00am**      **Spousal Support continued** [1.5 CJE]  
Cheryl Howell and Judge Fletcher
- 10:30am**      **Break**
- 10:45am**      **Separation Agreements and Property Settlements** [2.25 CJE]  
Cheryl Howell
- 1:00pm**      **Adjourn**

This program will have **13 hours** of instruction, all of which will qualify for general continuing judicial education credit under Rule II.C of Continuing Judicial Education. All 13.00 hours count towards Family Court Hours.

# Tab: Equitable Distribution

**Procedural Issues in Equitable Distribution**

Cheryl Howell  
May 2023

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1

**Various Procedural Rules**

- Need *in personam* jurisdiction over defendant  
Service of Process and Minimum Contacts
- District court has exclusive subject matter jurisdiction over ED claims
- Claim can be filed and adjudicated “at any time after the husband and wife begin to live separate and apart.”  
GS 50-21(a)
- Claim must be asserted before entry of absolute divorce  
“Reserving” in divorce judgment doesn’t work

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**More procedural rules**

- No jury trials allowed for any issue within ED
- No right to an attorney
- No attorney fees  
(except for contempt)
- ED is not an exclusive remedy  
No such thing as ‘marital property’ until parties separate and one requests ED  
All common law remedies remain available for property not addressed through ED

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**Procedural Stuff**

- Claim can be filed, or can proceed if already filed, after death of one party
- ED must be determined without regard to alimony and child support
  - Alimony can be tried before or after Equitable Distribution
- ED judgment enforced by contempt
  - Except distributive award also can be enforced through execution
- ED judgments cannot be modified
  - Only remedy is Rule 59 or 60

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**MUST establish date of separation early in the case**

- Stipulation
- Bifurcated trial
  - GS 1A, Rule 42(b)

**Date of separation in divorce judgment is not binding in the equitable distribution case**

- *Stafford v. Stafford*, 351 N.C. 94, 520 S.E.2d 785 (1999)

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**Family Financial Mediation**

**G.S. 7A-38.4A**

- "Any chief district court judge in a judicial district **may order** a mediated settlement conference or another settlement procedure, ... for any action pending in that district involving issues of equitable distribution, alimony, child or post separation support, or claims arising out of contracts between the parties under G.S. 52-10, G.S. 52-10.1, or Chapter 52B of the General Statutes.

**Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases (FFS Rules)**

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

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- Delay in entry of judgment is huge problem
- If party can show prejudice from delay, court of appeals will order new trial
  - 19-month delay required new trial
  - Wall v. Wall*, 140 NC App 303 (2000)
  - 2-year delay admonished
  - Sisk v. Sisk*, 729 SE2d 68 (2012)
- *Nunc pro tunc* not available to 'fix' delay
  - Whitworth v. Whitworth*, 731 SE 2d 707 (2012)
  - Dabbondanza v. Hansley*, 791 S.E.2d 116 (2016)

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Requests for TRO  
GS 50-20(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.”

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Bond required?

Rule 65 says yes

*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).

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Inventory Affidavits

- First party to file ED must file affidavit within 90 days
- Other party must respond within 30 days
- Does your district have a different schedule?

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Inventory Affidavits

- “Deemed in the nature of Interrogatories”
  - See *Helms v. Helms*  
191 NC App 19 (2008)
- Subject to Rule 11
- Failure to supply required information subject to:
  - Rule 26: General Discovery Rules
  - Rule 33: Interrogatories
  - Rule 37: Motions to Compel and Sanctions

See *Ward v. Ward*, unpublished, 736 NC App 647 (2013)

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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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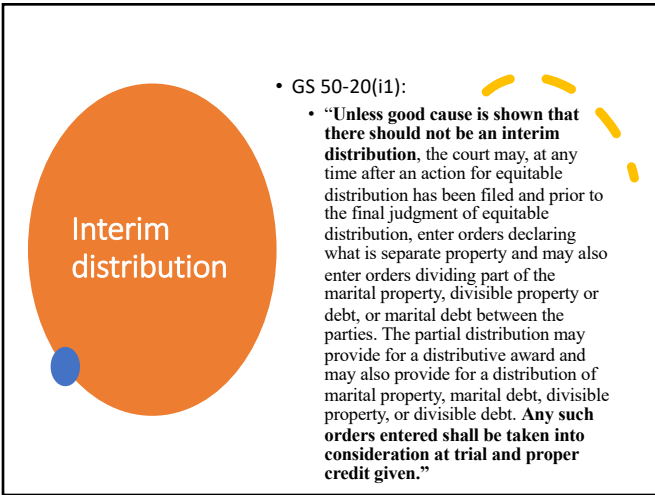
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Interim distribution

- GS 50-20(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.**”

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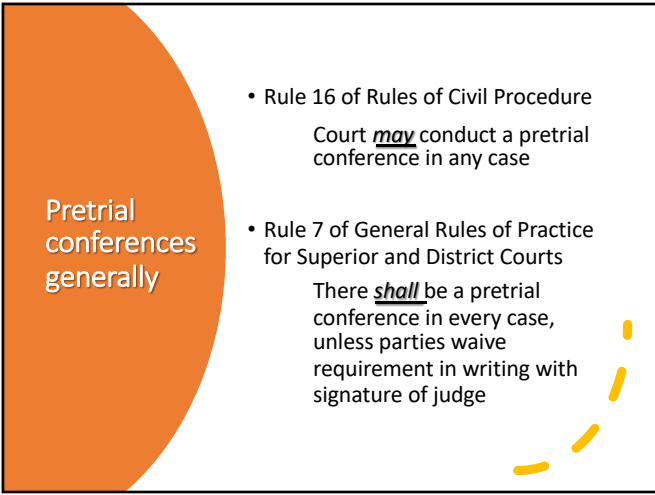
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Pretrial conferences generally

- 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:
  - 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:

1. Scheduling and discovery conference to be requested by party first filing ED within 120 days of filing
2. At scheduling and discovery conference, must set date for initial pretrial conference
3. 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 *Plomaritis v. Plomaritis*, 730 SE2d 784 (NC App 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

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Cases to consider.....

*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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## Equitable Distribution

### Introduction (1/54)

This session is intended to be an introduction to North Carolina law relating to equitable distribution. *Equitable distribution* is the legal system adopted in North Carolina to govern the distribution of property between separated and divorced spouses.

### Navigating the Course (2/54)

This course will play itself, however, you can navigate by using the arrows at the bottom of the screen to pause, go forward and go back. The menu to the right of your screen also allows you to move through the course.

### Course Objectives (3/54)

It is my hope that at the end of this program you will be able to do each of the following:

- Identify the key principles underlying the equitable distribution laws in North Carolina
- State the tasks judges must complete to enter a legally correct distribution judgment
- Define the key terms governing the classification of property
- Recognize the importance of valuing every asset and debt identified as marital or divisible; and finally
- Define the role of distribution factors in determining the final division of assets and debt between parties

### Equitable Distribution (4/54)

North Carolina adopted equitable distribution as the method for distributing property between divorcing spouses in 1981. Our equitable distribution statutes are found in North Carolina General Statutes Chapter 50-20, 50-20.1, 50-21. These statutes have been amended numerous times since first adopted in 1981.

### Equitable Distribution (5/54)

Unlike community property systems found in a few other states, equitable distribution has no impact on property rights *during* a marriage. Marital property, as that term is defined in equitable distribution, does not exist until a married couple separates and one or both request that the court make an equitable distribution of marital property.

### Equitable Distribution (6/54)

Equitable distribution replaced the common law *title system* that distributed property between divorcing spouses based solely on legal title or common law ownership principles. Under the title system, the non-owning spouse generally had no right to any interest in the property. This system resulted in great hardship to spouses who had not worked outside of the home and

who had not acquired assets in his or her own name during the marriage.

#### Key Principles (7/54)

The first key principle of NC equitable distribution is that **marriage is viewed as an economic partnership** for purposes of property division upon divorce. Each spouse is conclusively presumed to have contributed to the acquisition of all property which meets the definition of marital property.

#### Key Principles (8/54)

The second key principle of equitable distribution is that **property acquired during the marriage should be divided equitably upon divorce**, not necessarily equally. While an equal distribution is presumed to be equitable, the judge makes the final decision as to the equity in individual cases based upon numerous factors listed in GS 50-20.

#### Key Principles (9/54)

Property is distributed based upon the court's consideration of these distribution factors listed in the statute, and **the legal title and/or ownership of the particular piece of property is not controlling** on the court. Equitable distribution gives the court the authority to transfer title and ownership as necessary to achieve the appropriate equitable distribution.

#### Key Principles (10/54)

North Carolina has adopted an expansive definition of marital property and the presumption that all property acquired during the marriage is subject to the court's distribution authority. However, **North Carolina law also retains very strong protections for what is defined as separate property**. If property meets the definition of separate, North Carolina law requires that the property be returned to the owner unless return is impossible. If return is impossible, the owner must be compensated fully for any separate property not returned in kind.

#### North Carolina Equitable Distribution (11/54)

So in review, the key principles under North Carolina equitable distribution are:

1. Marriage is an economic partnership for the purposes of distribution of property and debt upon divorce
2. All property and debt acquired during the marriage must be divided equitably between the parties
3. Title and ownership principles are not binding or controlling upon the court
4. And finally, separate property must be returned to the owner if at all possible.

## Tasks of a Judge (12/54)

The judge in an equitable distribution case has three basic tasks:

1. *Classify* the property and debt subject to distribution
2. *Value* that property and debt
3. And *distribute* that property and debt.

***Classify, Value and Distribute: Remember “CVD” - just like the court file***

## Overview of the 3 Steps (13/54)

Step 1 is Classification. Classification is the most legally technical and complicated part of the process. The appropriate classification of each asset and debt is a legal conclusion that must be supported by specific findings of fact. Classification is not the stage of the process for a judge to try to do equity. The law supplies the right answer based on the particular facts. Equity is accomplished later through the distribution process. Classification is the process through which the court creates the estate or *the pie* to be divided between the parties. The pie must be created in accordance with the strict statutory and case law requirements; however, once the pie is created, the court has tremendous discretion in determining how to ultimately divide it between the parties.

### Step 2 (14/54)

Step 2 is valuation. GS 50-20(c) provides that property must be divided between the parties using net value. Each asset and each debt subject to distribution must be valued *as of the date of the separation* in order to appropriately create the marital pie.

### Step 3 (15/54)

Step 3 is distribution. Once the court classifies and values the property and debt that make up the marital estate, the court then distributes that property and debt in the way the court determines to be equitable.

## Classification Definition (16/54)

We'll start with step 1 - classification. The definitions of *marital property*, *separate property* and *marital debt* are the fundamental components of classification. It is best to commit these three definitions to memory. Except for the very narrow category of property called *divisible property*,

which we will discuss in more depth later on, a trial court has no authority to distribute any property that does not meet the definition of marital property. The same is true for debt: a debt must meet the definition of marital debt before the court can distribute it. Technically, separate property is not distributed, it is returned to the owner. Early on in the life of equitable distribution in this state, the North Carolina appellate courts established a very strict reading of the statute: if property does not meet the definition of marital, it cannot be distributed by the court.

Marital Property: GS 50-20 (b)(1) (17/54)

GS 50-20 (b)(1) defines marital property as **all real and personal property acquired by either or both spouses, during the marriage and before the date of separation that is presently owned.** The North Carolina appellate courts have interpreted the phrase “*presently owned*” to mean owned on the date of separation. In addition, the statute specifically states that the definition of marital property *includes retirement and deferred compensation rights* earned during the marriage. These assets must be identified and valued as of the date of separation and they will be included in the marital estate even when the actual benefits may not be received by either party until sometime in the future. GS 50-20.1 contains all of the statutory provisions relating to the classification, valuation and distribution of retirement accounts **and other forms of deferred compensation.**

Because of the importance of the definition of marital property, we will briefly review each element of the definition.

Marital Property Definition(18/54)

First: **all real and personal property.** It is critical to always identify the specific property interest at issue. Land, furniture and cars are obvious examples. But property rights also include interests such as contract rights, intellectual property rights, frequent flyer miles and perhaps even accumulated sick leave. If it is a *property interest* acquired during a marriage and owned on the date of separation, it must be identified and valued.

Marital Property Definition(19/54)

**Acquired by either or both.** As I said earlier, common law title and ownership principles do not control classification. Marital property can be property that is titled in the name of one spouse alone and property paid for completely with money earned by one spouse alone. It also can include property owned jointly by both parties.

Marital Property Definition(20/54)

**After marriage:** *The marital partnership does not begin until the wedding day*, so even property acquired in anticipation of marriage is not included in the definition of marital property.

**Before the date of separation:** *The marital partnership ends on the date of separation, not the date of divorce. The property interest being considered must actually be owned on the date of separation by one or both parties. We don't care about anything bought and sold during the marriage. The goal of equitable distribution is to divide the estate of divorcing parties as that estate exists when the marriage partnership ends.* If property is not owned on the date of separation, there is no need for the court to divide it.

#### Marital Property (21/54)

So in review, marital property is all real and personal property acquired by either or both spouses, after the date of marriage and before the date of separation, that is owned on the date of separation.

#### Marital Property Example (22/54)

For example: A grand piano purchased during the marriage is marital property, even if wife paid for the piano from funds she earned entirely by giving piano lessons. This is because marital property includes property acquired by either or both spouses during the marriage. However, the piano will not be marital property if the wife gave the piano to her daughter a year before the parties separated. This is true because in order to be marital property, the property must be owned by either or both spouses on the day of separation.

#### Marital Property (23/54)

Significantly, 50-20(b)(1) states that it is *presumed* that property acquired after the date of marriage and before the date of separation is marital property. This presumption may be rebutted by the greater weight of the evidence. This presumption plays an important role in the allocation of the *burden of proof* during the classification and the valuation stage of the equitable distribution proceeding. We will discuss burdens of proof in detail a little bit later in this presentation.

#### Separate Property (24/54)

Let's turn to the definition of Separate property. Separate property also has a specific statutory definition and it is found in GS 50-20(b)(2). **Separate property is not simply anything that is not marital.** To be classified as separate, the property must fall into one of the categories listed in the statute. The first category of separated property is ***all property acquired before marriage***. If a spouse brings an asset into the marriage, that spouse is entitled to take that property at the end of the marriage if it is still owned. While all property acquired before marriage is separate property, some property actually acquired during the marriage is defined as separate property as well.



### Separate Property (25/54)

In addition to all property acquired before marriage, the following property also is separate property:

1. **Property acquired during the marriage by gift or bequest by a spouse.** If the gift or bequest is to both spouses, it is marital property. However, if a conveyance is truly a gift and the donor intends it to be a gift to one spouse alone, that gifted or bequeathed property is separate property.
2. **All property received during the marriage in exchange for separate property.** The owner of the separate property can trade his/her separate property during the marriage and the property acquired as a result of the exchange will retain the separate property classification. As long as it is an even trade, the new property will not be marital.
3. **All passive income earned from separate property during the marriage and all passive increases in the value of separate property during the marriage.** The owner of separate property is entitled to keep as separate property any income or any increased value that accumulates from the separate property during the marriage, as long as the income or increased value is not earned through the efforts of either spouse during the marriage. Only that income and value which accumulates *passively*, meaning without the help of either party, will be considered separate property.
4. Finally, the statute defines **nontransferable professional licenses** as separate property. This means the court cannot distribute a spouse's license to practice medicine or to practice law even if the license was acquired during the marriage.

### Separate Property (26/54)

So returning to our previous example, if the wife bought the grand piano a week before the marriage, the piano will be her separate property. This is true because all property acquired before the date of marriage is separate property, even if the wife knew she would be getting married at the time she purchased the piano.

### Separate Property (27/54)

Similarly, if wife sold her piano after getting married and she used the proceeds to buy a boat, the boat will be the wife's separate property even though it was purchased during the marriage. This is true because property acquired during the marriage in exchange for separate property also will be separate property.

### Separate Property (28/54)

Let's consider another example. If husband owns stock in his father's company before marriage, that stock is separate property. And if the stock earned dividends because the company is profitable and the husband owns those dividends on the date of separation, the dividends also will be husband's separate property. That is true because *passive income earned from separate property during the marriage is separate property*. However, only that income earned passively from separate property, meaning without the effort of either spouse, will be separate property.

### Separate Property (29/54)

So if the company is profitable because of husband's work during the marriage, the dividends will be marital property to the extent they are earned as a result of his effort. This is true even though GS 50-20(b)(2) states that "income derived from separate property shall be considered separate property." The North Carolina courts decided early in the life of equitable distribution in this state that income earned through marital efforts – meaning the effort of either or both spouses - should be marital rather than separate. Only that income earned passively, meaning that without the effort of either spouse, will be separate property.

### Gifts (30/54)

Gifts are an important category of separate property. As I stated earlier, gifts or bequests received by one spouse during marriage are separate property. However, gifts to both spouses are marital property.

### Gifts Between Spouses (31/54)

GS 50-20(b)(2) provides that property acquired by gift *from the other spouse* during marriage shall be considered separate property *only* if such intention is *specifically expressed* in the conveyance. According to appellate decisions, this means that gifts between spouses during the marriage are presumed to be marital property. A spouse wishing to make a separate gift must be very careful to state that intention expressly when the transfer is made.

### Gifts Between Spouses (32/54)

This *interspousal gift rule* has one particularly important and common application in North Carolina. If one spouse causes his or her separate *real* property to become titled as a *tenancy by the entirety* during the marriage, the law presumes this conveyance to be a gift between spouses. The result is that the separate real property becomes completely marital property. Theoretically, this presumption can be rebutted when, by the greater weight of the evidence, the conveying spouse shows no gift was intended. However, to date, no litigant has been

successful in having the North Carolina appellate court agree that evidence presented at trial was sufficient to rebut the presumption that the conveyance was a gift to the marriage.

Quiz 33/54

Burden of Proof (34/54)

You will not try many equitable distribution cases before you realize that rules regarding the burdens of proof in classification are a trial judge's best friend. Classification often is complicated and difficult to prove. It is not uncommon for lawyers and litigants to have great difficulty giving the judge all of the evidence needed to make the findings of fact necessary to support the required conclusions of law. The rules regarding the burden of proof determine who wins and who loses when the evidence is less than sufficient to show exactly when and how an asset was acquired.

Burden of Proof (35/54)

The person seeking a marital classification of an asset goes first but has a significant advantage in the form of the *marital property presumption* I mentioned earlier. If the party seeking the marital classification can prove that the property at issue was **acquired by either or both spouses during the marriage and before the date of separation and that it was owned on the date of separation, the entire value of the property on the date of separation is presumed to be marital.**

Burden of Proof (36/54)

The burden then shifts to the party claiming the property to be separate. That party has the burden of proving by the greater weight of the evidence that the property, or at least a portion of the value of the property, falls into one of the categories of separate property.

Let's return to our piano example. Suppose wife buys the piano before the marriage but sells the piano during the marriage and uses the proceeds to buy a boat. We know that one category of separate property is property acquired during the marriage in exchange for separate property. That should mean that the boat in this example is separate property, because it was purchased with funds obtained directly from the sale of separate property. However, if the boat is still owned by wife on the date of separation, the boat will be presumed to be marital property because it was acquired during the marriage. Husband can meet his burden of proof that the property is marital simply by showing the boat was acquired during the marriage by a spouse and was owned on the date of separation. The burden of proof then shifts to the wife to prove that the boat actually is separate property by proving that the entire value of the boat was acquired with her funds from the sale of the piano. It is obvious in our example that the

boat was acquired with separate funds and therefore is separate property. However, in many cases, identifying the funds actually used to acquire an asset during the marriage can be difficult, especially for assets acquired years before the spouse actually separate.

#### Burden of Proof (37/54)

If both parties meet their burdens, the property will be separate property. However, if neither party meets their burden, *the property simply falls out of the case*. The court does not distribute the property, and the parties are left with other common law remedies such as partitioning or accounting to determine ownership after divorce. We will discuss this further a little later when we discuss valuation.

#### Mixed Assets (38/54)

In addition to understanding the statutory definitions of marital and separate property, it also is important to understand that classification in North Carolina is based primarily upon *the source of funds doctrine*. The source of funds doctrine provides that to the extent possible, **classification is determined by tracing the source of the funds used to acquire the total value of the asset on the date of separation**. In other words, we are interested in *identifying the source of the equity in an asset and distributing that equity between the parties*. Recognizing that equity often is acquired over time and that the source of equity can be both marital and separate in some circumstances, the law in North Carolina allows a single asset to be classified as *both* marital and separate property. Unlike some other equitable distribution states, where separate property mixed with marital property will “transmute” and be classified as entirely marital, North Carolina has a strong public policy in favor of protecting the separateness of separate property. Because North Carolina does not allow separate property to transmute into marital property, a single piece of property can be “*mixed*”, meaning it is properly classified as partially marital and partially separate property.

Property can become mixed in one of two ways. One way is by *acquisition*. Equity in property frequently is acquired over time. North Carolina does not classify an asset simply based on the moment in time title is acquired by either or both spouses. Instead, the source of funds doctrine requires that an asset be classified according **to when and how the equity in existence on the date of separation was acquired**.

#### Missed Assets-Example (39/54)

For example, if a house is purchased and entirely paid for during the marriage with wages earned by the spouses during the marriage, the entire value of the house on the date of separation will be marital property. That is because all of the equity, or value, in the house was acquired by the direct payment of marital funds together with any appreciation on the

investment of marital funds that often occurs due to market forces. However, if the house is purchased before the marriage with a down payment and a mortgage, the house will be separate property to the extent of the equity brought into the marriage by the purchasing spouse, but the house will be marital property to the extent the mortgage is paid and equity in the house is thus acquired during the marriage. *Classification of the date of separation value of the house must reflect both the separate and the marital contributions to the acquisition of that value.*

#### Mixed Assets (40/54)

The second way an asset can become mixed is when an item of *separate property increases in value during the marriage as a result of marital effort*. Marital effort means the effort of either or both spouses during the marriage. Remember we said that the definition of separate property includes increases in value of separate property during the marriage, but only if that increase in value is *passive* – meaning it is the result of market forces or other influences and not the result of the efforts of one or both spouses. If marital effort causes some or all of the increased value, the marital estate will receive an interest in the resulting equity. The asset will be classified as separate property to the extent the value is traced to the original separate property, or to passive increases in the value of that separate property. But it will be classified as marital property to the extent the equity on the date of separation is the result of marital effort.

So let's return to the example of a house. If the house was purchased by husband completely before marriage and was brought into the marriage with no mortgage, the house and any passive increase in the value of that house will remain husband's separate property. However, if the spouses add a bathroom or upgrade the kitchen after the marriage, any increase in the value of the house resulting from this marital effort will be marital property. The end result will be that the house is a mixed asset. The date of separation value of the house will be separate to the extent it reflects the date of marriage value of the house and any passive appreciation of that date of marriage value, and it will be marital to the extent it reflects the value added by the actions of the spouses during the marriage.

#### Mixed Assets – Burden of Proof

The *marital property presumption* can have a significant impact on the classification analysis of a mixed asset. This is true because "*tracing out*" the marital and separate components of a date of separation value of an asset can be extremely difficult as a practical matter in the context of a court proceeding. In our house example, let's say husband bought and paid for the house before he married wife. On the date of marriage, the house was worth \$200,000. By the date of

separation, the house is worth \$300,000. The only evidence offered by either spouse is that the couple spent \$40,000 of marital funds during the marriage to remodel the kitchen and bathrooms.

We know there is separate property valued at \$200,000 because that is the amount husband brought into the marriage. But how do we classify the remaining \$100,000 in equity? Because it is probable that the new kitchen and bathrooms increased the market value of the house, we know that some part of the \$100,000 probably is marital property. We also know that market forces also likely contributed to the fact that the house is worth more on the date of separation than it was on the date of marriage. Market forces are passive, therefore any appreciation of separate property resulting from market forces is separate property. So how do we divide the equity between the marital and separate estates?

Due to the marital property presumption, wife simply needs to show the house increased in value by \$100,000 during the marriage – by doing so she is showing that \$100,000 in property/equity was acquired during the marriage and owned on the date of separation. *Therefore, the \$100,000 is presumed to be entirely marital.* The burden then shifts to husband to “trace out” the part of that \$100,000 increase that is *not* directly attributable to the improvements made during the marriage with marital funds, thereby identifying that part of the appreciation caused by passive market forces. This means husband must produce evidence at trial to show exactly how much the new kitchen and bathrooms added to the date of separation value of the house, or to show exactly how much market forces caused the house to appreciate. As a practical matter, such evidence often is difficult to produce. If husband cannot meet his burden, the entire \$100,000 in appreciation must be classified as marital.

Another common example involves bank accounts. Suppose wife has a bank account containing \$50,000 on the date of marriage. That \$50,000 is separate property if it is still owned on the date of separation. Over the years of the marriage, her account grows through the accumulation of interest. In addition, she adds gifts and bequests from family members (also separate property). However, the spouses also add marital funds to the account and on the date of separation, the account has a balance of \$200,000. The \$150,000 increase in value during the marriage is presumed to be entirely marital because it is value acquired during the marriage. The wife has the burden of proving exactly how much of the value of the account on the date of separation is her separate property. As I am sure you can imagine, such specific tracing in an account is extremely difficult, if not impossible, to do. If wife cannot do the tracing, the entire \$150,000 increase must be classified as marital property.

## Classification of Debt (43/55)

The original version of the equitable distribution statute did not even mention debt. However, our appellate courts quickly held that liabilities as well as assets must be identified and distributed at the conclusion of a marriage. Marital debt must be distributed even when there are no assets. To be marital, a debt must have been incurred during the marriage and before the date of separation. However, the debt also must be owed on the date of separation. Like property, the court has no interest in debts which no longer need to be paid when the parties end their partnership. Also like property, the name attached to the debt is not controlling with regard to classification. The debt simply must be owed by one spouse or by both spouses on the date of separation. However, there is an additional element in the definition of marital debt that is not contained in the definition of marital property. In addition to having been incurred during the marriage and owed by either or both spouses on the date of separation, to be classified as a marital debt, the debt must have been incurred for the *joint benefit* of the parties. Also unlike property, there is *no presumption* that a debt acquired during the marriage is marital. Instead, a court needs affirmative proof that the debt was incurred for the joint benefit of the spouses, proof sufficient to allow the court to make a finding of fact identifying that joint benefit. Once joint benefit is proven, the value of the marital debt will be a *negative asset* added to the marital pie.

**So the definition of “marital” debt is that debt incurred during the marriage for the joint benefit of the parties which is owed by either or both spouses on the date of separation.**

## Test Yourself (44/55)

### Divisible Property, G.S. 50-20(b)(4) (45/55)

Hopefully by now you understand that as a general premise, the goal of the classification stage of an equitable distribution proceeding is to identify and value the marital property and debt in existence on the date of separation when the marital partnership came to an end. If property, debt or value does not exist on the date of separation, **it cannot be classified as marital.** However, there often is a significant period of time between the date of separation and the date the court actually distributes property and debt. *Divisible property* is a category of property created by statute in 1997 primarily to address changes in the value of marital property which frequently occurs *between the date of separation and date of the equitable distribution trial*. Before 1997, appellate courts in North Carolina had applied the statutory definition of marital property and debt *very* strictly to include only that value actually in existence on the date of separation. Therefore, the inevitable postseparation changes to the marital estate could not be strictly accounted for by the trial court in the final distribution of

the estate. The category of divisible property was created to allow the court to specifically include and divide certain *postseparation changes to the marital pie*.

#### Postseparation Changes (46/55)

Divisible property is defined in GS 50-20(b)(4). This category of property includes *changes in the value of marital property after separation as long as that change is not caused solely by the actions of a single spouse following separation*. The court of appeals has held that this statute *presumes* that increase and decreases in the value of marital property will be divisible. This means that the party arguing that it is *not* divisible bears the burden of proving that the change was the result of the actions of a single spouse. In addition to appreciation and depreciation of marital property after the date of separation not caused by the efforts of a spouse, the category of divisible property also includes:

- **Income earned from marital property after separation**, as long as the income is not generated by the work of a single spouse after the separation.
- **Assets received by either spouse after separation but earned during the marriage**. And,
- **Passive increases and decreases in marital debt**, including interest and finance charges related to marital debt.

All divisible property and debt must be identified, valued and distributed with the marital property.

#### Divisible Property – Examples

So, for example, a commission earned by one spouse for work that was completed before separation can be divided by the court as divisible property, even if it is not actually paid to the earning spouse until several weeks or months following the date of separation. Appellate courts had ruled that such commissions did not fit the definition of marital property because the commission itself was not owned by either party on the date of separation. Until the creation of divisible property, the equitable distribution statute would not allow the court to distribute the commission even though it clearly was earned as the result of *marital* effort.

Similarly, interest earned on a marital savings account after the date of separation is not marital property because it is value that did not exist on the date of separation. However, such interest income is divisible property, as long as it was earned *passively*, meaning without the effort of either spouse.

The divisible property statute also allows the court to account for and distribute postseparation **passive** changes in marital debt. So if a marital credit card debt increases in amount after the



date of separation due to the accumulation of interest and finance charges, the court can distribute and account for that increase as it meets the definition of divisible debt.

## Task 2 Valuation (48/54)

There is much more to be said about classification, but this presentation is intended to be an overview only. So we must briefly turn to Tasks 2 and 3 of the process, valuation and distribution of the marital and divisible estates. Valuation often is described as step two in the process of trying an equitable distribution case. In reality however, it is often impossible to separate valuation from classification. This is because, as I have said repeatedly during this presentation, classification involves identifying and tracing the source of the value or equity of a particular piece of property. This means, as a practical matter, it often is impossible to classify without knowing the value of the asset at issue.

Every judgment of equitable distribution must identify the date of separation value of every asset identified as marital property, and the date of separation value of every debt identified as marital debt. **If property or debt is not valued, a court has no authority to distribute the asset or debt.** Assets such as retirement plans and closely held corporations frequently require expert testimony to establish the date of separation value.

Unfortunately, when an asset or debt clearly was acquired completely during the marriage and there is no contention by either spouse that the property is “mixed” property, it is not uncommon for a court to reach the end of an equitable distribution trial and realize that neither party actually offered proof of the value of an asset or debt on the date of separation. This leaves a trial judge in a very bad position. Our appellate courts have been very strict; if there is no finding of fact regarding the date of separation value of an asset or debt, the court cannot distribute the asset or debt – even if it is very clear that the property or debt is marital.

So, as a judge, you will need to decide if you are willing to ask the parties for this critical piece of evidence. Some judges feel it is not their role to ask for evidence because it is the responsibility of the parties to meet their respective burdens of proof. Other judges share that philosophy in most civil cases but feel differently about family related cases. These judges prefer to ask for the evidence instead of allowing the property to pass by legal title alone. You will need to decide your individual philosophy and try hard to apply it *consistently* to the cases you hear.

In 2019, GS 50-20.1 was amended to create a limited exception to the rule that property cannot be distributed if not valued as of the date of separation. GS 50-20.1(d) now provides that if the plan to be divided is a defined benefit plan that is to be distributed by the deferred distribution method [meaning by QDRO to be divided in the future when and if the employee spouse begins to receive benefits] and the court determines that the marital portion of the plan is to be

divided equally between the parties, the court is not required to establish the date of separation value of the marital portion of the plan.

Common examples of defined benefit plans are the North Carolina state employee retirement plan and the federal military retirement plan. If the marital portion of the pension is to be divided in the future and the court determines that the marital portion should be divided equally, the court is not required to value the marital portion of either of these pensions as of the date of separation.

### Task 3: Distribution (49/54)

Distribution is the final step in the equitable distribution process. Once the marital and divisible pie is created, the court has significant discretion in deciding how the pie should be divided between parties. The court determines the appropriate distribution and division of assets based on a consideration of factors found in GS 50-20(c). These statutory factors often are referred to as *distribution factors*.

### Distribution (50/54)

**The law presumes that an equal distribution of the value of the total estate is equitable.**

However, a court needs **only one** of these statutory distribution factors to justify an unequal division. Once an unequal division is supported by a factor, the judge can order a split of any percentage the judge deems equitable, including a distribution of 100% of the marital and divisible estate to one party.

So, for example, one distribution factor is the separate estates of each spouse and another is the health of each spouse. In a situation where one spouse has a significant separate estate and good health while the other spouse has no separate estate and bad health, a trial judge *may* decide it is equitable to give the spouse with no estate and bad health a larger share of the marital and divisible estates.

### Distribution (51/54)

Because of this discretion, distribution is the stage where the court has the ability to do equity and make a division based on the judge's determination of fairness in a particular case as opposed to making a decision based on rigid rules. The appellate courts have told us that the presumption in favor of an equal distribution is extremely strong, but the equitable distribution statute recognizes that in these personal, family-related matters, courts must have flexibility to address the myriad of circumstances which arise. Appellate courts very seldom, if ever, overrule a trial judge's decision in regard to the percentage of the estate awarded to either party. As long as the court classifies all assets in accordance with the law and properly values

the property interest based on evidence, the appellate courts will not second guess the discretion of the trial judge on distribution.

Distribution (52/54)

It is important to remember however, that the statutory distribution factors relate *only* to the marital economy and economic factors. **Trial judges are prohibited from considering non-economic marital fault issues when considering the appropriate division of assets.**

Distribution (53/54)

The law also presumes that assets will be divided *in kind*. This means that the court generally should divide the marital estate by assigning specific assets to each spouse. However, under appropriate circumstances and with specific findings of fact, the court can use what is called a *distributive award* to effectuate a distribution. A *distributive award* is a payment of money by one party to the other to offset a distribution of actual assets to the paying party. For example, if the major marital asset in a case is a closely held corporation, there seldom are sufficient other assets to allow a court to make an equal in-kind division without requiring that the corporation be sold. So instead, the court can award the corporation entirely to one spouse and order that spouse to pay the other's share of the value of the marital property in cash. This type of award will preserve the value of the closely held corporation while still allowing both spouses their share of the marital estate.

Questions (54/54)

This session was intended to *briefly* introduce you to equitable distribution in North Carolina and to familiarize you with key principles and definitions that form the heart of the law in this area. Further study definitely is required to be fully informed concerning this complex and constantly evolving area of the law. If you have any questions, please contact me at the phone number and email address shown on your screen.

## **Equitable Distribution Case Study The Magnolias**

### **Wilma Lee Magnolia v. Henry Magnolia**

#### **Basic Information:**

##### Important Dates:

Wilma and Henry were married July 4, 2001 – the “DOM”.

They separated on December 1, 2021 – the “DOS”.

Date of Trial is April 10, 2023 – the “DOT”.

##### Children:

There were two children born during the marriage, Henry Junior is 17 on the DOT and Rosa Lee is 14.

Wilma Lee has custody of the children pursuant to court order.

Henry Junior is mentally and physically disabled and has been since birth.

##### Other Information:

Wilma Lee is 45 years old.

Wilma Lee has not worked outside of the home since DOM.

Wilma has a BA degree from a liberal arts college. She also has a nursing degree that she earned during the first several years of the marriage.

Henry is 49 years old.

Henry completed high school but did not attend college.

Henry’s salary at the DOT from both businesses is \$90,000 per year.

Both parties are in good health.

### **Information about Assets and Debts**

#### 1. Magnolia Knitting Mill, LLC

-Located on 3 acres adjacent to the marital residence. A chain link fence with a gate separates the two structures and encloses the 3 acres on which the mill is operated. The 3 acre track is titled in the name of Magnolia Knitting, LLC. However, at the time of marriage, the three acres were part of a 5-acre tract owned by Henry. Henry transferred title to the 3 acres to the mill sometime during the marriage but kept title to the remaining 2 acres for the marital residence.

-The Magnolias built and opened the mill one year after they were married

-The mill operated steadily with 3 shifts of workers during the marriage. During separation, Henry reduced operations to 2 shifts.

-Henry has been both the owner and manager since the mill opened. He worked long days and most weekends throughout the marriage. The mill is an LLC and Henry is the sole owner of the LLC.

-Wilma helped out at the mill from time to time during the marriage but spent most of her time caring for the children and the marital home.

-Wilma's expert – a CPA, CVA, ABV, from Charlotte with a resume 25 pages long - testified that the value of the business as a going concern on the DOS was \$300,000, but by the DOT that value had dropped to \$260,000. He explained that he used the capitalization of earnings method to arrive at both values. He also explained that the reduction in value during separation was the result of the decreased productivity of the mill following the separation of the parties.

-Henry offered the testimony of his accountant, Mr. John Magnolia. In addition to being Henry's uncle, John has kept the books for Magnolia Knitting since the formation of the business, and he has kept books for mills in the area for the last 25 years. John tells you that on the DOS the business owned assets, including the 3-acre tract upon which it is built, worth \$150,000. By DOT, that value had dropped to \$100,000 due to the fact that several pieces of equipment had been sold by Henry to Super Sewing, Inc. John testified that there is "no way" Henry could sell the mill for any more than the value of the assets. In John's opinion, the textile industry "is moving out of this country" and Henry will be lucky if he is able to continue to make enough from the mill to pay for its operation.

## 2. Stock in Super Sewing, Inc.

-Super Sewing, Inc. is a knitting mill located one mile from Magnolia Knitting Mill formed two months after the DOS.

-Henry owns 25% of the stock of that corporation, and he is paid a salary to help manage the mill. There is no evidence of the value of the stock.

-Wilma testified that Henry took equipment from Magnolia Knitting to use at the new mill. Henry admits that he sold a few pieces of equipment to Super Sewing, but he claims it was a legitimate business transaction between the two businesses. Wilma contends that the stock is marital property because the new mill is operating with the benefit of the marital property removed from Magnolia Knitting.

## 3. Marital Residence

-Built before the marriage by Henry on the 5 acre tract of land given to him by his father

-Henry borrowed \$80,000 to build the house.

-On the DOM, the house and remaining 2 acres of the land had a market value of \$95,000 and the loan balance was \$75,000.

-During the marriage, the mortgage was paid with marital funds and the knitting mill was built on the property. The parties devoted 3 acres to the mill, keeping the remaining 2 acres for use as their residence.

-Parties stipulated that the fair market value of the house and 2 acres of land on DOS was \$200,000. The mortgage balance was \$15,000.

-During separation, Henry has paid the mortgage pursuant to an order of postseparation support. Wilma and both children have lived in the house throughout separation and continue to do so at the time of trial.

-On DOT, the house has a fair market value of \$210,000 and the mortgage has been reduced to \$13,000.

#### 4. Mustang Convertible Automobile

- Purchased one month before DOS by Henry who gave it to Wilma as a birthday gift.
- Wilma has driven the car since Henry gave it to her.
- On DOS, the car loan had a balance of \$28,000. Henry has made all payments since separation to "save his credit." He has paid a total of \$3200 since separation. On DOT, the balance on the car loan is \$26,000.
- Wilma introduces evidence of that the "blue book" value was \$22,000 on the DOS and \$18,500 on the DOT. Henry argues the value would have been higher at the time of trial if Wilma had not driven the car to Key West Florida on two separate occasions to visit a new male friend.

#### 5. Joint Savings Account

- DOS value was \$24,000
- DOT value is \$0.
- Interim distribution at beginning of case gave \$12,000 to each party and thereafter the account was closed.
- Both parties admit that in 1999 Henry deposited \$8,000 into the account that he received as an inheritance from an uncle. Henry argues that the \$8,000 is his separate property.
- Both parties admit that numerous withdrawals and deposits were made in the account during the marriage.

#### 6. 37-acre tract of land

- Located immediately south of the 5-acre tract containing the marital home and knitting mill.
- Land titled in both parties
- The land was received as a gift from Wilma's elderly aunt during the marriage.
- Aunt testified that she gave the land to Wilma and Henry because of her love of her niece. She stated that she did not intend for Henry to have any part of the land that she and her late husband worked so hard for.
- Wilma introduced evidence that the tax value at the time of conveyance was \$14,500 and the tax value on DOS was \$20,000. Neither party introduced evidence of the value on the DOT.

#### 7. IRS Debt

- Assessed against Wilma and Henry as individuals and against Magnolia Knitting. Incurred as the result of an audit of the tax records of Magnolia Knitting.
- On DOS, debt had balance of \$18,000. Henry made payments during separation and the balance on the DOT is \$17,000.
- Wilma testified that she had no idea that Henry was "defrauding the IRS" during the marriage and that there is no way this debt was her fault.

## 8. “Collectibles”

-On the 37-acre tract, there are two barns full of old farm machinery, items Henry has collected over the years of the marriage from flea markets and auctions, and old sewing machines.

-Henry says it is all “junk” with no value.

-Wilma testified that Henry told her during the marriage that they would be able to retire and move to Florida with the proceeds from the sale of the “antiques” in the barn.

-Wilma had to obtain an order from the court during discovery because Henry kept the barns locked and refused to allow her to inventory the contents. She also testified that she saw Henry removing farm machinery from the barns after separation but before she was able to inventory the contents of the barn.

-Wilma’s appraiser – who is the owner of a local auction house and regularly buys and sells personal property as part of his business - testified that the contents of the barn had a value of \$25,000 on the DOS. He also testified that, based on Wilma’s description of the farm equipment she saw Henry remove from the barn, the missing equipment had a DOS value of at least \$5,000.

## 9. 401K Accounts

-Both Henry and Wilma have accounts in their individual names.

-On DOS, Wilma’s had a value of \$22,000. On the DOT, it had a value of 21,000. All contributions to Wilma’s account were made during the marriage. No contributions have been made into her account since the DOS.

-Henry’s account had a value of \$50,000 on the DOS. He opened the account 5 years before the marriage, and the account had a value of \$10,000 on the date of marriage. 3 months before separation, Henry withdrew \$15,000 from the account and spent it on a Caribbean vacation that he took with a female friend (the cause of the separation).

-On DOT, the balance in Henry’s account was \$51,000; Henry made contributions to the account in the amount of \$800 during separation.

## 10. Credit Cards

-Both Henry and Wilma have a credit card in their individual name.

-Wilma’s card had a balance of \$1,500 on the DOS. On the DOT, it had a balance of \$2,500. Wilma made \$500 worth of purchases with the card after the DOS. She testified that the entire debt was incurred for household needs and clothing for herself and the children.

-Wilma has made monthly minimum payments on her card of \$15 per month since the DOS, for a total of \$240.

-Henry’s card had a balance of \$300 on the DOS. On the DOT, the balance is \$1,000. Henry made \$500 worth of purchases with the card after the DOS. He testifies that the debt was incurred for his clothes, gifts for the children, as well as for his living expenses after the DOS. He also has made the \$15 per month minimum payment on the debt since the DOS, for a total of \$240.

**WORKSHEET**  
**Classify and value the assets and debts**

	<u>MARITAL</u>	<u>SEPARATE</u>	<u>DIVISIBLE</u>
1. Magnolia Knitting Mill	_____	_____	_____
2. Stock in Super Sewing, Inc.	_____	_____	_____
3. Marital Residence	_____	_____	_____
4. Mustang Convertible	_____	_____	_____
5. Car Loan	_____	_____	_____
6. Joint Account	_____	_____	_____
7. 37-acre tract	_____	_____	_____
8. IRS Debt	_____	_____	_____
9. Collectibles	_____	_____	_____
10. Henry's 401(k)	_____	_____	_____
11. Wilma's 401(K)	_____	_____	_____
12. Wilma's Credit Card Debt	_____	_____	_____
13. Henry's Credit Card Debt	_____	_____	_____

Notes:



## **WORKSHEET DISTRIBUTION**

**List all distribution factors:**

**WORKSHEET**  
**Distribute the assets and debts**

	<u>HENRY</u>	<u>WILMA LEE</u>
1. Magnolia Knitting Mill	_____	_____
2. Stock in Super Sewing, Inc	_____	_____
3. Marital Residence	_____	_____
4. Mustang Convertible	_____	_____
5. Car Loan	_____	_____
6. Joint Account	_____	_____
7. 37-acre tract	_____	_____
8. IRS Debt	_____	_____
9. Collectibles	_____	_____
10. Henry's 401(k)	_____	_____
11. Wilma's 401(k)	_____	_____
12. Wilma's Credit Card Debt	_____	_____
13. Henry's Credit Card Debt	_____	_____
Distributive Award?	_____	_____



# The Magnolias

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Very quick overview

## EQUITABLE DISTRIBUTION

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### Equitable Distribution



Legal process for dividing property and debt between divorcing spouses



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## Tasks for the Judge

- **Classify** Property and Debt Owned/Owed on the Date of Separation
- **Value** Marital/Divisible Property and Debt
- **Distribute** Marital/Divisible Property and Debt

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## Fundamental Principles

- Marriage is an **Economic Partnership**
- Marital property should be divided **equitably** upon divorce
- **Title** is not controlling
- **Separate property** should remain with the owner

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## Classification

- Identification of property and debt subject to the court's authority
  - Process for creating the 'pie' to be divided between the parties
  - If property is not marital or divisible, court has **no authority** to do anything with it



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## Key Classification Terms

- Marital Property
- Separate Property
- Marital Debt
- Divisible Property
- Divisible Debt

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## Marital Property G.S. 50-20(b)(1)

- All real and personal property
- Acquired by either or both spouses
- Between date of marriage and date of separation
- Owned by either or both spouses on date of separation
  - Legal or equitable ownership



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## Separate Property GS 50-20(b)(2)

- Acquired before the date of marriage
- Acquired by "a" spouse by gift or bequest during the marriage
- Acquired in exchange for separate property during the marriage
- Passive increase in value of or income from separate property during marriage
- Nontransferable Licenses

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## Burden of Proof in Classification

- Party seeking marital classification goes first
  - Property acquired during marriage before the date of separation
  - By either or both parties
  - Owned by either or both parties on date of separation
  - Value on date of separation
- Entire date of separation value presumed marital
- Burden shifts to party seeking separate classification

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## Mixed Property

- Separate property is protected
  - Mixing marital and separate does not result in separate property 'transmuting' to marital
- Source of Funds doctrine applies to classification
  - Value of an asset on date of separation is classified according to the source of the value
  - Both the marital and the separate estates are entitled to an interest in the property "in the ratio its' contribution bears to the total investment in the property."

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## Classification process

1. What is the property interest to be classified?
2. Was it owned in whole or in part by either or both parties on the date of separation?
3. What was the value of that property interest on the date of separation?
4. Where did that value come from?

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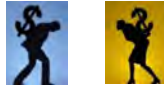
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## Marital Debt



- Incurred during the marriage by either or both spouses
- Owed on the date of separation
- Incurred for the *joint benefit of the parties*

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## Divisible Property: Post Separation



- *Passive* changes in value of marital property
- *Passive* income from marital property
- Property/cash earned as result of marital effort
- Increases/decreases in marital debt
  - After October 1, 2013: only *passive* increases and decreases

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## Classification

- A legal conclusion
- Must be supported with findings of fact
- Minimum findings:
  - Date property/debt acquired
  - Who acquired it and how
  - Date of marriage
  - Date of separation
  - (Value on date of separation for marital property/debt)
  - (Value on date of trial for divisible property/debt)

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## Valuation

- Every asset or debt identified as marital must have a date of separation value
  - No value = No distribution
- New exception:
  - GS 50-20.1(d)
  - Defined benefit plan (traditional pension) that is equally distributed by deferred distribution (in future by percentage) does not have to be valued

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## Distribution

- The place to do “equity”
  - Consider distribution factors
- Equal presumed equitable
  - Only need one factor to award unequal
- In-kind division presumed equitable
  - Distributive award allowed when in-kind is not practical

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## Magnolia Knitting, LLC Classification

- Marital property
  - Total DOS value acquired during the marriage
  - Owned on the DOS
  - Not separate property

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## Magnolia Knitting, LLC Value

- Court must “reasonably approximate the net value” of business on DOS
- Value must be based upon “sound methodology”
- “Expert”: a witness qualified by knowledge, skill, experience, training, or education to assist the trier of fact

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## Magnolia Knitting, LLC Classification

- Divisible property: GS 50-20(b)(4)(a)
  - Postseparation depreciation of marital property that is not the result of the actions of a spouse
- Decrease is a distribution factor if caused by postseparation actions of one spouse.
  - *Hay*, 148 NC App 649 (2002)

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## Stock

- General rule: property acquired after separation is not marital property
- But: **property acquired as result of “exchange or conversion” of marital property is marital**
  - *Mausser*, 75 NC App 115 (1985)
- Burden is on party seeking marital classification to trace and show value

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## Residence

- Mixed asset: both marital and separate
- Each estate is entitled to an interest in the property in the ratio its contribution bears to the total investment in the property
  - *Wade*, 72 NC App 372
- Need to account for contributions from each estate
  - *Mclver*, 92 NC App 116

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*Mishler* 90 NCAPP 72 “formula”

$$\text{Marital Property} = \frac{\text{Total Marital Contribution}}{\text{Total Contribution}} \times \text{DOS Net Value}$$

$$\text{Separate Property} = \frac{\text{Total Separate Contribution}}{\text{Total Contribution}} \times \text{DOS Net Value}$$

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## Residence

- Mixed Asset:
  - Separate Contribution: \$20,000
  - Marital Contribution: \$60,000
- Apply *Mishler* formula to \$185,000 DOS Net Value:
  - Marital Property: \$138,750 (75%)
  - Separate Property: \$46,250 (25%)

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## Residence

- Divisible property. GS 50-20(b)(4):
  - (a): Postseparation appreciation not caused by actions of a spouse
  - Payments generally are ‘actions’
- But general rule: do not consider payments made pursuant to **alimony or child support order** in ED case. GS 50-20(f)
  - *Morris*, 90 NC App 94

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## Residence

- Postseparation appreciation is divisible property
  - \$12,000 total (ignore payments)
- But, only to extent it is attributable to marital property
- Possible method: Apply **Mishler “formula”** to postseparation appreciation

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## Mustang

- Gift between spouses during marriage is marital property unless contrary intent stated in conveyance.
  - *Friend-Novorska*, 131 NC App 508 (1998)
- Fair Market Value?
  - Blue book: \$22,000 marital asset
  - Purchase price: \$28,000 marital asset

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## Mustang

- Divisible property. GS 50-20(b)(4)(a):
  - Postseparation decreases not caused by postseparation actions of a spouse
  - Presumed divisible
    - *Wirth v. Wirth*
- \$3,500 decrease caused by Wilma's actions?

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## Car Loan

- Marital debt defined as debt:
  - Incurred during the marriage
  - Existing on the DOS
  - Incurred for the joint benefit of the parties
- Joint benefit: debt encumbers a marital asset? See *Glaspy*, 143 NC App 435 (2001)

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## Car Loan

- **Divisible debt:** GS 50-20(b)(4)(d)
  - Interest and finance charges on marital debt
  - Decreases in marital debt
    - Payments made between 10/11/02 and 10/1/13)
  - Only *passive* changes in debt after 10/1/13
- Here:
  - \$2,000 decrease in loan balance
  - (\$1,200) interest and finance charges

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## Joint Account

- Deposit into joint account does not establish gift to the marriage
- But: account is **presumed marital** because acquired during the marriage
- Henry has burden of tracing separate part of DOS value
  - *Minter*, 111 NC App 321 (1993)

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## 37-acre Tract

- Gift to “a” spouse is separate property
- Gift to both spouses is marital property
- Burden on Wilma to prove donor’s intent to make gift to her alone
  - See *Hunt*, 86 NC App 484 (1987)

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## IRS Debt

- Marital if incurred for joint benefit of the parties
  - See *Glaspay*, 143 NC App 435 (2001)
- Is postseparation decrease in marital debt divisible property?
  - Payments between 10/11/02 and 10/1/13 result in divisible debt if reduce debt
  - After 10/1/13, only passive changes are divisible
    - GS 50-20(b)(4)(d)

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## Collectibles

- Marital because acquired during the marriage
- Wilma has burden to prove DOS value
  - See *Grasty*, 125 NC App 736 (1997)
- Methodology not needed for personal property

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## Collectibles

- Postseparation dissipation of marital assets
  - Distribute missing property to spouse that took it. *Sharp*, 84 NC App 128 (1987), or
  - Include property acquired with the missing property in marital estate. *Mauser*, 75 NC App 115 (1985)
- Both methods require a value?

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## Henry's 401(k)

- Deferred comp is marital property to the extent it is earned during marriage.
- GS 50-20.1(d1) – Defined contribution accounts
  - “The court 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.”

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## Henry's 401k (a defined contribution account)

- Source of Funds
  - \$10,000 separate
  - Rest presumed marital
  - Henry to prove passive appreciation of the \$10,000 investment
- Divisible property
  - Postseparation appreciation of marital portion not caused by one spouse
  - Here ?

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## Henry's 401(k)

- If insufficient evidence to classify by source of funds:
- The "coverture fraction" is used to determine marital portion of a defined contribution account and is the required method for classifying defined benefit plans
  - Years earning the pension while married over total years earning pension.
  - GS 50-20.1(d)

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## Henry's 401(k)

- 4/5ths marital (20 out of 25 years)
  - \$40,000 marital
- Divisible property
  - Postseparation appreciation of marital portion not caused by one spouse
  - Here - \$160?

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## Henry's 401(k)

- Pre-separation dissipation (no marital asset to distribute)
- A distribution factor if marital funds spent for non-marital purpose "contemporaneous with marital breakdown or in anticipation of separation."
  - See *Fountain*, 148 NC App 329 (2002)

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## Wilma's 401(k)

- All marital on DOS
- Divisible property: \$1,000
  - Postseparation decrease in marital property not caused by the actions of one spouse

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## Credit Cards

- DOS balance marital if incurred for joint benefit
  - See *Riggs*, 124 NC App 647 (1996)
- Postseparation increase in balance?
  - Divisible to extent represents interest and finance charges on marital debt
  - Otherwise, a distribution factor
- Postseparation payments?
  - Divisible if decrease marital debt (payments 10/11/02 through 10/1/13)
  - 'Consider' payments after 10/1/13

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## **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.)

## 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 19xx 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 19xx Brand Automobile, Vehicle Identification Number 9999999999999999. (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.

# MONTHLY PAYMENT

Necessary to amortize a loan

8%

TERM	1	2	3	4	5	6	7
AMOUNT	YEARS	YEARS	YEARS	YEARS	YEARS	YEARS	YEARS
\$50	4.35	2.27	1.57	1.23	1.02	.88	.78
100	8.70	4.53	3.14	2.45	2.03	1.76	1.56
200	17.40	9.05	6.27	4.89	4.06	3.51	3.12
300	26.10	13.57	9.41	7.33	6.09	5.26	4.68
400	34.80	18.10	12.54	9.77	8.12	7.02	6.24
500	43.50	22.62	15.67	12.21	10.14	8.77	7.80
1000	86.99	45.23	31.34	24.42	20.28	17.54	15.59
2000	173.98	90.46	62.68	48.83	40.56	35.07	31.18
3000	260.97	135.69	94.01	73.24	60.83	52.60	46.76
4000	347.96	180.91	125.36	97.66	81.11	70.14	62.35
5000	434.95	226.14	156.69	122.07	101.39	87.67	77.94
10000	869.89	452.28	313.37	244.13	202.77	175.34	155.87
15000	1304.83	678.41	470.05	366.20	304.15	263.00	233.80
20000	1739.77	904.55	626.73	488.26	405.53	350.67	311.73
25000	2174.72	1130.69	783.41	610.33	506.91	438.34	389.66
30000	2609.66	1356.82	940.10	732.38	608.30	526.00	467.59
35000	3044.60	1582.96	1096.78	854.48	709.68	613.67	545.52
40000	3479.54	1809.10	1253.46	978.52	811.06	701.33	623.45
45000	3914.48	2035.23	1410.14	1098.59	912.44	789.00	701.38
50000	4349.43	2261.37	1566.82	1220.65	1013.82	876.67	779.32
55000	4784.37	2487.51	1723.51	1342.72	1115.21	964.33	857.26
60000	5219.31	2713.64	1880.19	1464.78	1216.59	1052.00	935.11
65000	5654.25	2939.78	2036.87	1586.84	1317.97	1139.67	1013.11
70000	6089.20	3165.92	2193.55	1708.91	1419.35	1227.33	1091.04
75000	6524.14	3392.06	2350.23	1830.97	1520.73	1315.00	1168.97
80000	6959.08	3618.19	2506.91	1953.04	1622.12	1402.66	1246.90
85000	7394.02	3844.32	2663.60	2075.10	1723.50	1490.33	1324.83
90000	7828.96	4070.46	2820.28	2197.17	1824.88	1578.00	1402.76
95000	8263.91	4296.60	2976.98	2319.23	1926.26	1665.66	1480.70
100000	8698.85	4522.73	3133.64	2441.30	2027.64	1753.33	1558.63
105000	9133.79	4748.87	3290.32	2563.36	2128.03	1841.00	1636.56
110000	9568.73	4975.01	3447.01	2685.43	2230.41	1928.66	1714.49
115000	10003.67	5201.14	3603.69	2807.49	2331.79	2016.33	1792.42
120000	10438.61	5427.27	3722.37	2930.55	2433.17	2104.25	1870.35
125000	10873.56	5653.42	3843.05	3053.61	2534.55	2192.16	1948.28
130000	11308.51	5879.57	3963.73	3174.67	2635.93	2280.07	2026.21
135000	11743.46	6105.72	4084.41	3295.73	2737.31	2367.98	2104.14
140000	12178.41	6331.87	4205.09	3416.68	2838.69	2455.89	2182.07
145000	12613.36	6558.02	4325.77	3537.68	2939.07	2543.80	2260.00
150000	13048.31	6784.17	4445.86	3658.72	3039.45	2631.71	2337.93
155000	13483.26	7010.32	4565.95	3779.81	3139.83	2719.62	2415.86
160000	13918.21	7236.47	4683.04	3900.90	3240.21	2807.53	2493.79
165000	14353.16	7462.62	4800.13	4022.00	3340.59	2895.44	2571.72
170000	14788.11	7688.77	4917.22	4143.09	3440.97	2983.35	2649.65
175000	15223.06	7914.92	5034.31	4264.18	3541.35	3071.26	2727.58
180000	15658.01	8141.07	5151.40	4385.27	3641.73	3159.17	2805.51
185000	16092.96	8367.22	5268.49	4506.36	3742.11	3247.08	2883.44
190000	16527.91	8593.37	5385.58	4627.45	3842.49	3334.99	2961.37
195000	16962.86	8819.52	5502.67	4748.54	3942.87	3422.90	3039.30
200000	17397.81	9045.67	5619.76	4869.63	4043.25	3510.81	3117.23

# MONTHLY PAYMENT

Necessary to amortize a loan

8%

TERM	8	9	10	11	12	13	14
AMOUNT	YEARS	YEARS	YEARS	YEARS	YEARS	YEARS	YEARS
\$50	.71	.66	.61	.58	.55	.52	.50
100	1.42	1.31	1.22	1.15	1.09	1.04	1.00
200	2.83	2.61	2.43	2.29	2.17	2.07	1.99
300	4.25	3.91	3.64	3.43	3.25	3.10	2.98
400	5.66	5.21	4.86	4.57	4.33	4.14	3.97
500	7.07	6.51	6.07	5.71	5.42	5.17	4.96
1000	14.14	13.02	12.14	11.42	10.83	10.34	9.92
2000	28.28	26.04	24.27	22.84	21.65	20.67	19.83
3000	42.42	39.06	36.40	34.25	32.48	31.00	29.74
4000	56.55	52.08	48.54	45.67	43.30	41.33	39.66
5000	70.69	65.10	60.67	57.08	54.13	51.66	49.57
10000	141.37	130.19	121.33	114.16	108.25	103.31	98.14
15000	212.06	195.29	182.00	171.24	162.37	154.97	148.70
20000	282.74	260.38	242.66	228.31	216.50	206.62	198.27
25000	353.42	325.47	303.32	285.39	270.62	258.27	247.83
30000	424.11	390.57	363.99	342.47	324.74	309.93	297.40
35000	484.79	455.66	424.65	399.55	378.66	361.58	346.97
40000	565.47	520.75	485.32	456.62	432.99	413.23	396.63
45000	636.16	585.85	545.98	513.70	487.11	464.89	446.10
50000	706.84	650.94	608.64	570.78	541.23	516.54	495.66
55000	777.52	716.03	667.31	627.85	595.35	568.20	545.23
60000	848.21	781.13	727.97	684.93	648.48	618.55	594.80
65000	918.90	846.22	788.63	742.01	703.60	671.50	644.36
70000	989.59	911.32	849.30	799.09	757.72	723.16	693.93
75000	1060.28	976.41	909.96	856.18	811.84	774.81	743.49
80000	1130.97	1041.50	970.63	913.24	865.97	826.46	793.06
85000	1201.66	1106.60	1031.29	970.32	920.09	878.12	842.63
90000	1272.35	1171.69	1091.95	1027.40	974.21	929.77	892.19
95000	1343.04	1236.78	1152.62	1084.47	1028.33	981.43	941.76
100000	1413.73	1301.88	1213.28	1141.55	1082.45	1033.08	991.32
105000	1484.42	1366.97	1273.94	1198.63	1136.58	1084.73	1040.89
110000	1555.11	1432.06	1334.61	1255.70	1190.70	1136.39	1090.46
115000	1625.80	1497.16	1395.27	1312.78	1244.83	1188.04	1140.02
120000	1696.49	1562.26	1455.94	1370.86	1298.96	1241.35	1189.58
125000	1767.18	1627.34	1516.60	1426.94	1353.08	1291.35	1239.15
130000	1837.87	1692.43	1577.26	1483.02	1407.19	1343.35	1287.72
135000	1908.56	1757.51	1638.12	1539.10	1461.30	1393.62	1336.29
140000	1979.25	1822.60	1698.87	1595.02	1515.41	1443.89	1384.86
145000	2049.94	1887.68	1760.62	1650.87	1569.52	1496.16	1433.43
150000	2120.63	1952.76	1822.37	1706.72	1623.63	1548.43	1481.99
155000	2191.32	2017.84	1884.12	1762.57	1677.74	1600.70	1530.56
160000	2262.01	2082.92	1945.87	1818.42	1731.85	1652.97	1579.13
165000	2332.70	2148.00	2007.62	1874.27	1785.96	1705.24	1627.70
170000	2403.39	2213.08	2069.37	1930.12	1840.07	1757.51	1676.27
175000	2474.08	2278.16	2131.12	1985.97	1894.18	1809.76	1724.84
180000	2544.77	2343.24	2193.06	2041.82	1948.29	1864.01	1773.41
185000	2615.46	2408.32	2254.90	2097.67	2002.40	1918.24	1821.98
190000	2686.15	2473.40	2316.84	2153.52	2056.51	1972.47	1870.55
195000	2756.84	2538.48	2378.78	2209.37	2110.62	2026.70	1919.12
200000	2827.53	2603.56	2440.72	2265.22	2164.73	2080.93	1967.69



## 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.

## 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.

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## 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".





## **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: 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.

## Equitable Distribution: What is Property?

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.

## Equitable Distribution: The Marital Property Presumption

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 *Uhlrig 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

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),

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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: 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).





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

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 curium 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. 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 \(2006\)](#).



## PSS and Alimony

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## Spousal Support

- ▶ Prior to 1995: Completely based on fault
- ▶ After 1995: Purpose/goal less clear
  - Economic Need
  - Economic Parity
  - Rehabilitation
  - Punish guilty party

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## Jurisdiction

- ▶ Trial court has no jurisdiction to enter PSS or alimony order unless parties have physically separated.
  - *Baumann-Chacon v. Baumann*, 212 NC App 137 (2011)
  - Exception? PSS and alimony can be requested in pleading for divorce from bed and board filed before separation.
- ▶ Personal jurisdiction requires that defendant have minimum contacts with NC
  - Unless waived by defendant

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## Waiver of right to support

- ▶ Entitlement to PSS and/or alimony can be waived by an *express provision* in a prenuptial agreement or in a separation agreement
  - CS 50-16.6(b)
  - General waiver of "all marital rights" is insufficient; need specific reference to alimony or spousal support
  - Cannot waive right to support *during* marriage, before separation

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## Dependent Spouse

- ▶ Actually, substantially dependent on other spouse to maintain accustomed standard of living, or
- ▶ Substantially in need of maintenance and support in order to maintain accustomed standard of living
- ▶ Never reach issue of support unless find moving party is a dependent spouse

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## Dependent spouse

- ▶ Dependency can be established by showing spouse has insufficient income to meet reasonable needs

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## Supporting Spouse

- ▶ A spouse upon whom the moving party is dependent
- ▶ Never reach issue of support unless find nonmoving party is a supporting spouse

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## Supporting Spouse

- ▶ Supporting spouse can be established by showing spouse has income in excess of his/her reasonable needs

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## PSS and Alimony

- ▶ Reasonableness of expenses and needs is determined by consideration of the accustomed standard of living of the parties and the present financial circumstances of the parties.

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## Postseparation Support

- ▶ Temporary alimony
  - Ends as provided by statute GS 50-16.1A(4)
- ▶ Interlocutory order so don't use much court time
  - Can decide on affidavits or verified pleadings alone
  - Findings are not binding in alimony hearing; parties have the right to relitigate all facts found in PSS order
- ▶ Can be modified only upon changed circumstances

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## PSS

- ▶ If PSS order entered at time of divorce, alimony claim must be pending
  - GS 50-16.1A(4)
- ▶ Trial court has discretion to begin PSS payments at time of separation or at time of hearing, or sometime in between, but order must explain beginning date

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## PSS

- ▶ Subject to consideration of fault, must award PSS if:
  - Moving party is dependent
  - Nonmoving party is supporting
  - Dependent spouse has inadequate resources to meet his/her reasonable needs, and
  - Supporting spouse has ability to pay

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## PSS

- ▶ Decision shall be based on financial needs of the parties, but judge can consider fault if supporting spouse brings it up first.
  - Trial court shall consider marital misconduct of dependent spouse. GS 50-16.2A(d)
  - If court considers marital misconduct of dependent spouse, then also must consider misconduct of supporting spouse. GS 50-16.2A(d)
  - No form of marital misconduct is an absolute bar to PSS

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## Termination/duration of PSS

- ▶ GS 50-16A.1A(4): PSS terminates upon whichever first occurs:
  - The date specified in PSS order
  - The date of an order allowing or denying alimony
  - The date of a dismissal of an alimony claim
  - The date of entry of a divorce judgment if there is no claim for alimony pending at time judgment is entered

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## Alimony

- ▶ “Permanent” support
  - Duration up to you
  - Beginning date at time of separation, time of entry of order, or anytime in between, but must explain
- ▶ Subject to fault considerations, court “shall” award if:
  - Moving spouse is dependent
  - Other spouse is supporting, and
  - Judge determines award is equitable after considering all relevant factors, including those listed in statute

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## Fault in Alimony

- ▶ Pre-separation illicit sexual behavior by supporting spouse = alimony
- ▶ Pre-separation illicit sexual behavior by dependent spouse = no alimony
- ▶ Pre-separation illicit sexual behavior by both = judge decides weight and impact
- ▶ Any other marital misconduct = judge decides weight and impact

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## Alimony

- ▶ Order must explain amount and duration
- ▶ Ends automatically upon
  - Death of either party
  - Remarriage or cohabitation of dependent spouse
- ▶ Modification allowed upon showing change of circumstances affecting need for or ability to pay support
  - Never have subject matter jurisdiction to modify alimony order entered in another state after UIFSA

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## Manner of Payment

- ▶ 50-16.7(a)
  - Lump sum
  - Periodic payment
  - Income withholding
  - Transfer of title or possession of personal property
  - Security interest in or possession of real property
  - Title to real property owned by obligor to pay lump sum award, but only if net value of property does not exceed total amount to be satisfied

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## Attorney fees

- ▶ Either PSS or alimony, court can award reasonable fees to dependent spouse at any time that spouse would be entitled to alimony or PSS
  - GS 50-16.4
- ▶ Order needs findings that spouse is:
  - Entitled to relief demanded; and
  - Without sufficient means to subsist during the prosecution of case and to defer the cost of litigation; and
  - Dependent

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## Modification



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## PSS and Alimony

- ▶ Both can be modified only upon a showing of a substantial change in circumstances since the entry of the original order
- ▶ If substantial change is established, court must recalculate PSS or Alimony based on current circumstances

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## Substantial change

- ▶ Must be substantial
- ▶ Moving party has burden of proof to establish substantial change
- ▶ Change must relate to the financial needs of the dependent spouse or the supporting spouse's ability to pay
  - Consider statutory factors used to determine original award

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## PSS and Alimony Scenarios

### Family Law for Judges Part 1

The Magnolias were married for 20 years before they separated fourteen months ago.

Wilma is 45 years old and Henry is 49. Both parties are in good health. They have two children, ages 13 and 15. Wilma has primary physical custody based on a consent order. Wilma lives in the marital residence with the children. Henry lives with his girlfriend who is employed.

Worksheet A of the Child Support Guidelines was used to set permanent child support and it has been ordered at \$1,275 per month. A PSS order was entered by consent twelve months ago. It required only that Henry pay the mortgage payment for the marital home. During the marriage, the Magnolias enjoyed a comfortable middleclass lifestyle. Most summers they were able to take vacation at the beach or in the mountains.

Wilma has an undergraduate degree. She worked full time from when the parties were married until the second child was born. When the second child was born she did not work for about six years, then began working part time when the children were in elementary school. She just started working full time three months ago. She currently earns \$48,000 per year. Her monthly gross is \$4,000 and monthly net is \$3,150.

Henry has an undergraduate degree. He has worked throughout the marriage. He works as a manager for a local business. He makes \$100,000 per year. His monthly gross is \$8,333 and monthly net is \$6,083.

The ED judgment has been entered and Wilma was awarded the marital home, the mortgage on the home, a van, and her retirement account. Henry received his retirement account (valued much higher than Wilma's), a car that is much newer and more valuable than the van. The parties each have household furnishings from the ED.

Information from the parties' Financial Affidavits is attached. You have already decided that the needs and expenses as listed in the Financial Affidavits are reasonable. Worksheet A that was used to set child support is also attached.

Would you award alimony to Wilma? If so, how much and for how long?

How would you articulate the reasons for your decision?

	<b>Wife</b>	<b>Husband</b>
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<b>Shared Family Expenses</b>		
House payment (including taxes and insurance)	\$ 1,700.00	\$ 1,550.00
Electricity	\$ 150.00	\$ 100.00
Heat	\$ 80.00	\$ 75.00
Water	\$ 65.00	\$ 75.00
Cable TV	\$ 135.00	\$ 175.00
Telephone	\$ 125.00	\$ 100.00
Home food and supplies	\$ 700.00	\$ 550.00
House and yard maintenance	\$ 125.00	\$ 150.00
Car payment	\$ 300.00	\$ 500.00
Gasoline	\$ 200.00	\$ 150.00
Internet	\$ 60.00	\$ 60.00
Security	\$ -	\$ 17.00
<b>Total Shared Family Expenses</b>	<b>\$ 3,640.00</b>	<b>\$ 3,502.00</b>
<b>Individual Expenses of Spouse</b>		
Religious and Charitable Contributions	\$ 150.00	\$ 25.00
School/Work lunches	\$ 100.00	\$ 150.00
Medical/Dental vision Insurance*	\$ 250.00	\$ 450.00
Uninsured medical/dental	\$ 60.00	\$ 75.00
Clothing	\$ 200.00	\$ 150.00
Grooming	\$ 90.00	\$ 25.00
Laundry/Dry Cleaning	\$ 50.00	\$ 100.00
Entertainment/Recreation/Activities	\$ 75.00	\$ 100.00
Meals out	\$ 150.00	\$ 200.00
Christmas Gifts (prorated)	\$ 150.00	\$ 100.00
Birthday Gifts	\$ 75.00	\$ 50.00
Subscriptions	\$ 20.00	\$ -
Life Insurance	\$ 27.00	\$ 68.00
Car insurance	\$ 85.00	\$ 120.00
Car (maintenance/repair/regis/tax)	\$ 175.00	\$ 100.00
Vacations	\$ 250.00	\$ 250.00
<b>Total Individual Expenses of Spouse</b>	<b>\$ 1,907.00</b>	<b>\$ 1,963.00</b>

\*Husband's \$450 includes \$250 as cost for the children

<b>STATE OF NORTH CAROLINA</b>  County	Fife No.	IV-0 Case No. <b>3</b>
	Case No. (Code)	UIFSA Case No.

In The General Court of Justice District  
Superior Court Division

Civil: <u>Plaintiff Wilma Magnolia</u>	<b>WORKSHEET A CHILD SUPPORT OBLIGATION PRIMARY CUSTODY</b>
criminal: <u>STATE</u>	
Versus	
Name Of Defendant Henry Magnolia	

G.S. 50-13.4(c)

Children	Date Of Birth	Children	Date Of Birth
1			
2			

	Plaintiff	Defendant	Combined
1. MONTHLY GROSS INCOME	\$ 4,000.00	\$ 8,333.00	
a. Minus pre-existing child support payment	-	-	
b. Minus responsibility for other children	-	-	
2. MONTHLY ADJUSTED GROSS INCOME	\$ 4,000.00	\$ 8,333.00	\$ 12,333.00
3. Percentage share of income: <i>(line 2 for each parent's income, divided by Combined income)</i>	32.43 %	67.57%	
4. BASIC CHILD SUPPORT OBLIGATION <i>(apply line 2 Combined to the Schedule of Basic Support Obligations-see AOC-A -162, Rev. 1115)</i>			\$ 2,007.30
5. Adjustments <i>(expenses paid directly by each parent)</i>			
a. Work-related childcare costs	\$	\$	
b. Health insurance premium costs – child/children portion only <i>(total premium + # of persons covered x # of children subject to order = children's portion)</i>	\$	\$ 250.00	
c. Extraordinary expenses	\$	\$	
a. total Adjustments <i>(for each column, add 5a, 5b and 5c. Add two totals for Combined amount)</i>	\$	\$ 250.00	\$ 250.00
6. TOTAL Child Support Obligation <i>(add line 4 Combined to line 5d Combined)</i>			\$ 2,257.30
7. Each parent's child support obligation <i>(Line 3 x line 6 for each parent)</i>	\$ 732.04	\$ 1,525.26	
8. Non-Custodial Parent Adjustment <i>(enter non-custodial parent's line 5d)</i>	\$	\$ 250.00	
9. RECOMMENDED CHILD SUPPORT ORDER <i>(subtract line 8 from line 7 for the non-custodial parent only. Leave custodial parent column blank)</i>	\$	\$ 1,275.26	

Date \_\_\_\_\_ | Prepared By (type or print) \_\_\_\_\_



### Consideration of Fault

1. As you know from the equitable distribution discussion, Henry took a female friend to the Caribbean shortly before he and Wilma separated, spending money from his 401K account. Would your PSS or alimony award change if Wilma proved Henry had been having a sexual affair with the women for the last 10 years of the marriage?
2. Would your PSS or alimony award change if Henry did not have an affair at all but Henry proves Wilma had a weekend sexual affair with a man she met while visiting her old friends from nursing school 7 years before she separated from Henry?
3. What if both scenarios were true; Henry had a long-term affair and Wilma had the weekend affair. Would your PSS or alimony award change?
4. Neither Wilma nor Henry had a sexual affair before the date of separation. Henry moved out of the marital residence, telling Wilma he could not handle the stress of marriage and children anymore. After he moved, he continued to work at the Mill and to pay all of Wilma's household expenses, and he paid all expenses related to Henry, Jr. Two months after moving out of the marital residence, Henry moved in with the woman from the Mill.
  - a. Would your PSS or alimony award change?

### Modification

1. Assume you ordered Henry to pay alimony. Two years after entry of the order, Wilma files a motion to modify. She argues that Henry's income has increased substantially due to the success of Super Sewing, Inc. She asks that alimony be modified to reflect Henry's present ability to pay. Do you modify the award?
2. Assume you ordered Henry to pay alimony for a period of 15 years. Three years after entry of the order, Henry files a motion to modify. He establishes that he has married the girlfriend from the Mill and they recently had a child together. He argues that he no longer can pay alimony to Wilma because of his new family obligations. Do you modify the alimony order?
3. Again, assume you ordered Henry to pay alimony for 15 years. Ten years after entry of the order, when Henry is 59 years old and about to turn 60, he files a motion to modify. He argues that he will be retiring when he turns 60 and will no longer be able to pay the alimony award. Do you modify the order?

## The Role of Fault in Alimony

Long ago and far away, title and control of all of a woman's property vested in her husband upon marriage. In exchange, the husband became responsible for support of the wife for the remainder of her life. The support obligation continued even through divorce, unless the bad conduct of the wife was the reason for the divorce.

This is the common law foundation linking misconduct –fault – to alimony. Over time, the law came to require that any woman seeking alimony first prove that her husband's conduct rather than her own was the cause of the marital breakup.

### NC Law Before 1995

For many years, North Carolina law reflected this common law principle. Any dependent spouse seeking alimony – whether the husband or the wife – was required to first prove marital fault on the part of the supporting spouse before the court could consider financial need for support. And, even if the supporting spouse was at fault, an act of adultery by the dependent spouse, whether before or after separation, completely barred the adulterer from receiving support.

The present alimony statutes were enacted in 1995 and the new legislation significantly diminished the role of fault in favor of more focus on economic need. However, fault – now referred to as marital misconduct, [GS 50-16.1A\(3\)](#) – remains very relevant in the support determination generally and is still determinative in specific circumstances.

### Postseparation Support (PSS)

While [GS 50-16.2A\(c\)](#) provides that a dependent spouse is entitled to postseparation support (temporary alimony) if the court determines that the resources of the dependent spouse are not adequate to meet his or her reasonable needs and the supporting spouse has the ability to pay, this entitlement may be dependent upon the court's consideration of marital misconduct. The statute states:

...[T]he judge shall consider marital misconduct by the dependent spouse occurring prior to or on the date of separation in deciding whether to award postseparation support.... When the judge considers these acts by the dependent spouse, the judge shall also consider any marital misconduct by the supporting spouse in deciding whether to award postseparation support and in deciding the amount of postseparation support.

[GS 50-16.2A\(d\)](#).

This language indicates at least four things about fault and PSS:

- The court must consider allegations of marital misconduct on the part of the dependent spouse;
- The court cannot consider allegations of misconduct of the supporting spouse unless the court first considers misconduct by the dependent spouse;
- All marital misconduct is equal under the law in PSS proceedings, meaning adultery (called ‘illicit sexual behavior’) is not necessarily worse than any other misconduct; and
- While the court must consider allegations of marital misconduct, the impact of marital misconduct on the PSS award is within the discretion of the judge.

While there is no absolute bar to PSS, the court of appeals has held that it is within the trial court’s discretion to deny PSS solely because of marital misconduct. *Sorey v. Sorey*, 757 SE2d 518 (NC App, 2014).

[GS 50-16.3A\(d\)](#) allows a jury to determine whether a party committed marital misconduct when that issue is raised in the context of a claim for alimony, but a jury has no role in the PSS process. *Wells v. Wells*, 132 NC App 401 (1999)(noting that PSS can be determined on affidavits alone). A conclusion that a spouse committed marital misconduct in a PSS order is not binding on the court in the alimony trial because PSS is a temporary order. *Wells*.

### Alimony

According to the court of appeals, the 1995 amendments replaced a “fault-based approach” with a “needs-based approach” to alimony. Under the needs-based approach, except for the rules regarding illicit sexual behavior, marital misconduct is only one of many factors considered when determining whether alimony should be awarded and when determining the amount and duration of an alimony award. *Alvarez v. Alvarez*, 134 NC App 321 (1999). The weight attributed to marital misconduct generally is completely within the discretion of the trial judge. *Romulus v. Romulus*, 215 NC App 495 (2011).

### When Fault Controls

The significant exception to the “needs-based approach” to alimony is the impact of one specific type of marital misconduct; illicit sexual behavior. The statute defines illicit sexual behavior as:

“acts of sexual or deviate sexual intercourse, deviate sexual acts, or sexual acts defined in [G.S. 14-27.1\(4\)](#), voluntarily engaged in by a spouse with someone other than the other spouse”.

[GS 50-16.1A\(3\)\(a\)](#). See also *Romulus* (in addition to sexual intercourse, illicit sexual behavior includes sexual acts defined in [GS 14-27.1\(4\)](#); penetration of vagina by a finger was an act of illicit sexual behavior).

The impact of illicit sexual behavior on alimony is as follows:

- If the court finds that the dependent spouse participated in an act of illicit sexual behavior, as defined in [G.S. 50-16.1A\(3\)a.](#), during the marriage and prior to or on the date of separation, the court shall not award alimony.
- If the court finds that the supporting spouse participated in an act of illicit sexual behavior, as defined in [G.S. 50-16.1A\(3\)a.](#), during the marriage and prior to or on the date of separation, then the court shall order that alimony be paid to a dependent spouse.
- If the court finds that the dependent and the supporting spouse each participated in an act of illicit sexual behavior during the marriage and prior to or on the date of separation, then alimony shall be denied or awarded in the discretion of the court after consideration of all of the circumstances. Any act of illicit sexual behavior by either party that has been condoned by the other party shall not be considered by the court.

### [GS 50-16.3A\(a\).](#)

So an act of illicit sexual behavior committed before separation by a dependent spouse is a complete bar to alimony unless the supporting spouse also committed an act of illicit sexual behavior before the date of separation. This is true even if the supporting spouse committed other forms of marital misconduct. *See Romulus* (spouse barred from alimony due to one incident of illicit sexual behavior despite long history of domestic violence by supporting spouse).

On the other hand, the court must award alimony of some amount and duration if a supporting spouse committed an act of illicit sexual behavior before the date of separation and the dependent spouse did not. *See Fleming v. Fleming, unpublished, 765 SE2d 553 (NC App, Oct. 2014)* (trial court erred in denying alimony despite husband's illicit sexual behavior after concluding that needs of dependent spouse had been met by PSS award).



## Cohabitation is a Defense to Alimony

[N.C. Gen. Stat. 50-16.9\(b\)](#) provides that “if a dependent spouse who is receiving postseparation support or alimony from a supporting spouse ... engages in cohabitation, the postseparation support or alimony shall terminate.” In *Setzler v. Setzler*, 781 SE2d 64 (NC App., 2015), the court stated that “the primary intent in making cohabitation grounds for termination of alimony was to evaluate the economic impact of a relationship on a dependent spouse and, consequently, avoid bad faith receipts of alimony;” bad faith meaning a dependent spouse avoiding remarriage for the sole purpose of continuing to receive alimony. So if the relationship is such that one would expect the parties to be married, the assumption is the only reason they are not married is the desire to avoid the termination of alimony. For more on defining cohabitation, see my earlier post [Alimony: Cohabitation is All About Money After All](#).

Cohabitation clearly terminates an award of support. What if the dependent spouse is cohabitating or has cohabitated at the time she or he is asking the court for an award of postseparation support or alimony? Is cohabitation a defense to the establishment of a support obligation? Does it matter whether the dependent spouse still is cohabitating at the time of the support request?

### ***Williamson v. Williamson***

The first case to address this issue was *Williamson v. Williamson*, 142 NC App 702 (2001). Plaintiff Mr. Williamson was ordered to pay PSS to defendant Ms. Williamson beginning December 3, 1996. The court conducted a hearing on defendant’s claim for alimony during June and July 1998. During that hearing, the trial court concluded defendant had been cohabitating since June 1995, before the PSS order was entered. The trial court ordered Mr. Williamson to pay support to Ms. Williamson from the date of separation until June 1995 when she began cohabitating and denied her request for alimony.

On appeal, defendant argued that the clear language of GS 50-16.9(b) indicates that while cohabitation will terminate an existing order of support, it is not a defense to an initial award of alimony. The court of appeals disagreed, stating:

“[h]ere, the defendant both received payments pursuant to a court order and engaged in cohabitation since 16 July 1995. The statute clearly and unequivocally states that where these circumstances exist, the support payments shall terminate.”

The court of appeals affirmed the trial court’s determination that “plaintiff was not obligated for alimony or postseparation support payments from the time defendant’s cohabitation began” and held that “[i]n cases in which a dependent spouse receives alimony or postseparation support pursuant to a judgment or court order, cohabitation or remarriage terminates that spouse’s right to receive payments.”

The opinion does not indicate whether Ms. Williamson continued to cohabit at the time of her request for alimony and also does not indicate that it would matter at all in the analysis if she no longer was in that relationship when she requested support. The court actually states that the fact “that the defendant began cohabitating prior to the postseparation or alimony award is not relevant.”

### ***Orren v. Orren***

Very recently, the court of appeals interpreted the *Williamson* case broadly and held that even in a case where no support is being paid pursuant to a court order, cohabitation is a defense to a dependent spouse’s request for alimony.

In [Orren v. Orren, NC App \(May 16, 2017\)](#), defendant Ms. Orren requested postseparation support and alimony as well as equitable distribution. No PSS order was entered. Following entry of the equitable distribution judgment, the trial court held a hearing on Ms. Orren’s alimony claim. Following the hearing, the trial court wrote and signed an alimony order granting alimony but the written document was not filed. Three years later, after the trial court was informed that the alimony order had not been entered, the trial court determined that evidence should be reopened on the issue of alimony. Mr. Orren attempted to introduce evidence of wife’s cohabitation, but the trial court refused to admit the evidence, stating on the record that “cohabitation is not a defense to an alimony claim.”

After entry of the alimony order, Mr. Orren appealed. The court of appeals agreed with his contention that the trial court “acted under a misapprehension of the law” when it denied his request to introduce evidence of defendant’s cohabitation.

Ms. Orren argued that GS 50-16.9(b) states only that when a “spouse *who is receiving* postseparation support or alimony ... engages in cohabitation, the postseparation support or alimony shall terminate,” and the court of appeals acknowledged the precise language of the statute stating “[t]hus, the statute addresses situations in which postseparation support or alimony already has been ordered before cohabitation begins.”

Nevertheless, the court in *Orren* held that the opinion in *Williamson* clearly and broadly holds that cohabitation is “a defense to an initial action for alimony.” In addition, the court in *Orren* indicated that it would not make sense to allow alimony to go forward following cohabitation because the award “would immediately be subject to termination based on cohabitation.” The *Orren* court concluded that “[s]imply put, ...cohabitation may be asserted as a defense to an initial alimony claim.”

### **So once cohabitation occurs, all support obligation terminates forever?**

Like *Williamson*, the court in *Orren* does not indicate whether the dependent spouse continued to

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cohabitante at the time the trial court considered her request for alimony. Also like *Williamson*, the court in *Orren* indicates that it does not matter. In stating that cohabitation would automatically terminate any order of alimony entered, the court seems to say clearly that cohabitation at any point in time will terminate a supporting spouse's obligation to pay support forever, regardless of whether the dependent spouse continues to cohabitante at the time of the request for support or not.





## Alimony: Cohabitation is All About Money After All

North Carolina law long has provided that court-ordered alimony terminates upon the death of either the supporting or dependent spouse and upon the remarriage of the dependent spouse. Since 1995, the law provides that even if the dependent spouse does not remarry, alimony also will terminate if the receiver engages in cohabitation. Our appellate courts have struggled to provide clear guidance regarding how to determine when a relationship amounts to cohabitation. Last December, in [Setzler v. Setzler](#), 781 SE2d 64 (NC App., 2015), the court of appeals told us that the primary purpose of the cohabitation rule is to discourage “bad faith” decisions not to remarry and provided the clearest statement to date that cohabitation is proven by showing a relationship that provides economic benefits to the dependent spouse similar to those that would be provided by marriage.

### Cohabitation

[GS 50-16.9\(b\)](#) provides defines cohabitation as:

The act of two adults dwelling together continuously and habitually in a private heterosexual relationship, even if the relationship is not solemnized by marriage, or a private homosexual relationship. Cohabitation is evidence by the voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people, and which include, but are not necessarily dependent on, sexual relations.

In *Craddock v. Craddock*, 188 NC App 806 (2008), the court of appeals explained the cohabitation statute by quoting Professor Suzanne Reynolds:

The statute reflects several of the goals of the “live-in lover statutes,” terminating alimony in relationships that probably have an economic impact, preventing a recipient from avoiding in bad faith the termination that would occur at remarriage, but not the goal of imposing some kind of sexual fidelity on the recipient as the condition of continued alimony. The first sentence reflects the goal of terminating alimony in a relationship that probably has an economic impact. “Continuous and habitual” connotes a relationship of some duration and suggests that the relationship must be exclusive and monogamous as well. All of these factors increase the likelihood that the relationship has an economic impact on the recipient spouse.

2 Suzanne Reynolds, *Lee’s North Carolina Family Law* § 9.85, at 493-94 (5th ed.1999).

A few years later in *Smallwood v. Smallwood*, 742 SE2d 814 (NC App., 2013), the court again stressed the need to find that a relationship has a financial impact on the receiving spouse to support the conclusion that cohabitation has occurred. In affirming the trial court’s conclusion that the former wife was not cohabitating with her boyfriend even though the boyfriend slept at her

house five to seven nights each week, the court of appeals said:

While the court did determine that plaintiff and [her boyfriend] have engaged in some domestic activities, it did not find an assumption of marital rights and duties extending beyond those found in an intimate friendship—such as, for example, joint financial obligations, sharing of a home, combining of finances, pooling of resources, or consistent merging of families.

### ***Bird v. Bird***

But when the Supreme Court was presented with the opportunity to define cohabitation, it did not mention anything at all about the importance of finding that the relationship has a financial impact, raising a question about whether the Supreme Court shares the Court of Appeal's view of the purpose of the statute. In *Bird v. Bird*, 363 NC 774 (2009), the court reversed the trial court decision to grant summary judgment in favor of dependent wife after concluding she was not cohabitating. The Supreme Court held that because there was conflicting evidence about whether the couple maintained separate residences, the trial court was required to consider the subjective intent of the couple regarding whether they intended to cohabit. The court did not say the financial nature of the relationship was not important; it simply made no mention of that issue being significant.

### **[Setzler](#)**

The Court of Appeals made it clear in [Setzler](#) that *Bird* does not change the focus of the analysis from that set out by in *Craddock* and *Smallwood*. In [Setzler](#), the trial court denied former husband's motion to terminate alimony based on cohabitation after concluding that while wife and her boyfriend spent almost every night together, they did not assume those rights and responsibilities usually manifested by married people. The two maintained separate houses and neither kept clothes or personal items at the house of the other. The man did regularly pay living expenses and other bills of the wife, but wife repaid him entirely when she received her property settlement from husband.

The court of appeals affirmed the trial court decision. Significantly, the court of appeals stated that “the primary intent in making cohabitation grounds for termination of alimony was to evaluate the economic impact of a relationship on a dependent spouse and, consequently, avoid bad faith receipts of alimony;” bad faith meaning a dependent spouse avoiding remarriage for the sole purpose of continuing to receive alimony. So if the relationship is such that one would expect the parties to be married, the assumption is the only reason they are not married is the desire to avoid the termination of alimony.

The court held that there are two prongs to the definition of cohabitation found in [GS 50-16.9\(b\)](#). First the trial court must determine there is “a dwelling together continuously and habitually.” According to the court, this first prong reflects the goals of “live-in-lover statutes” discussed by Professor Reynolds in the quote above. The statute is not intended to allow a court to terminate

alimony simply because a recipient engages in a sexual relationship but recognizes that a continuous, habitual, monogamous and exclusive relationship usually results in an economic impact on the dependent spouse. In [Setzler](#), the trial court concluded that wife and the man did dwell together continuously and habitually, had a monogamous and exclusive relationship, and the relationship had a financial impact on wife because man paid for all of their expenses when they traveled, had dinner out or cooked for both of them at home.

However, the second prong of the statutory definition requires that the court find that the couple “voluntarily assumes those marital rights, duties, and obligations usually manifested by married people” based upon the totality of the circumstances. In this case, the trial court supported its conclusion that the parties did not meet this prong with findings that the two maintained separate residences, did not combine their finances, did not maintain each other’s homes, and did not refer to themselves as married. While the regular payment of living expenses by one for the other would support a conclusion that this prong exists, the payments do not establish this type of relationship if they are loans only, as they were in this case.



## Postseparation Support and Alimony

### § 50-16.1A. Definitions.

As used in this Chapter, unless the context clearly requires otherwise, the following definitions apply:

- (1) "Alimony" means an order for payment for the support and maintenance of a spouse or former spouse, periodically or in a lump sum, for a specified or for an indefinite term, ordered in an action for divorce, whether absolute or from bed and board, or in an action for alimony without divorce.
- (2) "Dependent spouse" means a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse.
- (3) "Marital misconduct" means any of the following acts that occur during the marriage and prior to or on the date of separation:
  - a. Illicit sexual behavior. For the purpose of this section, illicit sexual behavior means acts of sexual or deviate sexual intercourse, deviate sexual acts, or sexual acts defined in G.S. 14-27.20(4), voluntarily engaged in by a spouse with someone other than the other spouse;
  - b. Involuntary separation of the spouses in consequence of a criminal act committed prior to the proceeding in which alimony is sought;
  - c. Abandonment of the other spouse;
  - d. Malicious turning out-of-doors of the other spouse;
  - e. Cruel or barbarous treatment endangering the life of the other spouse;
  - f. Indignities rendering the condition of the other spouse intolerable and life burdensome;
  - g. Reckless spending of the income of either party, or the destruction, waste, diversion, or concealment of assets;
  - h. Excessive use of alcohol or drugs so as to render the condition of the other spouse intolerable and life burdensome;
  - i. Willful failure to provide necessary subsistence according to one's means and condition so as to render the condition of the other spouse intolerable and life burdensome.
- (3e) "Payor" means any payor, including any federal, State, or local governmental unit, of disposable income to an obligor. When the payor is an employer, payor means employer as defined under 20 U.S.C. § 203(d) of the Fair Labor Standards Act.
- (4) "Postseparation support" means spousal support to be paid until the earlier of any of the following:
  - a. The date specified in the order for postseparation support.
  - b. The entry of an order awarding or denying alimony.
  - c. The dismissal of the alimony claim.
  - d. The entry of a judgment of absolute divorce if no claim of alimony is pending at the time of entry of the judgment of absolute divorce.

e. Termination of postseparation support as provided in G.S. 50-16.9(b). Postseparation support may be ordered in an action for divorce, whether absolute or from bed and board, for annulment, or for alimony without divorce. However, if postseparation support is ordered at the time of the entry of a judgment of absolute divorce, a claim for alimony must be pending at the time of the entry of the judgment of divorce.

- (5) "Supporting spouse" means a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent for maintenance and support or from whom such spouse is substantially in need of maintenance and support. (1995, c. 319, s. 2; 1998-176, s. 8; 2005-177, s. 1; 2015-181, s. 20.)

### **§ 50-16.2A. Postseparation support.**

(a) In an action brought pursuant to Chapter 50 of the General Statutes, either party may move for postseparation support. The verified pleading, verified motion, or affidavit of the moving party shall set forth the factual basis for the relief requested.

(b) In ordering postseparation support, the court shall base its award on the financial needs of the parties, considering the parties' accustomed standard of living, the present employment income and other recurring earnings of each party from any source, their income-earning abilities, the separate and marital debt service obligations, those expenses reasonably necessary to support each of the parties, and each party's respective legal obligations to support any other persons.

(c) Except when subsection (d) of this section applies, a dependent spouse is entitled to an award of postseparation support if, based on consideration of the factors specified in subsection (b) of this section, the court finds that the resources of the dependent spouse are not adequate to meet his or her reasonable needs and the supporting spouse has the ability to pay.

(d) At a hearing on postseparation support, the judge shall consider marital misconduct by the dependent spouse occurring prior to or on the date of separation in deciding whether to award postseparation support and in deciding the amount of postseparation support. When the judge considers these acts by the dependent spouse, the judge shall also consider any marital misconduct by the supporting spouse in deciding whether to award postseparation support and in deciding the amount of postseparation support.

(e) Nothing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation. (1995, c. 319, s. 2.)

### **§ 50-16.3A. Alimony.**

(a) Entitlement. - In an action brought pursuant to Chapter 50 of the General Statutes, either party may move for alimony. The court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors, including those set out in subsection (b) of this section. If the court finds that the dependent spouse participated in an act of illicit sexual behavior, as defined in G.S. 50-16.1A(3)a., during the marriage and prior to or on the date of separation, the court shall not award alimony. If the court finds that the supporting spouse participated in an act of illicit sexual behavior, as defined in G.S. 50-16.1A(3)a., during the marriage and prior to or on the date of separation, then the court shall order that alimony be paid

to a dependent spouse. If the court finds that the dependent and the supporting spouse each participated in an act of illicit sexual behavior during the marriage and prior to or on the date of separation, then alimony shall be denied or awarded in the discretion of the court after consideration of all of the circumstances. Any act of illicit sexual behavior by either party that has been condoned by the other party shall not be considered by the court.

The claim for alimony may be heard on the merits prior to the entry of a judgment for equitable distribution, and if awarded, the issues of amount and of whether a spouse is a dependent or supporting spouse may be reviewed by the court after the conclusion of the equitable distribution claim.

(b) Amount and Duration. - The court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony. The duration of the award may be for a specified or for an indefinite term. In determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors, including:

- (1) The marital misconduct of either of the spouses. Nothing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation;
- (2) The relative earnings and earning capacities of the spouses;
- (3) The ages and the physical, mental, and emotional conditions of the spouses;
- (4) The amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others;
- (5) The duration of the marriage;
- (6) The contribution by one spouse to the education, training, or increased earning power of the other spouse;
- (7) The extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the custodian of a minor child;
- (8) The standard of living of the spouses established during the marriage;
- (9) The relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his or her reasonable economic needs;
- (10) The relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support;
- (11) The property brought to the marriage by either spouse;
- (12) The contribution of a spouse as homemaker;
- (13) The relative needs of the spouses;
- (14) The federal, State, and local tax ramifications of the alimony award;
- (15) Any other factor relating to the economic circumstances of the parties that the court finds to be just and proper.
- (16) The fact that income received by either party was previously considered by the court in determining the value of a marital or divisible asset in an equitable distribution of the parties' marital or divisible property.

(c) Findings of Fact. - The court shall set forth the reasons for its award or denial of alimony and, if making an award, the reasons for its amount, duration, and manner of payment. Except where there is a motion before the court for summary judgment, judgment on the pleadings, or other motion for which the Rules of Civil Procedure do not require special findings of fact, the



court shall make a specific finding of fact on each of the factors in subsection (b) of this section if evidence is offered on that factor.

(d) In the claim for alimony, either spouse may request a jury trial on the issue of marital misconduct as defined in G.S. 50-16.1A. If a jury trial is requested, the jury will decide whether either spouse or both have established marital misconduct. (1995, c. 319, s. 2; c. 509, s. 135.2(b); 1998-176, s. 11.)

# Spousal Agreements

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## Contracts Between Spouses

- ▶ Premarital agreements
- ▶ Postnuptial agreements
- ▶ Separation Agreements



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Remember the Magnolias.

When Wilma filed for Divorce, alimony and ED, Henry filed an answer alleging that Wilma's claim is barred by a prenuptial agreement signed by the parties. In the agreement both waive all spousal support and equitable distribution. Wilma admits signing the agreement, but she says it is no longer appropriate because she needs spousal support in order to be able to care for Henry Jr. Do you dismiss Wilma's claims?

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## Premarital agreements

- ▶ Uniform Premarital Agreements Act
  - GS 52B
  - Applies to contracts after July 1, 1987
- ▶ No consideration required
- ▶ Can contract re: everything except child support



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## Prenuptial Agreements

- ▶ Waiver of ED and alimony must be explicit
- ▶ General waiver of “all rights” not sufficient
- ▶ *See GS 50-16.6 (b)*
  - Waiver must be definitely and explicitly stated



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## Impoverished Spouse

- ▶ GS 52B-7(b)
  - If provision in premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility - assuming requirements of PSS and alimony statutes are met.

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Question 2:



Instead, Wilma argues that the prenuptial agreement should be set aside because she did not know what she was signing at the time the agreement was executed. She tells you that Henry and his father presented it to her to sign the day before the wedding. She thought she had to sign it and she has not looked at it since. Should you set aside the prenuptial?



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### GS 52B-7(a)

- ▶ A premarital agreement is not enforceable if the party against whom enforcement is sought proves:
  - That party did not execute the agreement voluntarily
  - Or .....



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### GS 52B-7(a)

- ▶ The agreement was unconscionable when entered, and before execution, that party:
  - Was not provided fair disclosure, AND
  - Did not expressly waive disclosure, AND
  - Did not have, and reasonably could not have had, knowledge of the property or financial obligations of the other

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### Question 3

Rather than a prenuptial, Henry and Wilma signed a contract after they had been married five years. In the contract, both waived all rights to alimony and equitable distribution. Wilma argues the agreement is now unconscionable in light of the present circumstances and should not be enforced. Does the agreement bar Wilma's claims?



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### Postnuptial agreements

- ▶ GS 52-10(a)
  - Contracts valid unless violate public policy
- ▶ GS 50-20(d)
  - Agreements re: property division allowed "before, during or after marriage"
- ▶ No alimony agreement unless separated



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### Agreements

- ▶ *Dawbarn*, 175 NC App 712 (2006)
  - Postnuptial agreement
- ▶ Violates public policy?
  - *Cf. Williams*, 120 NC App 707 (1995)
  - *Cf. Matthews*, 2 NC App 143 (1968)



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## Dawbarn

- ▶ Fraud, duress, undue influence
  - 3 year statute of limitation
- ▶ Unconscionability
  - Need procedural AND substantive
- ▶ Breach of fiduciary duty



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## Question 4

What if Wilma argues that the agreement should be set aside because she had no idea what the mill and marital home were worth when she signed the contract. She paid very little attention to financial matters because she spent so much time taking care of the children. She also testifies that Henry told her repeatedly that the mill was worth nothing because he could never sell it. Can you set aside the agreement?



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## Failure to Disclose as Defense

- ▶ Prenuptial
  - Also need procedural and substantive unconscionability
- ▶ Postnuptial
  - Duty to disclose as long as there is a fiduciary relationship
  - If breach duty, failure to disclose may be defense

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Question 5

No agreements during the marriage. However, the week before Henry moved out of the house, the Magnolias signed what it titled a "Separation and Property Settlement Agreement". The agreement divides all of the property and debt between Henry and Wilma, and it sets alimony and child support to be paid by Henry, and grants primary physical custody of both children to Wilma.

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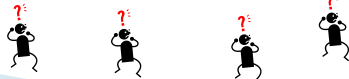
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Question 5(a)

Henry files for ED. Wilma answers that the agreement is a bar to Henry's claim. Henry states that he signed the agreement when he was feeling very guilty about the end of the marriage and he now feels he gave Wilma too much. He wants you to "ignore the agreement" and proceed with ED, or he wants you to at least modify the agreement to make it fair. Can you do either?



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## Separation Agreements

- ▶ Executed while separated or when separation imminent
- ▶ Can resolve all issues
- ▶ Contracts principles apply generally
- ▶ Modified only by written agreement between the parties



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## Defenses to Enforcement

- ▶ Fraud, undue influence, duress
- ▶ Lack of mental capacity
- ▶ Unconscionability
  - Nee both procedural and substantive
- ▶ Failure to disclose when in fiduciary relationship
- ▶ Vagueness



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### Question 5(b)



Instead, Henry testifies that while they were living apart when they signed the agreement, he and Wilma decided to try to 'work things out' and lived together for 6 months before separating for good. Does this fact make a difference?

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## Separation Agreements

- ▶ Reconciliation voids all executory provisions of the agreement
- ▶ What is executory?



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## Property Settlement Provisions

- ▶ If agreement is integrated, reconciliation voids *all* executory provisions of the agreement
- ▶ If agreement is not integrated, property settlement provisions will remain enforceable



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## Integrated?

- ▶ Are the separation provisions in consideration of the property provisions?
- ▶ Unequivocal integration clause controls
- ▶ If no clause, presumption is that agreement is NOT integrated



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## Question 6

There has been nothing between Henry and Wilma except Wilma's action for absolute divorce. At the summary judgment, Wilma's lawyer requests that the divorce judgment incorporate the separation agreement signed by the parties after they separated. Henry and his attorney are not present in court. Do you incorporate the agreement?

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## Incorporated Agreements

- ▶ Become court orders and lose their status as a contract
- ▶ Treated for all purposes as a consent judgment
- ▶ No requirement that judge allow incorporation



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### Question 7



After the divorce judgment is entered incorporating the agreement, Wilma files a motion to modify the provisions dealing with child support and alimony. She alleges there has been a substantial change of circumstances since she signed the agreement. Henry argues that you cannot modify a contract. Can you modify?

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## Incorporated Agreements

- ▶ Child custody, child support, and alimony subject to modification
- ▶ Moving party must show substantial change in circumstances since date of incorporation



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## Incorporated Agreements

- ▶ Property settlement provisions cannot be modified by the court
- ▶ If agreement is integrated, provisions labeled as alimony may not be 'true alimony'
- ▶ If the 'alimony' payments are really property settlement, the payments cannot be modified by the court

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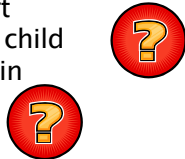
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### Question 8

Assume the agreement was never incorporated. Among other things, the agreement requires that Henry continue to pay child support for Henry Jr. as long as Wilma remains the primary caretaker of Henry Jr. Wilma files a complaint, asking that you hold Henry in contempt because he stopped paying child support altogether when their youngest child turned 18. Can you hold Henry in contempt?



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## Unincorporated Agreements

- ▶ Can enforce provisions even if they are provisions a court could not order
- ▶ Cannot enforce contract by contempt
  - First: Breach of Contract
  - Second: Remedy of Specific Performance
  - Third: Contempt for violation of order of specific performance



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