

RETIREMENT ACCOUNTS AND DEFERRED COMPENSATION

Equitable Distribution

G.S. 50-20(b)(1)

Marital property includes all real and personal property acquired during the marriage and before the date of separation

Marital property includes all vested and nonvested pension, retirement and other deferred compensation rights to the extent those rights were earned during the marriage

G.S. 50-20.1

Regulates the classification and distribution of a all pension, retirement and deferred compensation rights

“Applies to all plans, programs, and systems of funds, specifically including but not limited to uniformed services retirement programs, federal government plans, State government plans, local government plans, Railroad Retirement Act pensions, executive benefit plans, church plans, charitable organization plans, individual retirement accounts within the definitions of Internal Revenue Code sections 408 and 408A, and accounts within the definitions of Internal Revenue Code section 401(k), 403(b), or 457.”

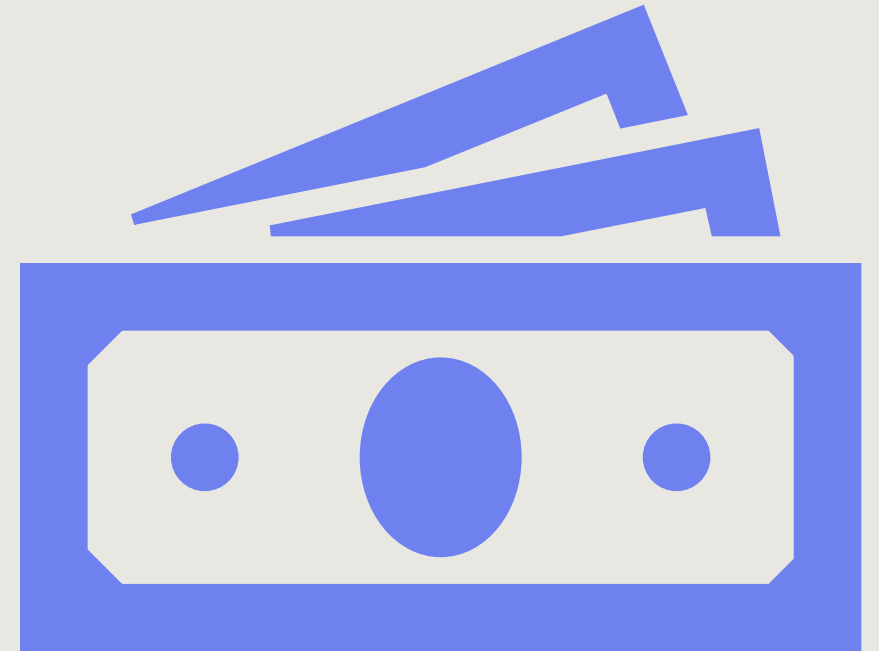
**Excluded
due to
federal law**

Social Security Benefits

Military Disability Benefits

Three examples

1. North Carolina State Employees Retirement Account
2. 401K Account
3. Stock Options



**North Carolina
State
Employees
Retirement
Account**

A Pension

A Defined Benefit Plan

GS 50-20.1(d)(amount of the benefit is determined in whole or in part by the length of time of the participant-spouse's employment)

401(k) account

A Retirement Account

A Defined Contribution Account

G.S. 50-20.1(d1)(amount of benefit is not determined by length of employment but is based on contributions held in one or more accounts with readily attainable balances)

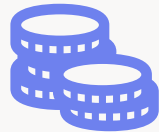


Stock Options



Deferred Compensation

the right or option to
buy stock at a certain
price in the future



A salary substitute



Probably a defined contribution benefit



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

GS 50-20.1(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 “coverture fraction”

Defined Benefit Plan

State Employees Retirement Account

1. **Wife begins working for the state two years after the date of marriage and she is still working for the state on the date of separation. On date of separation, she has worked for the state for 20 years**

What is the coverture fraction?

2. **Wife begins working for the state two years before the date of marriage and she is still working for the state on the date of separation. On the date of separation, she has worked for the state for 20 years.**

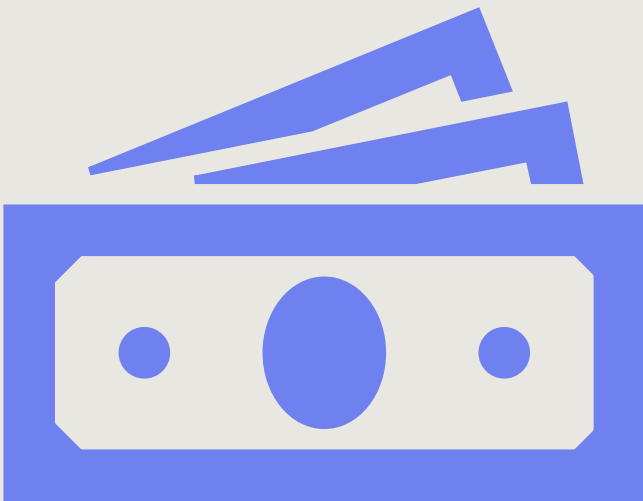
What is the coverture fraction?

Defined Contribution Benefit

GS 50-20.1(d1):

... the court shall not determine the award using the fraction described in subsection (d) of this section. The court instead shall determine the marital portion of the benefit by **determining the amount of the account balance that is due to contributions made or earned during the marriage and before separation, together with the income, gains, losses, appreciation, and depreciation accrued on those contributions. (tracing)**

If sufficient evidence is not presented to the court to allow the court to make this determination, the court shall then determine the marital portion of the benefit by using the fraction described in subsection (d) of this section (the coverture fraction)



401K Plan

1. Wife begins working and earning/contributing to the 401K two years after the date of marriage and she is still working and contributing to the 401K on the date of separation. On date of separation, she has worked for 20 years

How much of the account is marital?

2. Wife begins working and earning/contributing to the 401K two years before the date of marriage and she is still working and contributing to the 401K on the date of separation. On the date of separation, she has worked for the state for 20 years.

How much of the account is marital?



Valuation

Subject to one exception found in GS 50-20.1(d), all marital pension, retirement benefits, or deferred compensation benefits **must be valued as of the date of separation**

If there is no date of separation value, the benefits fall out of equitable distribution

A blue ballpoint pen is positioned diagonally across the frame, resting on a document. The document features a blue bar chart with several bars of varying heights. The background is a light blue gradient. The text is overlaid on the left side of the image.

HOW DO WE VALUE
A DEFINED
CONTRIBUTION
ACCOUNT??

HOW DO WE VALUE A DEFINED BENEFIT PLAN?

5-step process
set out in

Bishop v. Bishop

113 NC App 725
(1994)

METHODS OF DISTRIBUTION

**All pension,
retirement
and deferred
comp
benefits
(vested and
nonvested)**

As a lump sum by agreement

**Over a period of time in fixed
amounts by agreement, and**

**By the “fixed percentage method”
by court order or by agreement**

Fixed Percentage Method

GS 50-20.1(a)(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.

Sometimes requires a QDRO (ERISA plans) or a DRO

Court can allocate all costs assessed by plan equally between the parties. GS 50-20.1(f4)

Exception to Value Requirement

Fixed percentage method of distribution:

“if the court makes the award payable [by the fixed percentage method] and the court divides the marital portion of the benefit equally between the participant-spouse and nonparticipant spouse, the court shall not be required to determine the total value of the marital benefits before classifying and distributing the benefits.

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.”

GS 50-20.1(d)

All vested pension, retirement and deferred compensation benefits

- ❑ As a lump sum by agreement
- ❑ Over a period of time in fixed amounts by agreement
- ❑ By the fixed percentage method by court order or by agreement
- ❑ By the immediate offset method by court order or by agreement

Immediate Offset Method (also called present value method)

GS 50-20.1(a)(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.



Vested defined contribution accounts and benefits

- ❑ As a lump sum by court order or agreement
- ❑ Over a period of time in fixed amounts by court order or agreement
- ❑ By the fixed percentage method by court order or by agreement
- ❑ By the immediate offset method by court order or by agreement

Distribution

A court cannot order anything not authorized by the account or fund

A court cannot distribute more than 50% of the benefits unless the plan does not prohibit an award of more than 50% and:

- other assets subject to equitable distribution are insufficient; or
- there is difficulty in distributing any asset or any interest in a business, corporation, or profession; or
- 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
- 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
- both parties consent.

Procedure

GS 50-20.1(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.

Procedure

GS 50-20.1(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.

More about the fixed percentage order

GS 50-20.1(f1)

“Whenever the award is made payable [by the fixed percentage method], and the pension or retirement or deferred compensation plan, program, system, or fund permits the use of a **"separate interest" approach** in the order, there shall be a presumption, rebuttable by the greater weight of the evidence, that the "separate interest" approach shall be used to divide the benefit in question.

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.”

More about the fixed percentage order.....

GS 50-20.1(f2)

Whenever the pension or retirement or deferred compensation benefit is distributed [by the fixed percentage method] in an order that does not employ the "separate interest" approach, the court may, considering the length of the marriage and the ages of the parties:

- (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.

Last thing about fixed percentage orders

GS 50-20.1(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.