

Equitable Distribution Update

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2013 Classification Developments

- ▶ Tenancy by the Entirety
 - Marital property presumption
 - Marital gift presumption
- ▶ Postseparation Payment of Debt
 - Divisible debt
- ▶ Defined Contribution Plans
 - G.S. 50-20.1 and 401K plans and IRAs

Classification

- ▶ First step of three in ED
 - "CVD" - Like the court file
 - Creating the marital (and divisible) pie
- ▶ Most 'technical' step
- ▶ NOT the place for equity
- ▶ Conclusion of Law



Burdens of Proof

- ▶ A judge's best friend
- ▶ **Marital Property Presumption** is key
 - Person seeking marital classification must show:
 - Acquired by one or both during marriage before separation, and
 - Value on date of separation
- ▶ Rebutted by other party proving separate interest

Rebutting marital *property* presumption

- ▶ Show, **by the greater weight of the evidence**, property falls - in whole or in part - within category of separate property
 - Acquired before marriage
 - Acquired by gift/devise by 'a' spouse during the marriage
 - Except gift from other spouse is marital unless specifically say otherwise at time of conveyance
 - Acquired in exchange for separate property
 - Acquired with income earned from separate property
 - G.S. 50-20(b)(2)

SL 2013-103

Tenancy by the Entirety

- "It is presumed that all property acquired after the date of marriage and before the date of separation is marital property except that 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."
 - GS 50-20(b)(1)
 - Amendment effective October 1, 2013

Tenancy by the Entirety

- ▶ Rebut **marital property presumption** by showing, by greater weight of evidence:
 - Real property was acquired in exchange for separate property, or
 - Was acquired with income earned from separate property

Marital *Gift* Presumption

- ▶ A conveyance of separate property to tenancy by the entirety is presumed to be a gift to the marriage
 - *Walter v. Walter*, 149 NC App 723 (2002)
 - *McLean*, 323 NC 543 (1988)
 - *McLeod*, 74 NC App 144 (1985)
- Prove not a gift?
 - Cases say **only by clear, cogent and convincing evidence** of no intent to transfer title without consideration.
 - See *McLean* (motive for making gift is not relevant)
 - Legislation changes this to **greater weight of the evidence** - maybe????
 - See *McLean* (rebutting the marital property presumption and marital gift presumption are 'distinct' issues)

Gift Presumption

- ▶ If gift presumption is not rebutted, property held as tenants by the entirety created from separate property will be separate property only if that intention is **expressly stated in the conveyance**.
 - GS 50-20(b)(2)
 - See *McLean* and *Romulus*

Classifying Mixed Property

- ▶ When both the separate and marital estates contribute to the acquisition of equity in real property, **each estate is entitled to an interest in the property in the ratio its contribution bears to the total investment in the property**
 - *Wade v. Wade*, 72 NC App 372 (1985)
 - *Mishler v. Mishler*, 90 NC App 72 (1988)
- ▶ In this way, each estate receives its actual contribution and a proportionate share of any return on investment (meaning a share of any appreciation of the real property during the marriage)

Classifying a house – easy right?

- ▶ *Ross v. Ross*, 749 SE2d 84 (NC App September 2013)
 - Classification when house is *not* taken as a tenancy by the entirety, or when marital gift presumption is rebutted
 - **Total amount** contributed to acquisition of property up to *date of separation*: \$155,142.27
 - \$21,000 was husband's separate equity from before marriage (13.5% of total contribution)
 - \$134,142.27 was marital funds paying mortgage (86.5% of total contribution)
 - **DOS** equity in house was 86.5% marital
 - **DOS** equity in house was 13.5% separate
 - **Postseparation increase** in equity in house must be classified using same ratio of marital to separate interest existing on DOS
 - So – 86.5% increase is divisible property
 - 13.5% of increase is separate property of husband

Dechkovskaia 754 SE2d 831 (2013)

- ▶ Property cannot be classified in marital unless one or both spouses **owned** the property on the date of separation
 - Houses titled in name of child of the parties could not be marital property
- ▶ ED judge can impose constructive or resulting **trust** on property in favor of one or both spouses but not unless title holder is joined as a party to ED action

Divisible Property

- ▶ Subcategory of marital property
- ▶ Created to address inequities arising from rule that marital estate 'freezes' on date of separation
- ▶ Postseparation:
 - Passive changes in value of marital property
 - Passive income earned from marital property
 - Property acquired as result of effort before DOS
 - Changes in marital debt

Divisible Property

- ▶ Burden of proof
 - Party seeking divisible classification must show property/value/debt fits definition
 - Except – presume an increase/decrease in value of property is divisible

S.L. 2013-103 Effective October 1, 2013

- ▶ Divisible debt
 - "Passive increases and passive decreases in marital debt and financing charges and interest related to marital debt."
 - So active increases and active decreases no longer classified as divisible debt
 - Postseparation debt payments no longer required to be classified
 - Applies to payments made on or after October 1, 2013???

Postseparation Payments

- ▶ Party is entitled to “some consideration” for postseparation payments from separate funds when those payments benefit the marital estate.
 - *Bodie v. Bodie*, 727 SE2d 11 (2012)
- ▶ No \$ for \$ ‘credit’ is required
 - *Peltzer v. Peltzer*, 732 SE2d 357 (2012)
- ▶ Cases say court can:
 - Order reimbursement
 - Give ‘credit’ to paying spouse
 - Increase percentage of distribution
 - *Loving v. Loving*, 118 NC App 501 (1995)
 - *Smith v. Smith*, 111 NC App 460 (1993)

‘Consideration’ of Payments

- ▶ ‘Credit’
 - Distribution of the marital estate
 - ‘credit’ paying party by distributing to that party all or part of the DOS value of a marital debt
 - Can give ‘credit’ even when distribution is equal
- ▶ Distribution factor
 - Consideration of payments when deciding equal or unequal distribution of marital estate
 - No precise value necessary
 - Cannot consider if parties stipulate equal is equitable

“PENSION, RETIREMENT, OR OTHER DEFERRED COMPENSATION”

- ▶ GS 50–20(b)(1)
 - “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.”
- ▶ GS 50–20.1(d)
 - Restricts method of classification
 - *Coverture fraction* conclusively determines portion of DOS value of a plan ‘acquired during the marriage’
 - Restrict methods of distribution

"PENSION, RETIREMENT, OR OTHER DEFERRED COMPENSATION"

- ▶ Coverture Fraction?
- ▶ GS 50-20.1(d)
 - "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 employment which earned the vested and nonvested pension, retirement, or other deferred compensation benefits, to the total amount of time of employment."

Two Types of Plans

- ▶ Defined Benefit
 - A 'traditional' pension-type plan
 - No individual account
 - Formula determines future benefit
- ▶ Defined Contribution
 - An individual account
 - Examples include 401K plans and IRAs
 - It is possible to 'trace' specific value of separate contributions

Watkins v. Watkins
746 SE2d 394 (2013)

- ▶ **Must we use the coverture fraction to classify defined contribution plans?**
 - Not always
 - GS 50-20.1 applies only to "deferred" compensation
 - If owner has access to funds in account, it is not "deferred"
 - Plan may be partially deferred if employer contribution not vested
 - If benefits are not deferred, court can 'trace out' actual separate contribution

Johnson . Johnson
750 SE2d 25 (2013)

- ▶ *******Trial court cannot distribute a pension without finding **value of pension on the date of separation**

Divisible Property

- ▶ Passive income from marital property after date of separation is divisible
 - *Binder v. Binder, unpublished, 753 SE2d 743 (2013)*
 - Amount that represented salary of husband was his separate property; rest was divisible
- ▶ Income received after date of separation as the result of effort *before* the date of separation
 - *Simon v. Simon, 753 SE2d 475 (2013)*
