

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.