TOC

Chapter 6: **Equitable Distribution**

Part 1. Equitable Distribution Overview and Procedure

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I. Introduction and Overview

A. Background

1. Before 1981, North Carolina was a common law "title" jurisdiction with regard to property distribution after divorce. Property was allocated after divorce to the party holding title thereto, a disposition that "tended to reward the spouse directly responsible for its acquisition, while overlooking the contribution of the homemaking spouse." [*White v. White*, 312 N.C. 770, 774, 324 S.E.2d 829, 831 (1985).]
2. "With the advent of no-fault divorce, dependent spouses lost the 'bargaining power' of refusing to consent to a divorce. . . . The combination of no-fault divorce and a 'title only' rule for property distribution sometimes led to unconscionable results." [*McLean v. McLean,* 323 N.C. 543, 549, 374 S.E.2d 376, 380 (1988) (citations omitted). *See also Leatherman v. Leatherman*, 297 N.C. 618, 256 S.E.2d 793 (1979) (wife worked in home and in husband's closely held corporation for many years but could receive only one-half the marital home upon divorce under prevailing legal theories).] Pressure mounted for North Carolina to follow the lead of other states in adopting statutes based on community property or equitable distribution principles. . . . The General Assembly responded in 1981 by enacting 'An Act for Equitable Distribution of Marital Property,' codified as N.C.G.S. §§ 50-20, -21." [*McLean v. McLean,* 323 N.C. 543, 549, 374 S.E.2d 376, 380 (1988) (citations omitted). *See also Hill v. Hill,* 229 N.C. App. 511, 518, 748 S.E.2d 352, 358 (2013), and *Simon v. Simon,* 231 N.C. App. 76, 82, 753 S.E.2d 475, 479 (2013) (both cases citing *Friend-Novorska v. Novorska*, 131 N.C. App. 508, 507 S.E.2d 900 (1998), and both noting that one purpose of North Carolina's Equitable Distribution Act was to "alleviate the unfairness" of the title theory rule).]

B. Social Policy Considerations

1. "Equitable distribution reflects the idea that marriage is a partnership enterprise to which both spouses make vital contributions and which entitles the homemaker spouse to a share of the property acquired during the relationship." [*White v. White*, 312 N.C. 770, 775, 324 S.E.2d 829, 832 (1985).]
2. "Our equitable distribution statute, G.S. 50-20, was enacted in recognition of marriage as a partnership, economic and otherwise, to which both parties contribute either directly or indirectly. By enacting G.S. 50-20, our Legislature granted courts the power to consider factors other than legal title in distributing the marital assets upon the dissolution of the marriage thereby permitting courts to make an equitable distribution which effects a return to each party of that which he or she contributed to the marriage. As we interpret it, the policy behind G.S. 50-20 is basically one of repayment of contribution." [*Hinton v. Hinton*, 70 N.C. App. 665, 668–69, 321 S.E.2d 161, 163 (1984).]

3. "In other words, '[t]he goal of equitable distribution is to allocate to divorcing spouses a fair share of the assets accumulated by the marital partnership.' . . . The heart of the theory is that 'both spouses contribute to the economic circumstances of a marriage, whether directly by employment or indirectly by providing homemaker services.' " [*Smith v. Smith*, 314 N.C. 80, 86, 331 S.E.2d 682, 686 (1985) (citations omitted).]

C. Constitutionality

1. "We believe G.S. 50-20 sets forth reasonably clear guidelines and definitions for courts to interpret and administer it uniformly and in accordance with the legislative intent. The United States Supreme Court has recognized that there are certain areas where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision. . . . We feel the distribution of marital property upon dissolution of a marriage is one such area. . . . We hold that North Carolina's equitable distribution statute, G.S. 50-20, is not unconstitutionally vague." [*Ellis v. Ellis*, 68 N.C. App. 634, 636, 315 S.E.2d 526, 527–28 (1984) (citations omitted).]
2. The equitable distribution of property acquired **before** the effective date of the N.C. Equitable Distribution Act violates neither equal protection nor due process rights under the North Carolina or United States Constitutions. [*Armstrong v. Armstrong,* 322 N.C. 396, 368 S.E.2d 595 (1988).]
3. Retroactive application—deprivation of vested interest in property. In *Wilson v. Wilson*, 73 N.C. App. 96, 325 S.E.2d 668, *review denied,* 314 N.C. 121, 332 S.E.2d 490 (1985), the defendant filed her claim for equitable distribution before the 1983 amendment of the statutory definition of marital property. Before amendment, the statute referred to property acquired "during the course of the marriage." The 1983 amendment added the words "and before the date of separation of the parties." The amendment was applicable to actions pending on Aug. 1, 1983.

   Application of the amended statute was upheld despite defendant's argument that the amendment was unconstitutional because it retroactively excluded certain property from being marital property and further that she had vested rights pursuant to G.S. 50-20(k) to particular marital property acquired after the date of separation. The court of appeals held that the statute does not "create any vested rights in *particular marital property*; it create[s] a right to the equitable distribution of that property, whatever a court should determine that property is." [*Wilson v. Wilson*, 73 N.C. App. 96, 99, 325 S.E.2d 668, 670 (emphasis in original), *review denied,* 314 N.C. 121, 332 S.E.2d 490 (1985).]

D. Right to Equitable Distribution (ED)

1. G.S. 50-20(k) provides that "[t]he 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."
2. The vested right of ED does not create a property right in particular marital property, nor does the fact of separation create a lien on specific marital property in favor of the spouse. Rather, it only creates a right to an equitable distribution of that property, whatever the court should determine that property to be. [*Perlow v. Perlow,* 128 B.R. 412 (E.D.N.C. 1991); *Wilson v. Wilson*, 73 N.C. App. 96, 325 S.E.2d 668, *review denied,* 314 N.C. 121, 332 S.E.2d 490 (1985).]

3. ED is a method of property division upon divorce. Unlike the law in most community property states, ED has no effect on property rights during a marriage. There is no marital property unless married people separate and one requests ED. [*See Tuwamo v. Tuwamo*, 790 S.E.2d 331 (N.C. Ct. App. 2016).]

II. Tasks of a Trial Judge

A. Generally

1. "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 [both] between the parties in accordance with the provisions of this section." [G.S. 50-20(a).]
2. In making an equitable distribution, of property, the trial court follows a three-step process whereby it:
   a. Determines which property is marital and divisible property,
   b. Calculates the net value of the property, and
   c. Distributes the property in an equitable manner. [*Brackney v. Brackney,* 199 N.C. App. 375, 682 S.E.2d 401 (2009), *review withdrawn*, 363 N.C. 853, 694 S.E.2d 200 (2010); *Larkin v. Larkin,* 165 N.C. App. 390, 598 S.E.2d 651 (2004), *aff'd per curiam as modified,* 359 N.C. 316, 608 S.E.2d 754 (2005); *Albritton v. Albritton*, 109 N.C. App. 36, 426 S.E.2d 80 (1993).]

   Specific duties for each of the three steps are set out below.
3. The trial court does not fulfill its duties if it:
   a. Simply divides equally between the parties each asset listed in the equitable distribution affidavits without classifying and valuing each asset and finding facts to support the classification, valuation, and distribution; [*Stanley v. Stanley*, 118 N.C. App. 311, 454 S.E.2d 701 (1995).]
   b. Merely appoints commissioners to sell property and divide the net proceeds without first classifying and valuing the property. [*Thomas v. Thomas*, 102 N.C. App. 127, 401 S.E.2d 367 (1991).]

B. Classification

With respect to classification, the trial judge must:

1. Classify property according to the statutory classifications in G.S. 50-20 as either marital, separate, or divisible property;
2. Classify debt as either marital, separate, or divisible;
3. Support the classification of property by written findings of fact. [G.S. 50-20(j); *Hunt v. Hunt*, 112 N.C. App. 722, 436 S.E.2d 856 (1993).]

For more on the tasks of a trial judge with respect to classification, see *Classification*, Part 2 of this Chapter.

C. Valuation

With respect to valuation, the trial judge must:

1. Value marital and divisible property [G.S. 50-20(c); 50-21(b).] and marital and divisible debt; [*Byrd v. Owens,* 86 N.C. App. 418, 358 S.E.2d 102 (1987); G.S. 50-21(b).]
2. Value property as of the correct date; [For marital property, as of the date of separation pursuant to G.S. 50-21(b); for marital debt, as of the date of separation pursuant to *Mrozek v. Mrozek*, 129 N.C. App. 43, 496 S.E.2d 836 (1998); for divisible property and divisible debt, as of the date of distribution pursuant to G.S. 50-21(b).]
3. Identify the valuation methods used, except when valuing personal effects and household property;
4. Support its valuation with findings.

For more on the tasks of a trial judge with respect to valuation, see *Valuation,* Part 3 of this Chapter.

D. Distribution

With respect to distribution, the trial judge must:

1. Distribute marital and divisible property and marital and divisible debt; [G.S. 50-20(a); *Mrozek v. Mrozek,* 129 N.C. App. 43, 496 S.E.2d 836 (1998).]
2. Distribute marital and divisible property equally, unless she determines that an equal division is not equitable; [G.S. 50-20(c).]
3. If he determines that an equal division is not equitable, the trial judge must divide the marital and divisible property equitably; [G.S. 50-20(c); *Lucas v. Lucas,* 209 N.C. App. 492, 504, 706 S.E.2d 270, 278 (2011) (not sufficient for a trial court to conclude that an unequal distribution is equitable; equitable distribution judgment must state that trial court concluded that an "equal division is not equitable").]
4. Make findings of fact sufficient to address the distributional factors and to support the division ordered. [*Khajanchi v. Khajanchi*, 140 N.C. App. 552, 537 S.E.2d 845 (2000).]

For more on the tasks of a trial judge with respect to distribution, see *Distribution*, Part 4 of this Chapter.

E. When Parties Fail to Present Sufficient Evidence

1. The requirements that the trial court classify and value all property and debt of the parties, and distribute the marital and divisible property and debt, necessarily exist only when evidence is presented to the trial court that supports the claimed classification, valuation, and distribution. [*Miller v. Miller,* 97 N.C. App. 77, 80, 387 S.E.2d 181, 184 (1990) (quoting *In re Marriage of Smith,* 448 N.E.2d 545, 550 (1983)) (refusing to remand for the taking of new evidence when party who claimed debt was marital failed in his burden of proof; a second opportunity to present evidence "would only protract the litigation and clog the trial courts with issues which should have been disposed of at the initial hearing").]
2. Trial court's failure to value husband's pension plan was not prejudicial error because the party claiming an interest in the pension failed to present evidence of value. [*Albritton v. Albritton*, 109 N.C. App. 36, 426 S.E.2d 80 (1993); *Johnson v. Johnson,* 230 N.C. App.

280, 750 S.E.2d 25 (2013) (citing *Albritton*) (trial court did not err when it did not value or distribute defendant's military pension when there was no competent evidence as to the value of the pension as of the date of separation; trial court did consider fact that pension was not distributed as a distribution factor); *Washburn v. Washburn,* 228 N.C. App. 570, 749 S.E.2d 111 (2013) (**unpublished**) (not paginated on Westlaw) (citing *Albritton*) (trial court failed to value a military pension but ordered that a percentage of the future payments be distributed to defendant, which was error; on remand, the pension was to "be removed and excluded" from equitable distribution because defendant, the party claiming an interest, had failed to provide any evidence of the pension's value).]

3. Trial court did not err by not considering postseparation appreciation of marital stock as a distribution factor when wife failed to produce evidence of the appreciation or argue it as a distribution factor. [*White v. Davis,* 163 N.C. App. 21, 592 S.E.2d 265, *review denied,* 358 N.C. 739, 603 S.E.2d 127 (2004).]
4. No error when trial court did not consider husband's guaranty of corporate debt when husband failed to meet his evidentiary burden. [*Fox v. Fox*, 114 N.C. App. 125, 441 S.E.2d 613 (1994).]
5. Trial court is not required to consider tax consequences unless the parties offer evidence about them. [*Wall v. Wall*, 140 N.C. App. 303, 536 S.E.2d 647 (2000).] For the tax consequences to either party as a distribution factor, see *Distribution*, Part 4 of this Chapter, Section V.K.
6. Party appealing cannot meet his burden to show error by relying on his own failure to provide evidence from which the trial court could have made a more definitive ruling. [*Khajanchi v. Khajanchi*, 140 N.C. App. 552, 537 S.E.2d 845 (2000).]
7. If the party with the burden of proof fails to present credible evidence as to the value of an asset and the trial court, in its discretion, does not appoint an expert and does not value the asset, it is not subject to distribution under the Equitable Distribution Act. [*Grasty v. Grasty*, 125 N.C. App. 736, 482 S.E.2d 752, *review denied*, 346 N.C. 278, 487 S.E.2d 545 (1997).]

F. Discretion of the Trial Judge

1. Equitable distribution, as the term suggests, is not distribution according to some fixed schedule or formula; it requires the exercise of judgment and discretion according to the circumstances involved. [*Appelbe v. Appelbe,* 76 N.C. App. 391, 333 S.E.2d 312 (1985).]
2. Areas in which the trial court has discretion include:
   a. Determining that an equal division is not equitable; [*Holterman v. Holterman*, 127 N.C. App. 109, 488 S.E.2d 265, *review denied,* 347 N.C. 267, 493 S.E.2d 455 (1997).]
   b. Dividing the marital estate equally or unequally; [*Jones v. Jones*, 121 N.C. App. 523, 466 S.E.2d 342, *review denied,* 343 N.C. 307, 471 S.E.2d 72 (1996); *Leighow v. Leighow*, 120 N.C. App. 619, 463 S.E.2d 290 (1995).]
   c. Dividing the estate equally, despite the presence of distributional factors; [*Freeman v. Freeman,* 107 N.C. App. 644, 421 S.E.2d 623 (1992).]
   d. Evaluating and applying statutory factors; [*Leighow v. Leighow*, 120 N.C. App. 619, 463 S.E.2d 290 (1995).]

e. Assigning the weight to each distributional factor or deciding to give no weight to a particular factor; [*Khajanchi v. Khajanchi*, 140 N.C. App. 552, 537 S.E.2d 845 (2000); *Becker v. Becker*, 127 N.C. App. 409, 489 S.E.2d 909 (1997).]

f. Allocating specific property to the parties; [*Khajanchi v. Khajanchi,* 140 N.C. App. 552, 537 S.E.2d 845 (2000); *Harris v. Harris*, 84 N.C. App. 353, 352 S.E.2d 869 (1987); *Andrews v. Andrews*, 79 N.C. App. 228, 338 S.E.2d 809, *review denied,* 316 N.C. 730, 345 S.E.2d 385 (1986), *disapproved of on other grounds by Armstrong v. Armstrong,* 322 N.C. 396, 368 S.E.2d 595 (1988).]

g. The manner in which it distributes or apportions marital debts; [*Khajanchi v. Khajanchi*, 140 N.C. App. 552, 537 S.E.2d 845 (2000).]

h. Balancing the allocation of debts to one party by distributing additional assets to that party; [*Khajanchi v. Khajanchi*, 140 N.C. App. 552, 537 S.E.2d 845 (2000).]

i. Treating one spouse's postseparation debt payments as a distributional factor; [*Khajanchi v. Khajanchi*, 140 N.C. App. 552, 537 S.E.2d 845 (2000).]

j. The structure and timing of a distributive award; [*Smith v. Smith*, 111 N.C. App. 460, 433 S.E.2d 196 (1993), *rev'd in part on other grounds,* 336 N.C. 575, 444 S.E.2d 420 (1994).]

k. Whether to order interest on a distributive award; [*Mrozek v. Mrozek*, 129 N.C. App. 43, 496 S.E.2d 836 (1998).]

l. Whether to impose sanctions under G.S. 50-21(e) for willful delay or attempted delay and which sanctions to impose. [*Crutchfield v. Crutchfield*, 132 N.C. App. 193, 511 S.E.2d 31 (1999).]

III. Procedure

A. Jurisdiction

1. Subject matter jurisdiction.

   a. The district court division is the proper division, without regard to the amount in controversy, for the trial of actions for the equitable distribution of property. [G.S. 7A-244.]

   b. The district court no longer has subject matter jurisdiction to act in a case after final disposition of the matter or when district court action is no longer pending, unless an appropriate post-judgment motion is filed.

      i. Subject matter jurisdiction terminates upon the final disposition of the matter before the court. [*See Whitworth v. Whitworth,* 222 N.C. App. 771, 774, 731 S.E.2d 707, 710 (2012) (2008 equitable distribution (ED) order that specifically stated that it "settles and resolves all claims raised by the pleadings" was a final disposition, no appeal having been taken or post-judgment motions having been filed; thus, the trial court lacked jurisdiction to enter an order in 2010 allowing intervention in the ED case by a corporation owned by the divorced spouses; no statutory authorization for the exercise of continuing jurisdiction applied).]

ii. Final disposition of a case has been defined as "[s]uch a conclusive determination of the subject-matter that after the award, judgment, or decision is made, nothing further remains to fix the rights and obligations of the parties, and no further controversy or litigation can arise thereon." [*Whitworth v. Whitworth,* 222 N.C. App. 771, 780, 731 S.E.2d 707, 714 (2012) (quoting *Whiteco Indus. v. Harrelson,* 111 N.C. App. 815, 818, 434 S.E.2d 229, 232 (1993)).]

c. District court has exclusive jurisdiction over the marital and divisible property issues between the spouses. Nevertheless, a party may file an action in superior court concerning property involved in the ED action.

i. When pending ED action in district court bars superior court proceeding.

(a) When the same property is the subject of both the superior and district court actions, the district court action was filed first, and the relief sought and available is similar in each suit, the district court action precludes the superior court action. [*Burgess v. Burgess,* 205 N.C. App. 325, 698 S.E.2d 666 (2010) (citing *Garrison v. Garrison*, 90 N.C. App. 670, 369 S.E.2d 628 (1988), and *Hudson Int'l, Inc. v. Hudson*, 145 N.C. App. 631, 550 S.E.2d 571 (2001)) (test requires examination of the ED statutes to determine whether the superior court action can be "subsumed" or "lumped" into the ED action).] For discussion of the *Garrison* case, see Section III.H.2, below.

ii. Cases finding that superior court lacked jurisdiction.

(a) *Hudson Int'l, Inc. v. Hudson*, 145 N.C. App. 631, 550 S.E.2d 571 (2001) (citing *Garrison v. Garrison*, 90 N.C. App. 670, 369 S.E.2d 628 (1988), and *Sparks v. Peacock*, 129 N.C. App. 640, 500 S.E.2d 116 (1998)) (when district court's jurisdiction had been invoked under G.S. 7A-244, superior court did not have jurisdiction in subsequently filed declaratory judgment action maintained by an entity closely related to a spouse concerning an asset that might have been marital property).

(b) *Callanan v. Walsh,* 228 N.C. App. 18, 743 S.E.2d 686 (2013) (citing *Burgess v. Burgess,* 205 N.C. App. 325, 698 S.E.2d 666 (2010)) (superior court did not have subject matter jurisdiction over wife's action for specific performance of a prenuptial agreement and for payment of $450,000 as provided in the agreement; those matters were directly addressed in pending ED action).

(c) *Tripp v. Tripp,* 216 N.C. App. 184, 716 S.E.2d 441 (2011) (**unpublished**) (husband's action in New Hanover County Superior Court concerning property located in Kure Beach was properly dismissed for lack of subject matter jurisdiction when Brunswick County District Court had determined in a pending ED action that Kure Beach property was marital property; in both actions, husband sought a determination that he was the sole owner or, alternatively, economic damages to compensate him for the alleged fraud surrounding the conveyance of the property during marriage and the expenses of maintaining and improving the property, all of which could be addressed under the "catch-all" provision of G.S. 50-20(c)(12)).

(d) A dismissal of a superior court action for lack of subject matter jurisdiction pursuant to G.S. 1-1A, Rule 12(b)(1) due to a prior pending claim for ED in district court is not an adjudication on the merits under G.S. 1-1A, Rule 41(b). Thus, the dismissal cannot be with prejudice. [*Tripp v. Tripp,* 216 N.C. App. 184, 716 S.E.2d 441 (2011) (**unpublished**) (citing *Hudson Int'l, Inc. v. Hudson*, 145 N.C. App. 631, 550 S.E.2d 571 (2001), and Rule 41(b)) (dismissal of plaintiff's claims in superior court was without prejudice to his right to have those claims heard in the pending ED action).]

iii. Cases finding that superior court had jurisdiction over some claims and that district court had jurisdiction over other claims.

(a) *Burgess v. Burgess,* 205 N.C. App. 325, 698 S.E.2d 666 (2010). Ownership of a company jointly owned by a husband and wife was at issue in an ED action. While the ED case was pending in district court, wife filed a shareholder derivative suit in superior court. The North Carolina Court of Appeals held that the superior court had jurisdiction over wife's claims for breach of fiduciary duty and for an accounting and inspection of corporate books and records, since those claims did not involve the division of marital property, were outside the scope of G.S. 50-20, and were separate claims of the corporation. Even if the corporation was added as a party to the ED action, wife would not be entitled to the relief she sought in the derivative action, and the district court did not, and could not, obtain jurisdiction over the shareholder derivative suit by statute. However, the superior court erred when it exercised jurisdiction over wife's request to equitably divest husband of his shares in the company; district court jurisdiction to divide the parties' shares had been invoked by the ED action.

(b) *Whitworth v. Estate of Whitworth,* 222 N.C. App. 783, 731 S.E.2d 721 (**unpublished**) (citing *Burgess v. Burgess,* 205 N.C. App. 325, 698 S.E.2d 666 (2010)), *review denied*, 366 N.C. 602, 743 S.E.2d 207 (2012). Ownership of the parties' interests in a closely held corporation, Window World, was resolved pursuant to a consent order and redemption agreement, both signed by the parties' son as president of the corporation, requiring Window World to buy back over a period of years the stock of the parents, who were the husband and wife in an earlier resolved ED action in district court to which Window World was a party. After conclusion of the ED action, wife brought an action in superior court against her son's estate, the son's wife, individually and as executrix of the son's estate, and the corporation. The North Carolina Court of Appeals held that:

(1) The superior court had jurisdiction over claims against all defendants under the North Carolina RICO Act and had jurisdiction over claims against the son's estate and against the son's wife, individually and as executrix of the son's estate, for breach of fiduciary duty, constructive fraud, and fraud, except to the extent those claims sought rescission of the various orders and agreements in the ED case. The claims allowed in the superior court action did not concern the division of marital property, and the claims for relief in the superior court action against

the son's estate and the son's wife were outside the scope of the ED statute, G.S. 50-20, and even if the son's estate and the son's wife could be added as parties to the ED proceeding, the relief sought in the superior court action would not be available in the district court ED action.

(2) The superior court properly dismissed claims asserted in an independent action against Window World for breach of fiduciary duty, constructive fraud, fraud, and rescission as an improper collateral attack on the judgment in the ED action, which was no longer pending when the superior court action was filed, unlike in *Hudson International, Inc. v. Hudson*, 145 N.C. App. 631, 550 S.E.2d 571 (2001), *Garrison v. Garrison*, 90 N.C. App. 670, 369 S.E.2d 628 (1988), and other cases cited by the parties in support of the superior court's lack of jurisdiction. Claims against Window World for breach of contract and conversion essentially sought enforcement of the district court consent order/redemption agreement, so should have been brought in district court as for contempt.

iv. Superior court had jurisdiction over husband's claims but proceeding was stayed until resolution of the ED action.

(a) *Jessee v. Jessee,* 212 N.C. App. 426, 713 S.E.2d 28 (2011) (citing *Burgess v. Burgess,* 205 N.C. App. 325, 698 S.E.2d 666 (2010)). ED action was pending in Alamance County District Court when husband asserted tort claims against wife and others in Forsyth County Superior Court, based on allegedly fraudulent acts of the wife after the date of separation involving conversion of husband's social security checks and wrongfully incurring indebtedness in husband's name, the proceeds of which were used to clear title to, and wrongfully convey, the marital residence to a trust for the benefit of wife. The North Carolina Court of Appeals held that wife's motion to dismiss the Forsyth County tort action was properly denied; neither the exclusive jurisdiction provision in G.S. 7A-244 nor the prior pending action doctrine required dismissal. Because of the "clear interrelationship" between the two actions, the ED action in Alamance County was to proceed to resolution and the Forsyth County tort action was stayed, with the result to be taken into consideration in the tort action. Alamance County District Court was not an appropriate forum for husband's tort-based claims, as (1) the claims related to property allegedly acquired, and to debts allegedly incurred, after the date of separation and were based on acts that were purportedly taken for wife's own personal benefit and that did not stem from marital activities nor relate to marital and divisible property; (2) the claims related to the allegedly fraudulent transfer of the marital residence had little, if anything, to do with the valuation or distribution of that asset; (3) the district court could not accommodate husband's claims in the superior court action for compensatory and punitive damages, nor was it assured that the district court action would afford husband a complete consideration of claims based on actions after the date of separation; (4) there was no assurance that, if the district court were to distribute some interest in

the marital residence to wife, wife's interest would be available to satisfy a judgment in the superior court action; and (5) the district court could not render wife's separate property subject to execution to satisfy husband's tort-based claims.

2. Personal (in personam) jurisdiction.
   a. Generally.
      i. Unlike a simple divorce action in which the court exercises jurisdiction over a **status**, in an ED action the court is exercising jurisdiction over **property interests**. [*Carroll v. Carroll*, 88 N.C. App. 453, 363 S.E.2d 872 (1988).]
      ii. When a nonresident defendant challenges the court's exercise of jurisdiction, the burden is upon the plaintiff to establish by a preponderance of the evidence that personal jurisdiction exists. [*Sherlock v. Sherlock*, 143 N.C. App. 300, 545 S.E.2d 757 (2001) (action seeking, among other things, alimony, postseparation support, and equitable distribution).]
      iii. A court can exercise jurisdiction over any defendant who waives objection to personal jurisdiction. A general appearance in the proceeding waives objection to jurisdiction. [See discussion in Section III.A.2.h.iii, below.]
   b. To determine whether a trial court has personal jurisdiction over a nonresident defendant, the court must undertake a two-part inquiry.
      i. The court must first determine whether North Carolina law provides a statutory basis for the assertion of personal jurisdiction, i.e., "long-arm jurisdiction." *Speedway Motorsports Int'l Ltd. v. Bronwen Energy Trading Ltd.*, 209 N.C. App. 474, 707 S.E.2d 385 (2011), *review denied*, 365 N.C. 542, 720 S.E.2d 669 (2012).
      ii. If the court concludes that there is a statutory basis for jurisdiction, it next must consider whether the exercise of personal jurisdiction complies with the due process requirements of the Fourteenth Amendment, i.e., "minimum contacts" analysis. [*Sherlock v. Sherlock*, 143 N.C. App. 300, 545 S.E.2d 757 (2001); *Tompkins v. Tompkins*, 98 N.C. App. 299, 390 S.E.2d 766 (1990).]
   c. Because North Carolina's long-arm statute extends personal jurisdiction to the limits permitted by due process, in some appellate opinions, the two-part inquiry has been merged into one question: whether the exercise of jurisdiction comports with due process. [*See Lang v. Lang,* 157 N.C. App. 703, 579 S.E.2d 919 (2003); *Sherlock v. Sherlock*, 143 N.C. App. 300, 545 S.E.2d 757 (2001).] Note, however, that in *Speedway Motorsports International Ltd. v. Bronwen Energy Trading Ltd.*, 209 N.C. App. 474, 487, 707 S.E.2d 385, 394 (2011) (citing *Brown v. Ellis*, 363 N.C. 360, 678 S.E.2d 222 (2009)), *review denied*, 365 N.C. 542, 720 S.E.2d 669 (2012), the court of appeals rejected the practice of collapsing the long-arm statute analysis into the minimum contacts analysis in favor of "two separate steps of analysis."
   d. Factors to consider when determining whether defendant has sufficient minimum contacts with North Carolina.
      i. Quantity of defendant's contacts with the state;
      ii. The nature and quality of those contacts;
      iii. The source and connection of the cause of action to the contacts;

iv. The interest of North Carolina in litigating the matter;

v. The convenience of the parties; and

vi. The interests of, and fairness to, the parties. [*Hamilton v. Johnson,* 228 N.C. App. 372, 747 S.E.2d 158 (2013) (first five factors); *Shaner v. Shaner,* 216 N.C. App. 409, 717 S.E.2d 66 (2011), and *Sherlock v. Sherlock,* 143 N.C. App. 300, 545 S.E.2d 757 (2001) (both cases citing *Filmar Racing, Inc. v. Stewart,* 141 N.C. App. 668, 541 S.E.2d 733 (2001)).]

e. Whether a party has sufficient contacts is a factual determination made on a case-by-case basis. [*Shaner v. Shaner*, 216 N.C. App. 409, 717 S.E.2d 66 (2011) (citing *Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 541 S.E.2d 733 (2001)).]

f. Service on defendant within the state. [G.S. 1-75.4(1)a.]

i. It is not necessary to apply the minimum contacts test of due process set forth in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154 (1945), and later cases when the defendant is personally served in the forum state. [*Lockert v. Breedlove*, 321 N.C. 66, 361 S.E.2d 581 (1987); *Jenkins v. Jenkins,* 89 N.C. App. 705, 367 S.E.2d 4 (1988) (court need not determine minimum contacts where nonresident defendant was served with process while temporarily in North Carolina for a brief visit related to his employment).]

g. Consent to personal jurisdiction.

i. Where a nonresident defendant has consented to the jurisdiction of the court, the two-part inquiry to determine personal jurisdiction over a nonresident need not be conducted. [*Montgomery v. Montgomery,* 110 N.C. App. 234, 429 S.E.2d 438 (1993).]

ii. A consent agreement in which the parents agreed that future legal actions regarding their children would be brought where the children reside was a valid consent to the exercise of long-arm personal jurisdiction over the nonresident defendant and waived the minimum contacts/due process analysis usually required in the two-part inquiry. [*Montgomery v. Montgomery,* 110 N.C. App. 234, 429 S.E.2d 438 (1993).]

h. Statutory basis for personal jurisdiction. A North Carolina court has the statutory authority ("long-arm" jurisdiction) to assert personal jurisdiction over a resident or nonresident spouse who is a defendant in an ED action:

i. If the defendant is served with process within the state; [G.S. 1-75.4(1)a. See Section III.A.2.f, above, on service within state negating need for minimum contacts inquiry.]

ii. In any action which may be brought under statutes of this state that specifically confer grounds for personal jurisdiction; [G.S. 1-75.4(2) (Special Jurisdiction Statutes); *Butler v. Butler,* 152 N.C. App. 74, 80 n.5, 566 S.E.2d 707, 711 n.5 (2002) (a determination that statutory jurisdiction exists pursuant to the Uniform Interstate Family Support Act (UIFSA) is likewise a determination that statutory jurisdiction exists pursuant to G.S. 1-75.4(2), which confers personal jurisdiction whenever any special personal jurisdiction statute applies).]

iii. If the defendant makes a general appearance in the action; [G.S. 1-75.7(1) (general appearance). See Section III.A.2.g, above, on consent to jurisdiction

negating need for two-part inquiry; *Judkins v. Judkins*, 113 N.C. App. 734, 441 S.E.2d 139 (by filing an answer containing counterclaims for child custody and support and ED without contesting personal jurisdiction, defendant made a general appearance), *review denied*, 336 N.C. 781, 447 S.E.2d 424 (1994).]

iv. When the ED claim arises out of the defendant's marital relationship within the state, notwithstanding subsequent departure from the state, if the other party to the marital relationship continues to reside in the state. [G.S. 1-75.4(12); *Sherlock v. Sherlock*, 143 N.C. App. 300, 545 S.E.2d 757 (2001) (G.S. 1-75.4(12) authorized the exercise of personal jurisdiction over nonresident defendant in plaintiff's action for post-separation support, ED, alimony, and a restraining order barring husband from disposing of marital assets, when parties were married in North Carolina, plaintiff continued to reside here, and the action arose under G.S. Chapter 50 and sought resolution of issues pertaining to the dissolution of parties' marriage).]

i. Compliance with due process requirements.

i. Due process requires that defendant have minimum contacts with the state. [*Sherlock v. Sherlock*, 143 N.C. App. 300, 545 S.E.2d 757 (2001).]

ii. A summary of the aspects of a defendant's situation that have proven useful in an analysis of "minimum contacts" with a jurisdiction include:

(a) The quantity of defendant's contacts with the state;

(b) The nature and quality of those contacts;

(c) The source and connection of the cause of action to the contacts;

(d) The interest of North Carolina in litigating the matter;

(e) The convenience of the parties; and

(f) The interests of, and fairness to, the parties. [*Hamilton v. Johnson*, 228 N.C. App. 372, 747 S.E.2d 158 (2013) (first five factors); *Shaner v. Shaner*, 216 N.C. App. 409, 717 S.E.2d 66 (2011), and *Sherlock v. Sherlock*, 143 N.C. App. 300, 545 S.E.2d 757 (2001) (both citing *Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 541 S.E.2d 733 (2001)).]

iii. Cases finding that minimum contacts requirement was met.

(a) Defendant's contacts "clearly exceeded" the minimum contacts required for personal jurisdiction when he purchased a marital residence in North Carolina, made monthly visits for two years while still married, maintained a membership in a local social and sporting association, and used an equity line of credit secured by the North Carolina marital residence for business purposes.[*Butler v. Butler,* 152 N.C. App. 74, 566 S.E.2d 707 (2002) (claims for spousal support, child support, and equitable distribution).]

(b) Nonresident husband's act of transferring car title to a third party in violation of a North Carolina domestic violence protective order, issued at a hearing where husband had appeared, and fact that couple married and had lived in North Carolina during part of the marriage, provided sufficient minimum contacts for the exercise of personal jurisdiction in wife's ED action. [*Bates v. Jarrett,* 135 N.C. App. 594, 521 S.E.2d 735 (1999).]

(c) Wife had minimum contacts with North Carolina when she moved her personal property from Virginia and stored it in North Carolina, purchased real estate here, executed a power of attorney using a North Carolina attorney so that house purchase could be closed, and filed taxes and insured her car in North Carolina. [*Morgan v. Morgan,* 230 N.C. App. 143, 752 S.E.2d 259 (2013) (**unpublished**) (considering jurisdiction in context of wife's motion under G.S. 50-11(f)).]

iv. Cases finding that minimum contacts requirement was not met.

(a) Fact that defendant resided in North Carolina for a period of four months several years before ED action was filed in North Carolina, and made only brief visits thereafter, was not sufficient to support exercise of jurisdiction over defendant. [*Shaner v. Shaner,* 216 N.C. App. 409, 717 S.E.2d 66 (2011).]

(b) Plaintiff's move to North Carolina during the marriage and purchase of jointly titled real property did not constitute sufficient contacts by defendant, who had only briefly visited the state and who had not participated in or agreed to the purchase of the real property. [*Shamley v. Shamley,* 117 N.C. App. 175, 455 S.E.2d 435 (1994).]

(c) Plaintiff's allegation that defendant abandoned her in this state was not sufficient without allegations as to a nexus between defendant's misconduct and this state, such as that parties were married or shared a marital domicile in this state or that defendant had conducted activities here, owned property here, or otherwise had invoked the protection of North Carolina laws. [*Tompkins v. Tompkins*, 98 N.C. App. 299, 304, 390 S.E.2d 766, 769 (1990) (even if the marital relationship was still in existence when action for ED and alimony was brought, this "cannot of itself constitute sufficient contacts to establish personal jurisdiction").]

(d) Fact that out-of-state husband may have had an interest in some personal property located in North Carolina was not sufficient to establish personal jurisdiction over husband. [*Carroll v. Carroll*, 88 N.C. App. 453, 363 S.E.2d 872 (1988).]

B. Venue

1. Proper venue for an equitable distribution proceeding is in the county in which one of the parties resides at the commencement of the action, subject to the right of the court to transfer venue in accordance with G.S. 1-83 or another statute. [G.S. 1-82.]

2. Improper venue is subject to attack under G.S. 1A-1, Rule 12(b)(3), and if venue is improper, the court must transfer the case to the proper county. [*Kiker v. Winfield*, 368 N.C. 33, 769 S.E.2d 837 (2015), *aff'g per curiam* 234 N.C. App. 363, 364, 759 S.E.2d 372, 373 (2014) ("The provision in N.C.G.S. § 1-83 that the court 'may change' the place of trial when the county designated is not the proper one has been interpreted to mean 'must change.' "). *See also Little v. Little*, 12 N.C. App. 353, 183 S.E.2d 278 (1971) (stating the general rule that, in the absence of waiver or consent of the parties, express or implied, when a motion for change of venue as a matter of right has been properly made in apt time, the court is in error thereafter to enter any order affecting the rights of the parties,

save the order of removal; trial court erred in ordering alimony pendent lite and attorney fees while Rule 12(b)(3) motion to change venue was pending).]

3. Removal when joined with alimony or divorce.
    a. The defendant has the right to remove an action for alimony or divorce to defendant's county of residence if:
        i. Both plaintiff and defendant were residents of the state when the action was filed,
        ii. Plaintiff stopped being a resident after filing an action in the county of residence, and
        iii. Defendant does not reside in the county in which the action was filed. [G.S. 50-3.]
    b. If defendant has grounds for a change of venue pursuant to G.S. 50-3, the court must grant the request. [G.S. 50-3; *Gardner v. Gardner*, 43 N.C. App. 678, 260 S.E.2d 116 (1979) (language of G.S. 50-3 is mandatory), *aff'd*, 300 N.C. 715, 268 S.E.2d 468 (1980).]
    c. G.S. 50-3 requires removal of all claims joined in the same action with the claims for alimony or divorce, even after the case has been appealed and remanded. [*Dechkovskaia v. Dechkovskaia*, 780 S.E.2d 175 (N.C. Ct. App. 2015) (equitable distribution claim filed in same action as the alimony claim must be removed along with all of the other claims in the case).]
4. Venue provisions are not jurisdictional. Objection to venue is waived if not raised in writing before the time for answering expires. [*See Denson v. Denson*, 255 N.C. 703, 122 S.E.2d 507 (1961); *Smith v. Smith*, 56 N.C. App. 812, 290 S.E.2d 390 (1982) (citing *Denson*) (both cases considering venue under G.S. 50-3 in context of divorce action).] For more on waiver of objection to venue, see Cheryl Daniels Howell, *No Sua Sponte Change of Venue Allowed*, UNC Sch. of Gov't: On the Civil Side Blog (Aug. 26, 2016), http://civil.sog.unc.edu/no-sua-sponte-change-of-venue-allowed.

C. Manner of Asserting Claim

1. G.S. 50-21(a) provides that a claim for equitable distribution (ED) may be filed and adjudicated "[a]t any time after a husband and wife begin to live separate and apart."
2. Pursuant to G.S. 50-21(a), a claim for ED may be filed:
    a. As a separate civil action,
    b. With any other G.S. Chapter 50 action, [*See Hunt v. Hunt*, 117 N.C. App. 280, 450 S.E.2d 558 (1994) (party properly asserted claim for ED in a reply to an undenominated counterclaim filed in an action for absolute divorce).] or
    c. As a motion in the cause as provided by G.S. 50-11(e) or (f).
        i. G.S. 50-11(e) provides that a defendant in an action for absolute divorce may bring an action or file a motion in the cause for ED within six months after entry of judgment for absolute divorce if service of process in the divorce action was by publication and the defendant failed to appear.

ii. G.S. 50-11(f) provides that ED may be sought by action or by motion in the cause in an action for absolute divorce within six months after judgment of divorce is entered if the court entering judgment lacked personal jurisdiction over the absent defendant or lacked jurisdiction over the property subject to ED. [*Cooper v. Cooper*, 90 N.C. App. 665, 369 S.E.2d 630 (1988) (South Carolina court that granted divorce never acquired jurisdiction over marital property, so husband could bring action in North Carolina within six months for ED); *Morgan v. Morgan,* 230 N.C. App. 143, 752 S.E.2d 259 (2013) (**unpublished**) (trial court found that wife was an absent defendant as contemplated by G.S. 50-11(f) but that North Carolina had personal jurisdiction over wife based on her minimum contacts with North Carolina that included the following: wife moved her personal property from Virginia and stored it in North Carolina, purchased real estate here, executed a power of attorney using a North Carolina attorney so that house purchase could be closed, and filed taxes and insured her car in North Carolina).]

3. But see *Santana v. Santana,* 171 N.C. App. 432, 614 S.E.2d 438 (2005), where the court of appeals found that a claim for ED asserted by motion was filed before entry of a divorce judgment, thus making it timely; court did not discuss the propriety of asserting an ED claim by motion, but the holding implies that the motion was appropriate.
4. Oral motion is not sufficient to assert a claim for ED. [*Webb v. Webb,* 188 N.C. App. 621, 656 S.E.2d 334 (2008) (wife's oral motion for ED before trial court granted divorce was insufficient to assert her claim).]

D. Necessary Parties

1. G.S. 1A-1, Rules 19 and 20 provide for necessary and permissive joinder of parties.
2. When a person is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without her presence, such person is a necessary party to the action. [*Upchurch v. Upchurch*, 122 N.C. App. 172, 468 S.E.2d 61 (citing *Strickland v. Hughes,* 273 N.C. 481, 160 S.E.2d 313 (1968)) (finding that a third party who held legal title to property (bonds and notes) claimed to be marital property was a necessary party to an ED proceeding, with participation limited to issue of ownership of that property), *review denied*, 343 N.C. 517, 472 S.E.2d 26 (1996); *Dechkovskaia v. Dechkovskaia,* 232 N.C. App. 350, 754 S.E.2d 831 (citing *Upchurch*) (minor child was a necessary party when child held legal title to real property that was part of ED action between parents; plaintiff claimed child held the properties in a constructive trust for the marital estate), *review denied*, 367 N.C. 506, 758 S.E.2d 870 (2014); *Daetwyler v. Daetwyler,* 130 N.C. App. 246, 502 S.E.2d 662 (1998) (finding that husband's mother and sister were necessary parties in an ED action because those three family members held certificates of deposits claimed as marital property as joint tenants), *aff'd per curiam,* 350 N.C. 375, 514 S.E.2d 89 (1999).]
3. An order that determines a claim in an action where a necessary party has not been joined is null and void. When it appears to the court that a necessary party is absent, the court may refuse to deal with the merits of the action until the necessary party is brought into the action. [*Tanner v. Tanner*, 789 S.E.2d 888 (N.C. Ct. App. 2016).]

4. A necessary party must be properly joined before the court adjudicates the claim involving the necessary party. [*Tanner v. Tanner*, 789 S.E.2d 888, 892 (N.C. Ct. App. 2016) (trial court hearing equitable distribution matter erred by deciding that trust should be imposed on property owned by a third party before the third party was served with process and given the opportunity to participate as a party to the proceeding).]
5. A limited liability company (LLC) is a legal entity, and a court must have jurisdiction over the company before the court can order the LLC to do anything or before it can enter orders affecting property belonging to the LLC. [*Campbell v. Campbell*, 773 S.E.2d 93 (N.C. Ct. App. 2015).] For more on joinder of LLCs, see Cheryl Daniels Howell, *Equitable Distribution: When Does the Marital LLC Have to Be Joined as a Party?* UNC Sch. of Gov't: On the Civil Side Blog (Feb. 12, 2016), http://civil.sog.unc.edu/equitable-distribution-when-does-the-marital-llc-have-to-be-joined-as-a-party.
6. While third parties may be joined when there is a claim that the third party has marital property subject to ED, third parties should not be joined for the purpose of litigating a cause of action one spouse may have against that third party. [*See Mugno v. Mugno,* 205 N.C. App. 273, 695 S.E.2d 495 (2010) (trial court had no authority to order a corporation, in which husband owned stock and that by consent order was a necessary party and joined for ED purposes only, to make payments to wife as reimbursement for funds husband transferred during the marriage to the corporation; court of appeals stated that while wife could seek repayment of the funds by an equitable lien or pursuant to a separate cause of action against the corporation, an ED order is not the proper means to hold the corporation, a third party, responsible for that debt; while court of appeals recognized that corporations or individuals that hold marital assets in trust or that are transferees defrauding a creditor spouse may be subject to legal action to secure marital property in an ED action, court noted that no such subterfuge was present in the instant case).]
7. A trust is a legal entity that must be joined in the equitable distribution action before a constructive trust or a resulting trust is imposed upon property owned by the trust. [*Nicks v. Nicks*, 774 S.E.2d 365 (N.C. Ct. App. 2015).]
8. For necessary parties when property of a deceased spouse is involved, see Section III.I.2, below.

E. No Right to a Jury Trial

1. The only reference to jury trial rights in the equitable distribution (ED) statutes is found in G.S. 50-21(c), which provides that nothing in that statute or in G.S. 50-20 restricts or extends the right to trial by jury as provided by the Constitution of North Carolina. This language does not create a statutory right to trial by jury in an ED proceeding. [*Kiser v. Kiser,* 325 N.C. 502, 385 S.E.2d 487 (1989); *McCall v. McCall,* 138 N.C. App. 706, 531 S.E.2d 894 (2000) (citing *Kiser*).]
2. There is no constitutional right to trial by jury in a proceeding for ED. [*Kiser v. Kiser*, 325 N.C. 502, 385 S.E.2d 487 (1989); *Burgess v. Burgess,* 205 N.C. App. 325, 698 S.E.2d 666 (2010) (citing *Kiser*); *McCall v. McCall*, 138 N.C. App. 706, 531 S.E.2d 894 (2000) (citing *Kiser*).]

3. Cases have found no right to jury trial of the following issues of fact:
   a. The valuation and acquisition of certain property, intent to make a gift to the marital estate, and alleged dissipation of marital assets; [*Kiser v. Kiser,* 325 N.C. 502, 385 S.E.2d 487 (1989).]
   b. The date of separation for ED purposes, even though G.S. 50-10(a) allows for trial by jury on the date of separation in a divorce proceeding; [*McCall v. McCall,* 138 N.C. App. 706, 531 S.E.2d 894 (2000).] and
   c. What was marital property and what was an equitable distribution of the marital property. [*Phillips v. Phillips,* 73 N.C. App. 68, 326 S.E.2d 57 (1985).]
4. A third party to an ED proceeding does not have the right to a jury trial on a claim seeking imposition of a constructive trust. [*Sharp v. Sharp*, 351 N.C. 37, 519 S.E.2d 523, *rev'g per curiam for reasons stated in dissenting opinion in* 133 N.C. App. 125, 514 S.E.2d 312 (1999) (Timmons-Goodson, J., dissenting) (husband's partners, partnership, and corporation in which husband had an interest not entitled to a jury trial in action brought by wife seeking, among other things, to impose a constructive trust on property to which the third parties held legal title).]
5. A trial judge has discretion to use an advisory jury to try any issue or question of fact. [G.S. 1A-1, Rule 39(c).]
   a. Net value of an item of marital property may be appropriate issue for determination by an advisory jury. [*Phillips v. Phillips,* 73 N.C. App. 68, 326 S.E.2d 57 (1985) (court doubtful, given the equitable nature of the proceeding, whether any issue other than value is properly determined by a jury, even an advisory one).]
   b. What is marital property and what is an equitable distribution of the marital property are not pure questions of fact that may be decided by an advisory jury. [*Phillips v. Phillips,* 73 N.C. App. 68, 326 S.E.2d 57 (1985).]

F. No Right to an Attorney

1. There is no liberty interest at stake in an equitable distribution trial, so there is no constitutional right to counsel therein. [*McIntosh v. McIntosh,* 184 N.C. App. 697, 646 S.E.2d 820 (2007) (noting the numerous and lengthy delays in the case and the trial court's notice to wife to hire an attorney and be ready for trial at a certain date, wife's motion for continuance to hire an attorney was properly denied).]

G. Relationship of Equitable Distibution (ED) to Entry of Divorce Judgment

1. Judgment for ED may be entered **before or after** entry of an absolute divorce [S.L. 1995-245, § 1 (amending G.S. 50-21(a)).] so long as:
   a. The right to ED is asserted before judgment of absolute divorce [G.S. 50-11(e); see Sections III.G.4, 5, 6, below.] and
   b. There is no bar to ED (see Section VI, below, on agreements in bar of ED). [Pursuant to S.L. 2001-364, § 1 (amending G.S. 50-21(a)), an ED claim may be filed **and adjudicated** at any time after a husband and wife begin to live separate and apart.]

2. A judgment of absolute divorce destroys the right of a spouse to ED unless the right is asserted prior to judgment of absolute divorce, except as noted below in Section III.G.8, below. [G.S. 50-11(e).]
    a. For purposes of G.S. 50-11(e), a judgment of divorce does not become final until it is entered. A judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court as provided in G.S. 1A-1, Rule 58. [*Santana v. Santana,* 171 N.C. App. 432, 614 S.E.2d 438 (2005) (finding that an ED motion filed on August 18 was timely when the trial judge orally pronounced and rendered an absolute divorce judgment in open court on August 11, signed the order on August 18, and the order was filed on August 19).]
3. G.S. 50-20(a) does not set out the manner of asserting an ED claim. [*Rabon v. Rabon,* 102 N.C. App. 452, 402 S.E.2d 461 (1991).]
    a. An oral motion is not sufficient to assert a claim for ED. [*Webb v. Webb,* 188 N.C. App. 621, 656 S.E.2d 334 (2008). *But see Stone v. Stone,* 96 N.C. App. 633, 635, 386 S.E.2d 602, 603–04 (1989) (in an appeal from a proceeding in which a party had apparently orally requested ED, the appellate court noted that "the better practice would be for members of the Bar to actually file and assert claims for equitable distribution, and for the courts to require that pleadings asserting such claims be filed before the judgment of divorce is granted"), *review denied,* 326 N.C. 805, 393 S.E.2d 906 (1990).]
    b. Even where the ED claim is in writing, the language must be sufficient to put the opposing party on notice that the claim asserted is for ED. A husband's *pro se* answer, in which he objected to divorce "unless all property claims between the parties are settled judicially or extrajudicially" and asserted a claim to an interest in a specific piece of property or to proceeds generated from his interest in the property, was not sufficient to put wife on notice that husband was asserting a claim for ED. [*Goodwin v. Zeydel,* 96 N.C. App. 670, 670, 387 S.E.2d 57, 57 (1990).]
4. Whether a party has "asserted" his right to ED before divorce has been a matter of some litigation.
    a. The following allegations were not sufficient to assert a claim for ED:
        i. A spouse's pleading asserting an interest in a specific piece of property, or in proceeds generated from his interest in the property, was insufficient to state a claim for ED. [*Goodwin v. Zeydel*, 96 N.C. App. 670, 387 S.E.2d 57 (1990).]
        ii. A spouse's request to remain in the residence in which she and her child resided, to possess and use the personal property in that residence, and to possess and use a particular automobile did not establish a valid ED claim. [*Stirewalt v. Stirewalt*, 114 N.C. App. 107, 440 S.E.2d 854 (1994).]
    b. The following allegations were sufficient to assert a claim for ED:
        i. A counterclaim asserting that defendant wife "hereby requests and reserves the right for equitable distribution," coupled with a request in the prayer that "[d]efendant be granted the request to reserve the right for equitable distribution," was sufficient to assert an ED claim. [*Coleman v. Coleman,* 182 N.C. App.

25, 26, 641 S.E.2d 332, 334 (2007) (party not required to request equitable distribution of the parties' marital assets or property).]

ii. Defendant's *pro se* answer requesting the court to enter an order distributing the parties' assets in an equitable manner was sufficient to state a claim for ED. [*Hunt v. Hunt*, 117 N.C. App. 280, 450 S.E.2d 558 (1994) (language deemed an undenominated counterclaim for ED).]

iii. Where husband in his answer joined in wife's prayer for ED, husband's answer was construed as a counterclaim for ED. [*Rabon v. Rabon,* 102 N.C. App. 452, 402 S.E.2d 461 (1991). *See also Rhue v. Pace,* 165 N.C. App. 423, 598 S.E.2d 662 (2004) (where wife's complaint requested ED and husband's answer joined in wife's ED claim, husband's answer was a counterclaim for ED that prevented wife from taking a voluntary dismissal of ED claim without husband's consent).]

5. If a party has not "asserted" her right to ED before judgment of absolute divorce, appellate decisions limit a trial court's ability to relieve a party from the effects of the failure to assert a timely ED claim.

a. Court had no subject matter jurisdiction to enter an ED order when neither party had made a timely request for ED before divorce. [*Lockamy v. Lockamy,* 111 N.C. App. 260, 432 S.E.2d 176 (1993) (omission cannot be cured by consent, waiver, or estoppel). *Compare Gilbert v. Gilbert*, 111 N.C. App. 233, 431 S.E.2d 805 (1993) (court found that husband was equitably estopped from trying to bar wife's ED claim, even though she had not asserted an ED claim before judgment of absolute divorce; husband had asserted in his divorce complaint that ED would not be necessary because parties would decide distribution by agreement).]

b. The trial court's specific reservation of the issue of ED in the divorce order only preserves a claim that has been asserted and not dismissed before judgment of absolute divorce.

i. When a properly asserted ED claim is pending at the time the divorce judgment is entered, the trial court's reservation of the matter reserves the issue of ED for disposition at a later time. [*Stone v. Stone,* 96 N.C. App. 633, 386 S.E.2d 602 (1989) (error for a district court judge in a later hearing to dismiss the ED claim of one party pursuant to the motion of the other party), *review denied,* 326 N.C. 805, 393 S.E.2d 906 (1990). *See also Lutz v. Lutz,* 101 N.C. App. 298, 399 S.E.2d 385 (construing *Stone* decision), *review denied*, 328 N.C. 732, 404 S.E.2d 871 (1991).]

ii. If neither party has asserted a claim for ED before divorce, the trial court's reservation of the issue of ED in the divorce order does not authorize ED at a later time. [*Stirewalt v. Stirewalt,* 114 N.C. App 107, 440 S.E.2d 854 (1994); *Lockamy v. Lockamy,* 111 N.C. App. 260, 432 S.E.2d 176 (1993).]

iii. If only one party has asserted a claim for ED before divorce, the trial court's reservation of the issue reserves only that claim. If that party voluntarily dismisses the ED claim after entry of the divorce decree, there can be no equitable distribution. [*Lutz v. Lutz,* 101 N.C. App. 298, 399 S.E.2d 385, *review denied*, 328 N.C. 732, 404 S.E.2d 871 (1991).]

iv. If a party has voluntarily dismissed without prejudice pursuant to G.S. 1A-1, Rule 41(a)(1) an ED claim before judgment of absolute divorce, the ED claim is not preserved and the dismissing party cannot file a new action within the one-year period covered by Rule 41(a)(1). [*See Rhue v. Pace,* 165 N.C. App. 423, 598 S.E.2d 662 (2004) (order granting absolute divorce reserved ED claim for later resolution but wife had dismissed her claim prior to judgment of absolute divorce; her later assertion of an ED claim was a new claim forbidden by G.S. 50-11(e)).]

6. In certain circumstances, G.S. 1A-1, Rule 60(b) may be available to set aside a divorce judgment so as to allow the assertion of an ED claim.
   a. A counterclaim for ED can constitute a meritorious defense to a complaint for absolute divorce, which, with evidence of mistake, inadvertence, surprise, or excusable neglect, can provide the grounds for the court to set aside the divorce judgment under Rule 60(b). [*Baker v. Baker,* 115 N.C. App. 337, 444 S.E.2d 478 (1994).]
   b. But a party cannot, under Rule 60(b), set aside the effects of a divorce judgment, one of which is to bar a claim for ED not asserted before entry of the divorce judgment, without setting aside the divorce judgment itself. [*Howell v. Howell*, 321 N.C. 87, 361 S.E.2d 585 (1987).]
   c. For more on G.S. 1A-1, Rule 60(b), see Section III.O.2, below.
7. In certain circumstances, the doctrine of equitable estoppel may be available to allow a party to assert a claim for ED that would otherwise be barred as not timely.
   a. Cases finding party entitled to assert equitable estoppel:
      i. Where plaintiff wife did not assert an ED claim but joined in defendant husband's counterclaim for ED, which trial court preserved for further proceedings before entry of the divorce judgment, principles of equitable estoppel precluded husband from defeating wife's right to equitable distribution by voluntarily dismissing his counterclaim. [*Hunt v. Hunt,* 117 N.C. App. 280, 450 S.E.2d 558 (1994).]
      ii. Even though wife had not timely asserted a claim for ED, husband's assertion in his divorce complaint that ED would not be necessary because parties would decide distribution by agreement estopped husband from objecting to wife's claim for ED filed after divorce. [*Gilbert v. Gilbert*, 111 N.C. App. 233, 431 S.E.2d 805 (1993). *Cf. Morgan v. Morgan,* 230 N.C. App. 143, 752 S.E.2d 259 (2013) (**unpublished**) (not paginated on Westlaw) (when wife testified that husband had "a history of lying," trial court properly refused to set aside a divorce judgment for excusable neglect under G.S. 1A-1, Rule 60(b) based on wife's contention that she failed to file a responsive pleading to husband's complaint for divorce and ED because husband had assured her that they would divide marital property and that there was no need to obtain legal counsel; since wife filed no ED claim and husband voluntarily dismissed his ED claim before entry of divorce judgment, wife was not entitled to assert ED claim).]
      iii. If on remand the trial court determines that wife did not make a claim for ED before divorce because of husband's misrepresentations, husband should be equitably estopped from objecting to wife's claim for ED filed after divorce.

[*Harroff v. Harroff*, 100 N.C. App. 686, 398 S.E.2d 340 (1990), *review denied,* 328 N.C. 330, 402 S.E.2d 833 (1991).]

b. Cases finding party not entitled to assert equitable estoppel:

i. Where plaintiff wife had not joined in defendant husband's request for ED and was partially to blame for long delays and confusion in the case, she was not entitled to assert that husband was equitably estopped from denying existence of an ED claim. [*Atkinson v. Atkinson*, 350 N.C. 590, 516 S.E.2d 381 (1999).]

ii. Wife may not assert that husband is equitably estopped from pleading G.S. 50-11(e) in bar of her claim for ED when husband's alleged wrongful conduct took place after entry of the divorce decree. [*Lutz v. Lutz,* 101 N.C. App. 298, 399 S.E.2d 385) (wife was not prejudiced because her right to assert a claim for ED had been lost by entry of the divorce judgment before any alleged wrongful conduct of husband), *review denied*, 328 N.C. 732, 404 S.E.2d 871 (1991.]

8. Exceptions to rule that ED claim must be asserted before entry of divorce decree:

a. An ED claim filed after entry of divorce may go to judgment if service of process on defendant in the divorce action was by publication, defendant did not appear in the divorce action, and defendant filed an action or a motion in the cause for ED within six months after entry of the divorce judgment. [G.S. 50-11(e).]

b. An ED claim filed after entry of divorce may go to judgment if the court entering the divorce judgment lacked jurisdiction over the defendant or over the property and the defendant filed an action or a motion in the cause for ED within six months after entry of the divorce judgment. [G.S. 50-11(f).]

c. When ED claim was filed before divorce, dismissed, and refiled pursuant to G.S. 1A-1, Rule 41(a).

i. An ED claim that was properly asserted but voluntarily dismissed without prejudice pursuant to Rule 41(a)(1) **before** judgment of absolute divorce may not be refiled within the one-year period covered by Rule 41(a)(1). [*Rhue v. Pace,* 165 N.C. App. 423, 598 S.E.2d 662 (2004) (order granting absolute divorce reserved ED claim for later resolution but wife had dismissed her claim prior to judgment of absolute divorce; wife's assertion of an ED claim after entry of divorce judgment was a new claim forbidden by G.S. 50-11(e)).]

ii. An ED claim that was properly asserted before judgment of absolute divorce and voluntarily dismissed without prejudice pursuant to Rule 41(a)(1) **after** judgment of absolute divorce may be refiled within the one-year period covered by Rule 41(a)(1). [*Stegall v. Stegall*, 336 N.C. 473, 444 S.E.2d 177 (1994).]

iii. An ED claim that was properly asserted before judgment of absolute divorce and voluntarily dismissed without prejudice pursuant to Rule 41(a)(1) after judgment of absolute divorce and not refiled within the one-year period covered by the Rule is lost. [*Sparks v. Peacock*, 129 N.C. App. 640, 500 S.E.2d 116 (1998). *See also Webb v. Webb,* 188 N.C. App. 621, 656 S.E.2d 334 (2008) (no ED claim existed after husband dismissed his claim after entry of divorce and wife had not properly asserted ED claim before or within six months after absolute divorce was granted).]

9. A judgment of absolute divorce obtained in another state bars ED unless the court lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property **and** an action or motion in the cause is filed within six months after entry of the divorce judgment. [G.S. 50-11(f).]
    a. In *Cooper v. Cooper*, 90 N.C. App. 665, 369 S.E.2d 630 (1988), South Carolina lacked jurisdiction to distribute the parties' property in a divorce action in that state. Husband could proceed in a subsequent ED action filed in North Carolina in apt time.
    b. In *Atassi v. Atassi*, 117 N.C. App. 506, 451 S.E.2d 371, *review denied*, 340 N.C. 109, 456 S.E.2d 310 (1995), the court considered the effect of a divorce obtained in a foreign country and determined that it would not be valid in North Carolina if the party obtaining the divorce was domiciled in North Carolina at the time of divorce.

H. Relationship of Equitable Distribution (ED) to Common Law Property Rights

1. When ED is not sought.
    a. Where ED is not sought under G.S. 50-20, an ex-spouse (now tenant in common of property formerly held by entirety during marriage) may bring an action for waste, ejectment, accounting, or partition. [*Hagler v. Hagler*, 319 N.C. 287, 354 S.E.2d 228 (1987); *Diggs v. Diggs,* 116 N.C. App. 95, 446 S.E.2d 873 (1994) (partition action proper where no ED action filed, unless right was waived).]
    b. Where parties are procedurally barred from bringing an ED action, former husband may maintain an action in superior court for contribution from wife on promissory notes paid by him. [*Sparks v. Peacock*, 129 N.C. App. 640, 500 S.E.2d 116 (1998) (superior court not precluded from exercising jurisdiction merely because the parties are former spouses).]
    c. When parties agreed after separation for husband to make payments on a vehicle in consideration of wife's relinquishment of any interest in the car, upon husband's default, wife was entitled to maintain a breach of contract action. [*Harrington v. Harrington*, 110 N.C. App. 782, 431 S.E.2d 240 (1993).]
2. When ED action is pending.
    a. When an ED action is pending, neither spouse can maintain an action for partition of marital property. [*Garrison v. Garrison*, 90 N.C. App. 670, 369 S.E.2d 628 (1988) (jurisdiction of the district court had been invoked under G.S. 7A-244 to equitably distribute the parties' marital property).]
    b. When an ED action is pending, the superior court does not have jurisdiction over a declaratory judgment action maintained by an entity closely related to a party concerning an asset that may be marital property. [*Hudson Int'l, Inc. v. Hudson*, 145 N.C. App. 631, 550 S.E.2d 571 (2001).]
    c. When an ED action is pending, the superior court does not have jurisdiction over an action filed by husband seeking recovery on notes executed by wife in favor of husband during the marriage. [*Hudson v. Hudson,* 135 N.C. App. 97, 518 S.E.2d 811 (1999) (claim for recovery on notes was a compulsory counterclaim to wife's fraud claim asserted in the ED action).]

d. When an ED action is pending, wife cannot circumvent classification of postseparation appreciation of stock in a family-owned corporation as separate property by seeking equitable relief under G.S. 55-14-30, which provides for judicial dissolution of a corporation. [*Edwards v. Edwards*, 110 N.C. App. 1, 428 S.E.2d 834, *cert. denied*, 335 N.C. 172, 436 S.E.2d 374 (1993).] For a case discussing jurisdictional issues in a shareholder derivative action brought under G.S. Chapter 55 while an ED action was pending, see *Burgess v. Burgess,* 205 N.C. App. 325, 698 S.E.2d 666 (2010), discussed in Section III.A.1.c, above.

e. But if the pending ED action does not redress the injury complained of, an action to establish a constructive trust may not be barred. [*Lamb v. Lamb*, 92 N.C. App. 680, 375 S.E.2d 685 (1989) (since the Equitable Distribution Act does not provide a remedy for the wrongful conversion of separate property, it was error for the trial court to dismiss an action to impose a constructive trust on certain money before the money was classified as either marital or separate property).]

3. When ED action is final.

a. Final disposition of a case is defined as "[s]uch a conclusive determination of the subject-matter that after the award, judgment, or decision is made, nothing further remains to fix the rights and obligations of the parties, and no further controversy or litigation can arise thereon." [*Whitworth v. Whitworth,* 222 N.C. App. 771, 780, 774, 731 S.E.2d 707, 714, 710 (2012) (quoting *Whiteco Indus. v. Harrelson, Inc.,* 111 N.C. App. 815, 818, 434 S.E.2d 229, 232 (1993)) (2008 ED order that specifically stated that it "settles and resolves all claims raised by the pleadings" was a final disposition, no appeal having been taken or post-judgment motions having been filed).]

b. When a final property division under G.S. 50-20 has been made, a party's common law right to an accounting of rents and benefits from former entirety property is extinguished. [*Beam v. Beam*, 325 N.C. 428, 383 S.E.2d 656 (1989), *rev'g per curiam for reasons stated in dissenting opinion in* 92 N.C. App. 509, 374 S.E.2d 636 (1988) (Greene, J., dissenting).]

4. There is no common law action of "intentional marital destruction" based upon one spouse's bad faith in bringing about an end to the marital relationship in order to benefit from equitable distribution. [*Smith v. Smith*, 113 N.C. App. 410, 438 S.E.2d 457, *review denied,* 336 N.C. 74, 445 S.E.2d 37 (1994).]

I. Effect of Death of a Spouse on an Equitable Distribution (ED) Claim

1. Generally.

a. Before 2001, whether an ED claim survived the death of a spouse depended upon the status of the parties' divorce.

i. An ED action abated if death occurred **before** a judgment of divorce was entered, [*Brown v. Brown*, 353 N.C. 220, 539 S.E.2d 621 (2000). *Accord Trogdon v. Trogdon*, 97 N.C. App. 330, 388 S.E.2d 212, *cert. denied*, 326 N.C. 487, 392 S.E.2d 102 (1990).] but

ii. The ED action survived if death occurred **after** a judgment of divorce was entered. [*Tucker v. Miller*, 113 N.C. App. 785, 440 S.E.2d 315 (1994).]

b. For actions pending or filed on or after Aug. 10, 2001, but before June 12, 2003, a claim for ED could be **filed and adjudicated** at any time after a husband and wife began to live separate and apart, [G.S. 50-21(a), *amended by* S.L. 2001-364, § 1.] and the death of a party did not abate a pending action for ED. [G.S. 50-20(l), *added by* S.L. 2001-364, § 2.] S.L. 2001-364 was effective Aug. 10, 2001, and was applicable to actions pending or filed on or after that date.

   i. G.S. 50-20(l) was found to apply to actions pending or filed on or after Aug. 10, 2001, even though the death of a party occurred before the effective date of the amendment. [*Bowen v. Mabry,* 154 N.C. App. 734, 572 S.E.2d 809 (2002) (reversing trial court's determination that husband's ED action had abated on his death in February 2001, making G.S. 50-20(l) not applicable), *review allowed, cert. dismissed,* 357 N.C. 249, 582 S.E.2d 27, *review dismissed as improvidently granted,* 597 S.E.2d 671 (2003).]

   ii. An ED award to a surviving spouse entered **after** the death of her spouse was not a claim against the estate of the deceased spouse but was instead property of the surviving spouse that must be given to the surviving spouse before the deceased spouse's estate could be administered. [*Painter-Jamieson v. Painter*, 163 N.C. App. 527, 594 S.E.2d 217, *review withdrawn,* 358 N.C. 545, 599 S.E.2d 406 (2004).] **NOTE:** Amendments to G.S. 50-20(l) pursuant to S.L. 2003-168, § 1 would change the result in this case for awards made on or after June 12, 2003 (if applicable to pending claims), or otherwise for ED claims filed on or after June 12, 2003. See Section III.I.2, below.

c. Effective June 12, 2003, an ED claim, whether filed or not, survives the death of a spouse so long as the parties are living separate and apart at the time of death. [G.S. 50-20(l)(1), *amended by* S.L. 2003-168, § 1; *Langston v. Richardson,* 206 N.C. App. 216, 696 S.E.2d 867 (2010) (citing *Estate of Nelson v. Nelson,* 179 N.C. App. 166, 633 S.E.2d 124 (2006), *aff'd per curiam,* 361 N.C. 346, 643 S.E.2d 587 (2007)) (a pending action for ED does not abate upon the death of a party), *appeal dismissed, cert. denied,* 365 N.C. 191, 707 S.E.2d 231 (2011).]

   i. An ED claim is extinguished by operation of G.S. 50-20(l)(1) if, at the time of a spouse's death, the husband and wife have resumed marital relations. [*Casella v. Estate of Casella*, 200 N.C. App. 24, 682 S.E.2d 455 (2009).]

   ii. "Resumption of marital relations" is defined as the voluntary renewal of the husband and wife relationship, as shown by the totality of the circumstances. Isolated incidents of sexual intercourse between the parties shall not constitute resumption of marital relations. [G.S. 52-10.2.]

   iii. There may be a resumption of marital relations even though it lasts only a short time. [*See Casella v. Estate of Casella*, 200 N.C. App. 24, 682 S.E.2d 455 (2009) (finding that parties reconciled for three-week period before husband's death).]

   iv. The relevant timeframe to determine reconciliation is the period after which a party contends that the parties have reconciled, and the evidence presented should speak to the period following the date of alleged reconciliation. [*Casella v. Estate of Casella*, 200 N.C. App. 24, 682 S.E.2d 455 (2009).]

v. Whether parties have reconciled is determined by one of two methods:

(a) When the evidence is undisputed and there are substantial objective indicia that the parties held themselves out as husband and wife, the trial court may find reconciliation as a matter of law. The trial court does not need to consider the subjective intent of the parties.

(b) When the evidence of reconciliation is in dispute, the trial court must consider the subjective intent of the parties. [*Casella v. Estate of Casella*, 200 N.C. App. 24, 682 S.E.2d 455 (2009).]

vi. A party may argue the two methods in the alternative. Doing so promotes judicial economy since the appellate court would not have to remand the matter for application of the second method if it finds that the first method did not establish reconciliation. [*Casella v. Estate of Casella*, 200 N.C. App. 24, 682 S.E.2d 455 (2009).]

vii. Trial court properly determined that the facts were not in dispute and that objective evidence established that the parties had reconciled as a matter of law, warranting dismissal of an ED claim by estate of husband. [*Casella v. Estate of Casella*, 200 N.C. App. 24, 682 S.E.2d 455 (2009) (undisputed evidence established that the parties slept in the same bed, that wife assumed responsibility for the intimate care of the husband, that both parties indicated to others that they had reconciled and held themselves out to the public in a manner that suggested that they were husband and wife, and others interacted with the plaintiff as if she were defendant's wife, and that a substantial amount of property passed to wife outside of husband's will).]

2. Effect of death.

a. No ED action pending upon death of a spouse: surviving spouse versus decedent's estate.

i. *Surviving spouse has two options for asserting a claim.* If the spouses lived separate and apart before death, the surviving spouse may assert an ED claim either:

(a) By filing an ED action in accordance with G.S. 50-20 in district court against the decedent's personal representative [G.S. 28A-19-19(c).] or

(b) By filing a claim with the personal representative as provided in G.S. 28A-19-1.

ii. ED action filed.

(a) *Claim must be timely.* The surviving spouse's ED action must be filed within the time specified for the presentation of claims in G.S. 28A-19-3.

(b) *Commencement of the action deemed presentation of the claim.* Commencement of the action against the personal representative for the deceased spouse constitutes presentation of a claim against the estate of the deceased spouse. [G.S. 28A-19-1(b).]

(c) *Written settlement allowed.* The personal representative of the estate of the deceased spouse and the surviving spouse may enter into a written agreement providing for distribution of marital or divisible property. [G.S. 28A-19-19(b).]

(d) Necessary parties.

(1) The personal representative must be made a defendant.

(2) If real property of the deceased spouse is involved in the ED action, the heirs or devisees of the deceased spouse must be named as defendants in the ED action. [*Swindell v. Lewis*, 82 N.C. App. 423, 346 S.E.2d 237 (1986) (recognizing that because title to decedent's real property vested in decedent's heirs upon decedent's death, heirs were necessary parties because trial court could divest the heirs of their interest in the property by distributing it to the surviving spouse). *But see Tucker v. Miller,* 113 N.C. App. 785, 440 S.E.2d 315 (1994) (where court proceeded with ED without joining the heirs or devisees of the deceased spouse).]

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

a. G.S. 50-20(h) provides in part that "[a]ny person . . . whose interest is obtained by descent, prior to the filing of the lis pendens [by a spouse claiming an interest in that property in an equitable distribution proceeding], shall take the real property free of any claim resulting from the equitable distribution proceeding."

iii. Claim filed with the personal representative (PR).

(a) *Claim must be timely*. The surviving spouse's ED claim must be filed with the estate within the time specified for the presentation of claims in G.S. 28A-19-3. [G.S. 28A-19-3.]

(b) *PR may reject a claim*.

(1) The PR may reject the claim by giving written notice of rejection to the surviving spouse. [G.S. 28A-19-16.]

(2) If the personal representative rejects the claim, the surviving spouse must file an action for ED in district court within three months after notice or be barred from filing such action. [G.S. 28A-19-16.]

(c) *PR may refer a claim*. If the PR doubts the justness of the surviving spouse's claim for ED, the PR and surviving spouse may agree in writing to refer the matter to one or more disinterested persons. The agreement and any award thereon must be filed in the clerk's office. [G.S. 28A-19-15.]

(d) *PR may settle a claim against the estate.* The PR of the estate of the deceased spouse and the surviving spouse may enter into a written agreement providing for distribution of marital or divisible property. [G.S. 28A-19-19(b).]

b. No ED action pending upon death of a spouse: decedent's estate vs. surviving spouse.

i. If no ED action is pending, the personal representative of the estate of a deceased spouse must file an action for ED in district court against the surviving spouse within one year of the deceased spouse's death or be forever barred. [G.S. 50-20(l)(3).]

c. ED action pending upon death: surviving spouse vs. decedent.

i. Substitution of PR.

(a) *PR must be substituted for deceased spouse, then action may continue against the substituted party.* If an ED action is pending at the time of the spouse's death, the action may continue with the PR of the deceased spouse substituted as a party to the action. [G.S. 28A-18-1(a); G.S. 1A-1, Rule 25(a).]

(b) *If there has been no substitution, a court should not enter orders in the ED proceeding.* Orders entered after a party's death but before substitution of the PR are of no effect. [*See Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp.,* 175 N.C. App. 474, 624 S.E.2d 380 (2006) (summary judgment order dismissing malpractice action against doctor was of no effect and had to be vacated when doctor died during pendency of malpractice suit and executrix for doctor's estate had never been made a party to the action).]

(c) *Motion to substitute must be made within certain time limits.* If an ED action is pending at the time of the spouse's death, a motion to substitute the PR of the estate of the deceased spouse into the ED action must be made within the time specified for the presentation of claims in G.S. 28A-19-3. [G.S. 1A-1, Rule 25(a); G.S. 28A-18-1(a). For an overview of G.S. 28A-19-3, see *Pierce v. Johnson,* 154 N.C. App. 34, 571 S.E.2d 661 (2002).]

(d) *Substitution or motion therefor deemed presentation of the claim.* A motion to substitute the PR for the deceased spouse, or an order for the substitution, will be deemed presentation of the ED claim against the estate of the deceased spouse, provided that the substitution or a motion for substitution is made within the time specified for the presentation of claims under G.S. 28A-19-3. [G.S. 28A-19-1(c), *amended by* S.L. 2014-107, § 4.1, effective Aug. 6, 2014.]

ii. Necessary parties.

(a) If real property of the deceased spouse is involved in the ED action, the heirs or devisees of the deceased spouse must be named as defendants in the ED action. [*Swindell v. Lewis*, 82 N.C. App. 423, 346 S.E.2d 237 (1986) (recognizing that because title to decedent's real property vested in decedent's heirs upon decedent's death, heirs were necessary parties because trial court could divest the heirs of their interest in the property by distributing it to the surviving spouse). *But see Tucker v. Miller,* 113 N.C. App. 785, 440 S.E.2d 315 (1994) (where court proceeded with ED without joining the heirs or devisees of the deceased spouse).]

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

(1) G.S. 50-20(h) provides in part that "[a]ny person . . . whose interest is obtained by descent, prior to the filing of the lis pendens [by a spouse claiming an interest in that property in an equitable distribution

proceeding], shall take the real property free of any claim resulting from the equitable distribution proceeding."

iii. *Written settlement allowed.* The PR of the estate of the deceased spouse and the surviving spouse may enter into a written agreement providing for distribution of marital or divisible property. [G.S. 28A-19-19(b).]

d. ED action pending upon death: decedent vs. surviving spouse.

i. *PR must be substituted for deceased spouse.* If an ED action is pending at the time of the spouse's death, the action may continue with the PR of the deceased spouse substituted as a party to the action. [G.S. 28A-18-1(a); G.S. 1A-1, Rule 25(a).] The motion to substitute the PR of the estate of the deceased spouse into the ED action must be filed within the time specified for the presentation of claims in G.S. 28A-19-3. [G.S. 1A-1, Rule 25(a); G.S. 28A-18-1(a).]

ii. See Sections III.I.2.c.i and ii, above, for other provisions applicable to substitution and necessary parties.

iii. *Written settlement allowed.* The PR of the estate of the deceased spouse and the surviving spouse may enter into a written agreement providing for distribution of marital or divisible property. [G.S. 28A-19-19(b).]

e. Payment of an ED judgment or a claim against the decedent's estate.

i. *Certain provisions of G.S. Chapter 28A do not apply to ED claims.* The provisions of G.S. 28A-19-5 (payment of contingent or unliquidated claims) and 28A-19-7 (dealing with the satisfaction of claims other than by payment) do not apply to claims for ED. [G.S. 28A-19-19(a).]

ii. *Surviving spouse's ED claim is a G.S. Chapter 28A claim.* A surviving spouse's claim for ED is treated as a claim against the decedent's estate, subject to the provisions of G.S. Chapter 28A, Article 19. [G.S. 50-20(l)(2).]

iii. *ED judgment or settlement entered after death is a G.S. Chapter 28A claim.* An ED judgment, settlement agreement between the surviving spouse and the PR, or an award resulting from the referral of a matter pursuant to G.S. 28A-19-15, entered **after** the death of a spouse or former spouse, is a claim against the estate of the deceased party. [See language in G.S. 50-20(l) speaking to "claims" for ED.]

iv. *Priority of the surviving spouse's claim for ED.*

(a) A claim for ED is eighth in order of payment priority with regard to other claims against the estate of a person who died on or after Oct. 1, 2009. [G.S. 28A-19-6(a), *amended by* S.L. 2009-288, § 1, effective Oct. 1, 2009, and applicable to estates of individuals dying on or after that date.]

(b) All general debts of and claims against an estate are given a ninth-class priority, which means that ED claims are paid before general debts and claims.

3. Death as a distribution factor.

a. In upholding an equal division of the marital assets following the death of one of the parties, the court of appeals assumed that G.S. 50-20(c)(1) or (12) would allow the trial court to consider the needs of the parties and that evidence of the wife's death,

on its own, was sufficient to show that her estate had no needs. [*Tucker v. Miller,* 113 N.C. App. 785, 440 S.E.2d 315 (1994).]

b. If one spouse dies before entry of an ED order, property passing to the surviving spouse upon the death, or the right of the surviving spouse to claim an elective share, is a distribution factor. [G.S. 50-20(c)(11b), *added by* S.L. 2001-364, § 3, effective Aug. 11, 2001, and applicable to actions pending or filed on or after that date).] See *Distribution*, Part 4 of this Chapter.

4. Effect of death on the status of property.

a. Death of a spouse after separation did not transform property held by the parties as tenants by the entirety on the date of separation into the surviving spouse's separate property. [*Estate of Nelson v. Nelson,* 179 N.C. App. 166, 633 S.E.2d 124 (2006) (three tracts of real property held by the parties on the date of separation as tenants by the entirety were marital property and were not transformed by husband's death while ED action was pending into wife's separate property by virtue of her right of survivorship), *aff'd per curiam,* 361 N.C. 346, 643 S.E.2d 587 (2007).]

J. Use of Reference Procedure

1. The N.C. Rules of Civil Procedure provide for a compulsory reference when the "trial of an issue requires the examination of a long or complicated account" and "[w]here the taking of an account is necessary for the information of the court before judgment." [G.S. 1A-1, Rule 53(a)(2)a. and b.] When appointed, a referee is not an agent of the parties but of the court, so any action for damages against the referee is barred by judicial immunity. [*Sharp v. Gulley*, 120 N.C. App. 878, 463 S.E.2d 577 (1995), *review denied,* 342 N.C. 659, 467 S.E.2d 723 (1996).]

2. One panel of the North Carolina Court of Appeals commented that a "reference may be inappropriate" in equitable distribution (ED) proceedings. [*Vick v. Vick,* 80 N.C. App. 697, 699, 343 S.E.2d 245, 247 (trial court's denial of a motion for compulsory reference affirmed), *review denied*, 317 N.C. 341, 346 S.E.2d 149 (1986).] However, there is no specific appellate prohibition, and the court of appeals has considered more recent cases in which referees have been appointed without further reference to appropriateness.

a. In *Yeager v. Yeager,* 232 N.C. App. 173, 753 S.E.2d 497 (2014), a referee/receiver was appointed in an ED action to accomplish the cancellation of two deeds of trust on two parcels of marital property. An appeal from an order finding plaintiff wife in contempt of an order of the referee/receiver was dismissed as moot when the underlying controversy had ceased to exist (receivership had been dissolved, properties at issue had been distributed, and plaintiff had not suffered an injury or prejudice from being found in civil contempt).

b. In *Sharp v. Miller*, 121 N.C. App. 616, 468 S.E.2d 799, *review denied,* 343 N.C. 309, 471 S.E.2d 76, *cert. denied*, 519 U.S. 871, 117 S. Ct. 187 (1996), the court of appeals affirmed the dismissal of claims against accountants appointed by a referee, with the consent of the parties, to appraise certain property and testify as expert witnesses as to value.

c. In *Sharp v. Gulley*, 120 N.C. App. 878, 463 S.E.2d 577 (1995), *review denied,* 342 N.C. 659, 467 S.E.2d 723 (1996), the court of appeals affirmed the dismissal on the basis of

judicial immunity of an action for damages against a referee appointed by consent of the parties.

d. In *Sharp v. Sharp*, 116 N.C. App. 513, 517, 449 S.E.2d 39, 41, *review denied*, 338 N.C. 669, 453 S.E.2d 181 (1994), the trial court appointed a referee pursuant to G.S. 1A-1, Rule 53(a)(1) "to hear and determine all of the issues involved in the action." The court of appeals specifically upheld the trial court's order that each party pay one-half of the referee fee of $13,320.

e. In *Brown v. Brown,* 112 N.C. App. 15, 434 S.E.2d 873 (1993), the court of appeals noted, without comment, that the trial judge had appointed a referee pursuant to G.S. 1A-1, Rule 53(a)(2)b. to identify and value marital assets and suggest an equitable distribution.

f. In *Stewart v. Stewart,* 235 N.C. App. 220, 763 S.E.2d 338 (2014) (**unpublished**) (not paginated on Westlaw), the court of appeals affirmed an ED judgment that adopted, over defendant's objection, a referee's final report "in whole as a final resolution of the equitable distribution claims of the parties" and incorporated the referee's findings and conclusions into the ED judgment. The referee was appointed to make findings of fact of the fair market value of marital assets and to recommend equitable distribution of the marital property.

K. Consideration of Alimony and Child Support

1. Equitable distribution (ED) is to be determined without regard to support of the children of both parties or alimony. [G.S. 50-20(f); *Haywood v. Haywood,* 95 N.C. App. 426, 382 S.E.2d 798) (court erred by entering order for ED that clearly took into consideration order for temporary alimony), *review denied,* 325 N.C. 706, 388 S.E.2d 454 (1989.]

2. Amount owed by one party pursuant to an ED judgment may not be offset against the child support obligation owed by the other party. [*Brinkley v. Brinkley*, 135 N.C. App. 608, 522 S.E.2d 90 (1999) (husband was improperly given a credit against future child support in the amount of $500, which was amount wife owed him under the parties' ED judgment; the court cited G.S. 50-20(f), requiring that ED actions be decided independently of support actions, as one basis, among others, for denying the credit sought by husband).]

3. G.S. 50-20(f) provides that, upon request of either party after entry of an ED judgment, the court must consider whether an order for alimony or child support should be vacated or modified pursuant to G.S. 50-16.9 or 50-13.7 (both statutes require a finding of substantial change of circumstances).

4. Alimony.

   a. Early case law provided that when both alimony and ED were requested, the court was to decide the ED claim first. [*Talent v. Talent*, 76 N.C. App. 545, 334 S.E.2d 256 (1985), *superseded by statute as stated in Rhew v. Rhew,* 138 N.C. App. 467, 531 S.E.2d 471 (2000); *McIntosh v. McIntosh*, 74 N.C. App. 554, 328 S.E.2d 600 (1985).]

   b. For actions filed on or after Oct. 1, 1995, a court may hear an alimony claim on the merits before entry of an ED judgment. [G.S. 50-16.3A(a), *amended* by S.L. 1995-319, § 2, effective Oct. 1, 1995.]

c. If alimony is awarded before entry of a judgment for ED, 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 ED claim. [G.S. 50-16.3A(a).] Unlike G.S. 50-20(f), discussed in Section III.K.3, above, G.S. 50-16.3A(a) does not appear to require a finding of changed circumstances before an alimony order can be modified following ED.

d. If alimony is awarded after entry of a judgment for ED, the court may consider 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 ED proceeding. [G.S. 50-16.3A(b)(16).]

e. For more on the relationship between alimony and ED, including a discussion on the simultaneous hearing of alimony and ED claims, see *Postseparation Support and Alimony*, Bench Book, Vol. 1, Chapter 2, Section III.B.7.

5. Child support.

a. When a child support order grants the custodial parent exclusive possession of the marital residence, it is good practice to provide in the order that possession lasts only until entry of the final equitable distribution order.

b. Modification of child support.

i. Absent the request of a party, a trial court is not required to reconsider child support after equitable distribution. [*Diehl v. Diehl,* 177 N.C. App. 642, 630 S.E.2d 25 (2006).]

ii. After the court enters an order of ED, it may modify a prior order for child support if it finds a substantial change in circumstances under G.S. 50-13.7. [*Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985).] See G.S. 50-20(f), discussed in Section III.K.3, above, providing for modification of an award of child support after entry of an ED judgment pursuant to G.S. 50-13.7.

iii. No requirement of finding of substantial change of circumstances if prior order of child support is clearly temporary, pending entry of an ED order and a final support order. [*Little v. Little,* 74 N.C. App. 12, 327 S.E.2d 283 (1985).]

iv. An earlier order of child support may not be modified in an ED order but, rather, must be modified in an order entered after the ED order. [*Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985) (trial court erred when, in an ED order, it terminated a writ of possession to the marital home granted to mother and child in a child support order).] However, the court may in an ED order modify a provision of an earlier support order concerning the depository of the child support payment. [*Shoffner v. Shoffner,* 91 N.C. App. 399, 371 S.E.2d 749 (1988) (ED order modified support only to provide that defendant was to pay child support to clerk rather than to plaintiff directly).]

L. Dismissal of an Equitable Distribution (ED) Claim

1. Voluntary dismissal pursuant to G.S. 1A-1, Rule 41(a).

a. Under G.S. 1A-1, Rule 41, a plaintiff has the right to take a voluntary dismissal of an action or any claim therein without order of court at any time before resting her case. [G.S. 1A-1, Rule 41(a)(1).]

b. When both parties have asserted an ED claim, a party cannot take a Rule 41(a) voluntary dismissal without the consent of the other party.

i. Where wife's complaint requested ED and husband's answer joined in wife's ED claim, husband's answer was a counterclaim for ED that prevented wife from taking a voluntary dismissal of ED claim without husband's consent. [*Rhue v. Pace,* 165 N.C. App. 423, 598 S.E.2d 662 (2004) (citing *Gardner v. Gardner,* 48 N.C. App. 38, 269 S.E.2d 630 (1980)).]

c. Once plaintiff rests his case, he cannot terminate the case by taking a voluntary dismissal. At that point only a judge can dismiss the case. Unless otherwise specified, a dismissal under G.S. 1A-1, Rule 41(a)(2) is without prejudice. [G.S. 1A-1, Rule 41(a)(2).]

d. For cases discussing ED claims filed before divorce, dismissed, and refiled pursuant to Rule 41(a) as an exception to the requirement that an ED claim be pending before entry of a divorce judgment, see Section III.G.8, above.

2. Involuntary dismissal pursuant to G.S. 1A-1, Rule 41(b) for failure to prosecute.

a. Under G.S. 1A-1, Rule 41, a defendant may move for dismissal of an action or of any claim therein for failure of the plaintiff to prosecute or to comply with the rules of civil procedure or any court order. [G.S. 1A-1, Rule 41(b).]

b. Before dismissing a claim for failure to prosecute with prejudice under G.S. 1A-1, Rule 41(b), a trial judge must address three factors:

i. Whether the plaintiff acted in a manner that deliberately or unreasonably delayed the matter;

ii. The amount of prejudice, if any, to the defendant; and

iii. The reason, if one exists, that sanctions short of dismissal would not suffice. [*Wilder v. Wilder,* 146 N.C. App. 574, 553 S.E.2d 425 (2001) (trial court erred in dismissing plaintiff's ED claim when it failed to consider whether lesser sanctions were appropriate); *McKoy v. McKoy,* 214 N.C. App. 551, 714 S.E.2d 832 (2011) (dismissal based on party's failure to take any steps to pursue his claim for twenty-six months was remanded to trial court because judgment did not show trial court had considered lesser sanctions).]

c. For a case affirming dismissal for failure to prosecute, see *Williard v. Williard,* 226 N.C. App. 202, 739 S.E.2d 627 (**unpublished**) (ED action filed in 1995 and administratively closed in 2004 without prejudice was properly dismissed in 2012 with prejudice pursuant to G.S. 1A-1, Rule 41(b); wife's failure to appear for mediation and her later waiver of it, her hiring of more than six attorneys, and her delay of eight years before attempting to revive case constituted unreasonable delay, which prejudiced husband, who lost time from work, had attorney on retainer for seventeen years, and serviced marital debt during that time; court properly considered lesser sanctions but found none adequate), *review denied*, 366 N.C. 598, 743 S.E.2d 222 (2013).]

M. Hearing

1. Evidence.
    a. Generally.
        i. The credibility of the evidence in an equitable distribution (ED) trial is a matter for the trial court. [*Quesinberry v. Quesinberry,* 210 N.C. App. 578, 586, 709 S.E.2d 367, 374 (2011) (quoting *Grasty v. Grasty*, 125 N.C. App. 736, 739, 482 S.E.2d 752, 754 (1997)) (trial court "has the right to believe all that a witness testified to, or to believe nothing that a witness testified to, or to believe part of the testimony and to disbelieve part of it"). *See also Ritchie v. Ritchie,* 222 N.C. App. 782, 731 S.E.2d 721 (2012) (**unpublished**) (not paginated on Westlaw) (citing *Quesinberry*) (defendant's submission of a "voluminous record of exhibits" that were "not in any way organized to allow the Court to track or trace funds from source to claimed use," coupled with defendant's "confusing" and "hesitant" testimony about his postseparation payments, led court to find the evidence not credible).]
    b. Competent evidence.
        i. Neither plaintiff's post-trial memorandum, requesting the trial court to take judicial notice of documents not offered at trial and suggesting internet sites to assist the court with valuation, nor defendant's unsubstantiated estimates during "very limited" cross-examination as to amount of his monthly retirement benefit or possible date of retirement, constituted competent evidence as to the value of defendant's military pension. [*Johnson v. Johnson,* 230 N.C. App. 280, 750 S.E.2d 25 (2013).]
    c. Even though the declarant is available as a witness, records of regularly conducted activity ("business records") are not excluded by the hearsay rule if the record meets the requirements of N.C. R. Evid. 803(6).
        i. The trial court erred when it denied plaintiff's request to introduce payment journals as evidence of postseparation commissions received by defendant. [*Simon v. Simon*, 231 N.C. App. 76, 753 S.E.2d 475 (2013) (Rule 803(6) foundational requirement was met by plaintiff's submission of an affidavit by a representative of defendant's company; live testimony not required).]
    d. For trial court's use of expert testimony, see *Valuation*, Part 3 of this Chapter, Section III.D.8.
    e. For weight assigned to factors in G.S. 50-20(c), see *Distribution*, Part 4 of this Chapter, Section III.D.

N. Entry of Judgment

1. An ED judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. [G.S. 1A-1, Rule 58.]
2. Whether delay in the entry of judgment is prejudicial is determined on a case-by-case basis as opposed to by a bright-line rule. [*Britt v. Britt,* 168 N.C. App. 198, 606 S.E.2d 910 (2005).]

3. On appeal, a party must show that he has been actually prejudiced by the court's delay in entering an ED judgment. [*Hill v. Hill,* 229 N.C. App. 511, 748 S.E.2d 352 (2013) (citing *Wright v. Wright*, 222 N.C. App. 309, 730 S.E.2d 218 (2012)).]
    a. Delay resulting in an admonishment.
        i. A two-year delay in entry of an ED judgment "clearly contributed to the germination of the issues raised by this appeal," and the fact that the judge was assigned to another county shortly after the ED trial was no excuse and not uncommon in multi-county districts. The North Carolina Constitution provides that "right and justice shall be administered without favor, denial, or delay." [*Sisk v. Sisk,* 221 N.C. App. 631, 637, 729 S.E.2d 68, 73 (2012), *review denied,* 366 N.C. 571, 738 S.E.2d 368 (2013).]
    b. Cases finding delay prejudicial.
        i. Eighteen-month delay was prejudicial and ordinarily would require a new hearing for the presentation of additional evidence as to changes in value of marital and divisible property and distributional factors. An order for a new hearing was not necessary where the matter was already remanded for a new trial as to all issues. However, the court of appeals expressed "regret" arising from the extensive delay, and the irreparable damage that may have been done, and "trusted" that on remand the ED judgment would be entered promptly after trial. [*Plomaritis v. Plomaritis*, 222 N.C. App. 94, 730 S.E.2d 784 (2012).]
    c. Cases finding delay not prejudicial.
        i. Entry of an ED judgment twenty-one months after the last evidentiary hearing did not warrant a new hearing when defendant alleged only that the parties "potentially could have benefited from further hearing given the passage of such a significant period of time" and did not show actual prejudice from the delay. [*Wright v. Wright*, 222 N.C. App. 309, 315, 730 S.E.2d 218, 222 (2012) (court of appeals "strongly" advised lower courts not to allow a significant lapse of time between the hearing and the entry of an ED order); *Hill v. Hill,* 229 N.C. App. 511, 748 S.E.2d 352 (2013) (plaintiff failed to show any specific prejudice from six-month delay, aside from the delay that is inherent in any contested ED case; court noted that since matter was remanded for findings, both parties could address on remand any changes occurring since original order, including those arising from delay in entry of original order and from the delay that is a "necessary consequence" of appeal).]
        ii. Wife was not prejudiced by entry of an ED order sixteen months after the hearing when she did not allege any change in the value of marital or divisible property between the hearing and entry of the ED order, nor did she identify any potential change in circumstances that would impact the ED order. [*Britt v. Britt,* 168 N.C. App. 198, 606 S.E.2d 910 (2005).]
        iii. Delay of three months after oral rendition of decision and entry of ED order, which included twenty-five pages of findings and conclusions as well as forty-nine pages of property schedules, was not prejudicial. [*White v. Davis*, 163 N.C. App. 21, 592 S.E.2d 265, *review denied*, 358 N.C. 739, 603 S.E.2d 127 (2004).]

d. Cases finding delay warranted additional consideration by trial court.

i. Nineteen-month delay between the date of trial and entry of an ED order was more than a de minimus delay and required entry of a new distribution order. On remand, trial court was to give the parties an opportunity to offer evidence as to any substantial changes in their respective conditions or changes, if any, in the value of the marital property since the ED trial. [*Wall v. Wall*, 140 N.C. App. 303, 536 S.E.2d 647 (2000).]

4. Consent judgments.

a. Consent judgments are different from stipulations of the parties.

i. There can be no entry of a consent judgment unless the terms of the judgment are reduced to writing, signed by the judge, and filed with the clerk of court. [G.S. 1A-1, Rule 58.]

ii. For a stipulation to be effective, it must either be signed by the parties or meet the requirements of *McIntosh v. McIntosh,* 74 N.C. App. 554, 328 S.E.2d 600 (1985). For more on stipulations, see Section V, below, and *Valuation*, Part 3 of this Chapter, Section III.A.

b. Validity of a consent judgment rests on consent of the parties.

i. The power of the court to sign and enter a consent judgment depends on the unqualified consent of the parties thereto. [*McIntosh v. McIntosh,* 184 N.C. App. 697, 646 S.E.2d 820 (2007); *Tevepaugh v. Tevepaugh*, 135 N.C. App. 489, 521 S.E.2d 117 (1999); *Chance v. Henderson*, 134 N.C. App. 657, 518 S.E.2d 780 (1999); *Milner v. Littlejohn,* 126 N.C. App. 184, 484 S.E.2d 453, *review denied*, 347 N.C. 268, 493 S.E.2d 458 (1997).]

ii. A consent judgment is void if consent of the parties does not exist at the time the court sanctions or approves the agreement and promulgates it as a judgment. [*McIntosh v. McIntosh,* 184 N.C. App. 697, 646 S.E.2d 820 (2007); *Tevepaugh v. Tevepaugh*, 135 N.C. App. 489, 521 S.E.2d 117 (1999); *Chance v. Henderson*, 134 N.C. App. 657, 518 S.E.2d 780 (1999) (consent must still exist at time court is called upon to sign consent judgment); *Milner v. Littlejohn,* 126 N.C. App. 184, 484 S.E.2d 453 (judgment entered based on a tentative agreement had to be set aside where wife filed objections to tentative agreement before judgment was entered), *review denied*, 347 N.C. 268, 493 S.E.2d 458 (1997).]

c. Consent can be determined from the written agreement. There is no requirement with consent judgments, including consent judgments relating to property, support, and custody rights of married persons, that the parties, at the time of the entry of the judgment, actually appear in court and acknowledge to the court their continuing consent to the entry of the consent judgment. [*Tevepaugh v. Tevepaugh*, 135 N.C. App. 489, 521 S.E.2d 117 (1999). *See also Thacker v. Thacker,* 107 N.C. App. 479, 420 S.E.2d 479 (if agreement is written and properly executed, court not obligated to independently ascertain extent to which parties understood agreement upon which they placed their signatures), *review denied*, 332 N.C. 672, 424 S.E.2d 407 (1992).]

d. Notwithstanding her displeasure at having to choose between two unappealing options, settling the case or proceeding *pro se*, wife's consent in an ED case was valid

when she entered the agreement in the absence of threat, coercion, intimidation, or duress. [*McIntosh v. McIntosh,* 184 N.C. App. 697, 646 S.E.2d 820 (2007).]

e. For a case using contempt to enforce a consent order entered in an ED proceeding, see *Watson v. Watson,* 187 N.C. App. 55, 652 S.E.2d 310 (2007), *review denied,* 362 N.C. 373, 662 S.E.2d 551 (2008).

f. Trial court has no authority to amend the terms of an equitable distribution consent judgment after it has been entered. [*Ghandi v. Ghandi*, 779 S.E.2d 185 (N.C. Ct. App. 2015).]

5. Use of *nunc pro tunc*.

a. *Nunc pro tunc* orders are allowed only when "a judgment has been actually rendered, or decree signed, but not entered on the record, in consequence of accident or mistake or the neglect of the clerk . . . provided [that] the fact of its rendition is satisfactorily established and no intervening rights are prejudiced." [*Whitworth v. Whitworth,* 222 N.C. App. 771, 777–78, 779–80, 731 S.E.2d 707, 712, 713 (2012) (quoting *Long v. Long,* 102 N.C. App. 18, 21–22, 401 S.E.2d 401, 403 (1991)) (noting that it is "well established" that a *nunc pro tunc* entry "may not be used to accomplish something which ought to have been done but was not done").]

b. Before entry of an order *nunc pro tunc* to the date when the prior order was decreed or signed, the following requirements must be met:

i. There must first be an order or judgment actually signed on the prior date. [*Dabbondanza v. Hansley*, 791 S.E.2d 116 (N.C. Ct. App. 2016). *See also Whitworth v. Whitworth,* 222 N.C. App. 771, 731 S.E.2d 707 (2012) (nonspecific oral ruling by trial court, indicating that details of an order allowing intervention in an ED action were to be fleshed out in a later written order, was not a sufficient rendering to support the entry three years later of a detailed written order *nunc pro tunc*); *Hinkle v. Hinkle,* 227 N.C. App. 252, 256 n.1, 742 S.E.2d 325, 328 n.1 (2013) (appellate court noted that it was unclear why an order announced and executed on the same day was entered *nunc pro tunc*).]

ii. The signed order or judgment was not entered due to accident, mistake, or neglect of the clerk and no prejudice has arisen in the intervening time. [*Whitworth v. Whitworth,* 222 N.C. App. 771, 779, 731 S.E.2d 707, 713 (2012) (quoting *Walton v. N.C. State Treasurer*, 176 N.C. App. 273, 276–77, 625 S.E.2d 883, 885 (2006)) (when a 2010 order allowing intervention in an ED action did not simply "correct the record to reflect a prior ruling made in fact but defectively recorded," and did not "merely recite[] court actions previously taken, but not properly or adequately recorded," entry of the 2010 order *nunc pro tunc* was improper).]

iii. The trial court still must have jurisdiction in the matter. [*Whitworth v. Whitworth,* 222 N.C. App. 771, 731 S.E.2d 707 (2012) (2010 order was void for lack of subject matter jurisdiction when the ED case had been finally disposed of by judgment entered in 2008; no statutory authorization for the exercise of continuing jurisdiction applied).]

iv. For more on *nunc pro tunc*, see Cheryl Daniels Howell, *No More Nunc Pro Tunc in Civil Cases?* UNC Sch. of Gov't: On the Civil Side Blog (Sept. 2, 2016), http://civil.sog.unc.edu/no-more-nunc-pro-tunc-in-civil-cases.

6. When proceeding must be recorded. A five-minute proceeding to enter a consent order was not a "trial" required to be recorded per G.S. 7A-198(a), but a later hearing on a G.S. 1A-1, Rule 60(b)(3) motion to set aside the consent order was a trial that should have been recorded. [*Coppley v. Coppley*, 128 N.C. App. 658, 496 S.E.2d 611, *review denied*, 348 N.C. 281, 502 S.E.2d 846 (1998).]

O. Relief from an Equitable Distribution (ED) Judgment under G.S. 1A-1, Rule 60

1. Rule 60(a).
   a. Rule 60(a) provides a limited mechanism for trial courts to amend erroneous judgments. [*Spencer v. Spencer,* 156 N.C. App. 1, 575 S.E.2d 780 (2003); *Ice v. Ice,* 136 N.C. App. 787, 525 S.E.2d 843 (2000).]
   b. Rule 60(a) provides that a judge may correct clerical mistakes in judgments or orders "arising from oversight or omission . . . at any time on [the judge's] own initiative or on the motion of any party."
   c. Trial courts "do not have the power under Rule 60(a) to affect the substantive rights of the parties or correct substantive errors in their decisions." [*Spencer v. Spencer,* 156 N.C. App. 1, 11, 575 S.E.2d 780, 786 (2003) (quoting *Hinson v. Hinson*, 78 N.C. App. 613, 615, 337 S.E.2d 663, 664 (1985), *review denied*, 316 N.C. 377, 342 S.E.2d 895 (1986)).]
   d. A change is substantive and outside the boundaries of Rule 60(a) when it alters the effect of the original order. [*Lee v. Lee,* 167 N.C. App. 250, 605 S.E.2d 222 (2004); *Ice v. Ice,* 136 N.C. App. 787, 525 S.E.2d 843 (2000).]
   e. Purported errors of law are not an appropriate basis for a Rule 60(a) motion. Errors of law are for appellate courts. [*Ice v. Ice,* 136 N.C. App. 787, 525 S.E.2d 843 (2000).]
   f. Relief held proper.
      i. Trial court's amendment of a qualified domestic relations order (QDRO) to require wife to pay all fees and penalties associated with the lump sum transfer of funds from husband's retirement account was proper under Rule 60(a). [*Lee v. Lee,* 167 N.C. App. 250, 605 S.E.2d 222 (2004) (fact that parties had provided for payment of taxes in two other QDROs distributing their various retirement accounts suggested that failure to do so in QDRO at issue was an "oversight or omission").]
      ii. Changing the date on which interest began to accrue on a distributive award to the date of the amended judgment rather than the original judgment was proper under Rule 60(a). [*Ice v. Ice,* 136 N.C. App. 787, 525 S.E.2d 843 (2000) (amended judgment increased amount of distributive award but made no reference to accrual of interest on the award).]
2. Rule 60(b) generally.
   a. Rule 60(b) allows a court to "relieve a party . . . from a final judgment, order, or proceeding" under certain circumstances. A motion under Rule 60(b) must seek relief

from a judgment rather than modification or amendment of a judgment. [*White v. White,* 152 N.C. App. 588, 592, 568 S.E.2d 283, 285 (2002) (affirming trial court's denial of a Rule 60(b) motion requesting a modification of the prior order), *aff'd per curiam*, 357 N.C. 153, 579 S.E.2d 248 (2003). *See also Ghandi v. Ghandi*, 779 S.E.2d 185 (N.C. Ct. App. 2015) (trial court has no authority to amend the property provisions in a consent judgment).] But courts have modified prior orders pursuant to Rule 60(b). [*See Harris v. Harris,* 162 N.C. App. 511, 591 S.E.2d 560 (2004) (citing *Howell v. Howell,* 321 N.C. 87, 361 S.E.2d 585 (1987)) (stating that Rule 60(b)(6) empowers the court to set aside or modify a final judgment when necessary to do justice; modification upheld).]

b. Rule 60(b) provides no relief for errors of law. [*Davis v. Davis*, 360 N.C. 518, 631 S.E.2d 114 (2006) (for errors of law, party should proceed under G.S. 1A-1, Rule 59(a)(8) or should file an appeal).]

c. Rule 60(b) is "a grand reservoir of equitable power to do justice in a particular case." [*Sloan v. Sloan,* 151 N.C. App. 399, 404, 566 S.E.2d 97, 101 (2002) (quoting *Branch Bank & Tr. v. Tucker*, 131 N.C. App. 132, 137, 505 S.E.2d 179, 182 (2007)).]

d. A Rule 60(b) motion is subject to the requirement that the motion be made "within a reasonable time." The rule specifically provides that motions made under Rule 60(b)(1), (2), and (3) must be made not more than one year after the judgment or order was entered. [G.S. 1A-1, Rule 60(b).]

e. A motion to set aside a judgment pursuant to Rule 60(b) is not subject to the five-day notice requirement in G.S. 1A-1, Rule 6(d). [*Sloan v. Sloan,* 151 N.C. App. 399, 566 S.E.2d 97 (2002) (no error when trial court granted wife's request during a show cause hearing for contempt to have her motion considered as a Rule 60(b) motion, rejecting husband's argument of improper notice).]

f. Although it would be the better practice to do so when ruling on a Rule 60(b) motion, the trial court is not required to make findings of fact unless requested to do so by a party. [G.S. 1A-1, Rule 52(a)(2); *Nations v. Nations,* 111 N.C. App. 211, 431 S.E.2d 852 (1993).]

g. Because Rule 60(b) cannot be used as a substitute for appeal, the trial court, after an appeal is dismissed, "may deny a [Rule 60(b)] motion for relief that is based on a ground that was open to the movant on the appeal." [*Nations v. Nations,* 111 N.C. App. 211, 215, 431 S.E.2d 852, 855 (1993) (quoting 7 James W. Moore et al., Moore's Federal Practice ¶ 60.30[2], at 60-339 (1993)). *See also Surles v. Surles,* 154 N.C. App. 170, 571 S.E.2d 676 (2002) (when an appeal was not taken, a party is limited to arguing that the trial court abused its discretion in denying a Rule 60(b) motion and may argue that the underlying judgment is erroneous only to the extent the error demonstrates an abuse of discretion in denying the 60(b) motion).]

h. A trial court's ruling on a Rule 60(b) motion is reviewable only for an abuse of discretion. Abuse of discretion is shown only when the challenged actions are manifestly unsupported by reason. [*Harris v. Harris,* 162 N.C. App. 511, 591 S.E.2d 560 (2004). *See also Sloan v. Sloan,* 151 N.C. App. 399, 404, 566 S.E.2d 97, 101 (2002) (quoting *Worthington v. Bynum*, 305 N.C. 478, 487, 290 S.E.2d 599, 605 (1982), and *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980)) (a discretionary ruling should

not be disturbed on appeal unless the ruling "probably amounted to a substantial miscarriage of justice" or was "manifestly unsupported by reason").]

3. Rule 60(b)(1).
   a. A party may be granted relief from a final judgment or order for mistake, inadvertence, surprise, or excusable neglect.
   b. Rule 60(b)(1) motions must be filed within one year after the judgment or order was entered. [G.S. 1A-1, Rule 60(b)(1); *Sloan v. Sloan,* 151 N.C. App. 399, 566 S.E.2d 97 (2002) (motion under Rule 60(b)(1) not filed within one year was untimely; trial court set aside order under Rule 60(b)(6), which requires only that motion be made within a reasonable time).]
   c. Wife's Rule 60(b)(1) motion for relief from a consent judgment for ED was properly denied when her failure to hire an attorney did not constitute excusable neglect. [*McIntosh v. McIntosh,* 184 N.C. App. 697, 646 S.E.2d 820 (2007) (proceedings had been going on for more than three years, wife had contributed to the delays, wife had been put on notice that she needed to hire an attorney and be prepared for trial at a certain date, and judge entered a well-reasoned nine-page order based on her lengthy experience with the case and the parties); *Morgan v. Morgan,* 230 N.C. App. 143, 752 S.E.2d 259 (2013) (**unpublished**) (not paginated on Westlaw) (when wife testified that husband had "a history of lying," trial court properly refused to set aside a divorce judgment for excusable neglect under G.S. 1A-1, Rule 60(b)(1) based on wife's contention that she failed to file a responsive pleading to husband's complaint for divorce and ED because husband had assured her that they would divide marital property and that there was no need to obtain legal counsel).]
4. Rule 60(b)(3).
   a. A party may be granted relief from a final judgment for fraud, misrepresentation, or other misconduct of an adverse party.
   b. Trial court properly denied husband's Rule 60(b)(3) motion for fraud based on wife's allegedly false testimony at the parties' ED trial about several issues, including their daughter's student loan debt and the amount of wife's personal credit card debt, when husband did not show that he was prevented from fully and fairly litigating his ED claim due to the alleged fraud. [*Washburn v. Washburn,* 228 N.C. App. 570, 749 S.E.2d 112 (2013) (**unpublished**) (husband did not satisfactorily explain why he failed to challenge wife's testimony at trial, and as to the credit card debt, it appeared from the record that husband had access to that information).]
5. Rule 60(b)(4).
   a. A party may be granted relief from a final judgment when the judgment is void.
   b. An order allowing intervention entered in 2010 was void for lack of subject matter jurisdiction when the ED case had been finally disposed of by judgment entered in 2008. Trial court erred when it denied party's motion to set aside the 2010 order pursuant to Rule 60(b)(4). [*Whitworth v. Whitworth,* 222 N.C. App. 771, 731 S.E.2d 707 (2012).]

6. Rule 60(b)(6).
   a. A party may be granted relief from a final judgment or order for any reason justifying relief from the operation of the judgment.
   b. The test for whether a judgment, order, or proceeding should be modified or set aside under Rule 60(b)(6) is two pronged:
      i. Extraordinary circumstances must exist and
      ii. There must be a showing that justice demands that relief be granted. [*Harris v. Harris,* 162 N.C. App. 511, 591 S.E.2d 560 (2004); *Sloan v. Sloan,* 151 N.C. App. 399, 566 S.E.2d 97 (2002).]
   c. A Rule 60(b)(6) motion must be made within a reasonable time, with what constitutes a reasonable time depending on the circumstances of the individual case. [*Sloan v. Sloan,* 151 N.C. App. 399, 566 S.E.2d 97 (2002).]
      i. Ex-wife acted within a reasonable time by filing a motion to set aside judgment just over a year after order was entered. [*Sloan v. Sloan,* 151 N.C. App. 399, 566 S.E.2d 97 (2002).]
      ii. A delay of nineteen months between the entry of judgment and a motion to set aside the judgment was found not to be reasonable. [*Hoolapa v. Hoolapa,* 105 N.C. App. 230, 412 S.E.2d 112 (1992).]
   d. Relief held proper.
      i. ED order was properly set aside under Rule 60(b)(6) when husband failed to inform the court during the ED and alimony trial that he had borrowed against an equity line of credit secured by the marital residence awarded to the wife after parties had paid off the equity line, an action that violated an injunction ordering husband not to dispose of or encumber marital assets. [*Sloan v. Sloan,* 151 N.C. App. 399, 566 S.E.2d 97 (2002).]
      ii. A qualified domestic relations order (QDRO) was properly modified under G.S. 1A-1, Rule 60(b)(6) when the QDRO, entered to implement parties' agreement for husband to pay wife a distributive award of $81,000 from husband's retirement account, inadvertently ordered payment of $81,000 plus gains and losses from the date of separation. [*Harris v. Harris,* 162 N.C. App. 511, 591 S.E.2d 560 (2004) (modification of QDRO appropriate when evidence supported conclusion that both parties intended that wife only receive a set amount of $81,000).]
   e. Relief not proper.
      i. The trial court did not abuse its discretion when it denied husband's Rule 60(b)(6) motion to revise the lump sum distribution portion of an ED order; a change in the value of the stock market over the course of five years did not amount to an extraordinary or even unforeseeable circumstance. [*Lee v. Lee,* 167 N.C. App. 250, 605 S.E.2d 222 (2004).]

P. Motion for New Trial under G.S. 1A-1, Rule 59

1. A new trial may be granted to all or any of the parties and on all or part of the issues for any of the causes or grounds set out in G.S. 1A-1, Rule 59(a)(1) to (9).
2. A judge who did not try a case had no jurisdiction to rule upon a Rule 59 motion for a new trial. [*Sisk v. Sisk*, 221 N.C. App. 631, 729 S.E.2d 68 (2012) (Judge B did not have jurisdiction to rule on a motion for a new trial in a case tried by Judge A, even though Judge A had recused himself from hearing further matters in the case), *review denied*, 366 N.C. 571, 738 S.E.2d 368 (2013).]
3. A trial judge erred in ordering a new trial under Rule 59 when the primary conduct complained of (defendant's unsolicited submission of a proposed equitable distribution (ED) judgment, later modified and entered in the case) did not constitute an irregularity and plaintiff failed to demonstrate prejudice under Rule 59(a)(1), and when the submission was not an ex parte communication constituting misconduct by a party under Rule 59(a)(2), and did not cause plaintiff to be surprised in violation of Rule 59(a)(3). It also was clear that the judge made an independent determination of the relevant legal issues before directing that the proposed judgment be modified and entered. [*Sisk v. Sisk,* 221 N.C. App. 631, 729 S.E.2d 68 (2012) (in the situation presented here, where a judge who did not try the case was held to be without authority to rule upon a motion for a new trial, the appellate court reviewed the alleged errors to determine whether the party was entitled to a new trial), *review denied,* 366 N.C. 571, 738 S.E.2d 368 (2013).]

Q. Costs and Attorney Fees

1. Two statutes authorize a court to tax costs and award attorney fees in an equitable distribution (ED) action.
    a. G.S. 50-20(i) authorizes a court to tax certain costs and attorney fees against a spouse who has removed or taken possession of the separate property of the other spouse.
        i. When the trial court ordered a husband to return the wife's separate property pursuant to G.S. 50-20(i), the trial court's award of attorney fees to the wife was proper, even though the trial court later dismissed the ED claim. [*McKissick v. McKissick,* 129 N.C. App. 252, 497 S.E.2d 711 (1998) (preliminary order and award of fees under G.S. 50-20(i) was proper, even though court later found ED claim to be barred by premarital agreement).]
    b. G.S. 50-21(e) allows a court to order a party to pay reasonable attorney fees as a sanction for willful obstruction or unreasonable delay of an ED proceeding. [See Section IV.B.4.b.i, below.]
2. Attorney fees.
    a. When G.S. 50-20(i) and 50-21(e) are not applicable, there is no statutory authority for an award of attorney fees in an ED action and attorney fees are not recoverable. [*Eason v. Taylor*, 784 S.E.2d 200 (N.C. Ct. App. 2016); *Lauterbach v. Weiner,* 174 N.C. App. 201, 620 S.E.2d 317 (2005); *Cunningham v. Cunningham,* 171 N.C. App. 550, 566, 615 S.E.2d 675, 686 (2005) (quoting *Holder v. Holder,* 87 N.C. App. 578, 584, 361 S.E.2d 891, 894 (1987)) ("attorney fees are not recoverable in an action for equitable distribution").]

b. If an ED action is combined with actions in which attorney fees are awarded, such as child support or child custody [G.S. 50-13.6.] or alimony or postseparation support, [G.S. 50-16.4.] the findings of fact must reflect that the attorney fees awarded were attributable only to the alimony or child custody and support claims. [*Robinson v. Robinson,* 210 N.C. App. 319, 707 S.E.2d 785 (2011) (in a combined action for ED, alimony, and child support, findings should have reflected that attorney fees awarded were attributable only to the alimony and/or child support actions); *Cunningham v. Cunningham,* 171 N.C. App. 550, 615 S.E.2d 675 (2005) (citing *Holder v. Holder,* 87 N.C. App. 578, 361 S.E.2d 891 (1987)).]

c. Contempt. A party held in contempt for violating an ED order can be ordered to pay attorney fees, even though there can be no award for fees incurred in obtaining the ED order in the first place. [*Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991). See Section IX.D, below.]

d. A contingency fee agreement in an ED action, that was separate from an hourly rate contract covering claims for divorce, custody, and child support, was not void on public policy grounds. [*Robinson, Bradshaw & Hinson v. Smith*, 129 N.C. App. 305, 498 S.E.2d 841 (provision in the contingency fee contract prohibiting wife from communicating with husband regarding ED was invalid but remainder of contract was enforceable; public policy rationale against contingency fee contracts in divorce, alimony, and child support actions not applicable to actions for ED), *review denied*, 348 N.C. 695, 511 S.E.2d 649, *review dismissed*, 348 N.C. 695, 511 S.E.2d 650 (1998).]

3. Costs.

a. Reasonable and necessary fees of expert witnesses are assessable or recoverable solely for actual time spent providing testimony at trial, deposition, or other proceedings. [G.S. 7A-305(d)(11); *McKinney v. McKinney,* 228 N.C. App. 300, 745 S.E.2d 356 (2013) (noting that in earlier unpublished case between these parties, appellate court had determined that G.S. 7A-305(d)(11) authorizes a trial court to assess costs for time spent by an expert testifying, but not time spent preparing to testify), *review denied,* 367 N.C. 288, 753 S.E.2d 678, *review dismissed,* 367 N.C. 288, 753 S.E.2d 679 (2014).]

i. If a category of costs is set forth in G.S. 7A-305(d), "the trial court *is required to assess the item as costs*." [*Simon v. Simon,* 231 N.C. App. 76, 87, 753 S.E.2d 475, 482 (2013) (emphasis in original) (quoting *Priest v. Safety-Kleen Sys., Inc.,* 191 N.C. App. 341, 343, 663 S.E.2d 351, 353 (2008)).]

ii. Expert witness fees in G.S. 7A-305(d)(11) are taxable as costs even though the expert testimony is not compelled by subpoena. [*Lassiter ex rel. Baize v. N.C. Baptist Hosps., Inc.*, 368 N.C. 367, 778 S.E.2d 68 (2015).] Cases suggesting that the subpoena requirement in G.S. 7A-314 applies to expert witness fees taxed as costs pursuant to G.S. 7A-305(d)(11) are overruled. [*Lassiter*.]

iii. Although G.S. 7A-314, set out in Section III.Q.3.b, immediately below, gives a trial court discretion as to expert witness compensation, when the court of appeals gave specific instructions to compensate an expert only for the time the expert actually spent testifying as provided in G.S. 7A-305(d)(11), and not for time spent waiting in court, trial court on remand was bound by that mandate

and erred in awarding compensation for court time pursuant to G.S. 7A-314. [*McKinney v. McKinney,* 228 N.C. App. 300, 745 S.E.2d 356 (2013), *review denied,* 367 N.C. 288, 753 S.E.2d 678, *review dismissed,* 367 N.C. 288, 753 S.E.2d 679 (2014).]

b. A court has discretion to:

i. Award a witness under subpoena reimbursement of certain travel expenses [G.S. 7A-314(b).] and

ii. Authorize compensation and allowances to an expert witness, subject to the specific limitations set forth in G.S. 7A-305(d)(11). [G.S. 7A-314(d), *amended by* S.L. 2015-153, § 2, effective Oct. 1, 2015, and applicable to motions and applications for costs filed on or after that date.] The amendment to G.S. 7A-314(d) would change the result in *Simon v. Simon,* 231 N.C. App. 76, 753 S.E.2d 475 (2013), which held that a trial court has the authority to award costs for a subpoenaed witness' time attending, but not testifying, at trial under G.S. 7A-314(d).

c. For compensation of experts appointed by the court to assist in valuation, see *Valuation*, Part 3 of this Chapter, Section III.D.4.

R. Applicability of G.S. 1A-1, Rule 68 (Offer of Judgment) to Equitable Distribution (ED) Actions

1. The court of appeals has not ruled on the applicability of Rule 68 to ED actions. [*See Lauterbach v. Weiner,* 174 N.C. App. 201, 620 S.E.2d 317 (2005) (court of appeals identified the issue but did not resolve it because the Rule 68 offer in the case at issue related only to the distribution of the marital residence and did not propose an offer for the division of the entire marital estate).]

IV. Pretrial Remedies, Procedures, and Protective Measures

A. Pretrial Remedies and Protective Measures

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

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

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

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

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

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

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

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

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

d. Bond.

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

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

e. Injunctive relief to protect separate property.

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

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

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

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

a. G.S. 50-20(i1) was amended in 1997 "to encourage interim distribution of property or debt." [S.L. 1997-302 (quoting title of session law). *See Wirth v. Wirth,* 193 N.C. App. 657, 668 S.E.2d 603 (2008) (recognizing that parties should be encouraged to settle as

many matters as possible before an ED trial and refusing to discourage such contractual arrangements by interpreting them in a way contrary to their express terms).]

b. Unless good cause is shown that there should not be an interim distribution, the court may, at any time after an action for ED has been filed and prior to the final judgment of ED, enter orders declaring what is separate property and may also enter orders dividing part of the marital property, divisible property or debt, or marital debt between the parties. [G.S. 50-20(i1).]

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

d. Any order for interim distribution must be taken into consideration at trial and proper credit given. [G.S. 50-20(i1); *Wirth v. Wirth,* 193 N.C. App. 657, 668 S.E.2d 603 (2008). *Cf. Johnson v. Johnson,* 230 N.C. App. 280, 750 S.E.2d 25 (2013) (when wife made post–interim distribution payments on the marital residence, which she received in the interim distribution, the payments were payments on her own personal residence—they were not made for the marital estate, were not payments on marital debt, and were not payments that benefitted husband—and did not have to be accounted for in the final ED order).]

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

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

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

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

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

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

"subject to Defendant's [wife's] rights to an equitable distribution of property, both as marital and divisible property" and further stated that "Defendant's rights and claims to said property are preserved until an equitable distribution of marital and divisible property," the interim order preserved wife's claim for equitable distribution of marital and divisible property related to that house. [*Brackney v. Brackney,* 199 N.C. App. 375, 378, 682 S.E.2d 401, 403 (2009), *review withdrawn,* 363 N.C. 853, 694 S.E.2d 200 (2010).]

B. Pretrial Procedures

1. Inventory affidavit. [G.S. 50-21(a).]
    a. The party who first asserts a claim for equitable distribution (ED) must prepare and serve upon the opposing party an inventory affidavit listing all property claimed to be marital and separate property, as well as an estimated date of separation fair market value of each item, within ninety days of filing the claim. [G.S. 50-21(a).]
    b. The opposing party must serve a responding inventory within thirty days after service of the inventory affidavit. [G.S. 50-21(a).]
    c. The inventory affidavits are subject to amendment and are nonbinding at trial as to completeness or value. [G.S. 50-21(a).]
        i. This is in contrast to stipulations, which, once made and of record, are binding on the parties absent fraud or mutual mistake. [*Lawing v. Lawing,* 81 N.C. App. 159, 344 S.E.2d 100 (1986). See Section V, below, and *Valuation*, Part 3 of this Chapter, Section III.A for more on stipulations.
        ii. Where wife listed husband's painting business in her inventory affidavit as having an unknown value at the date of separation, wife was free to present expert testimony on value at trial, when husband had received appropriate notice of the expert opinion. [*Franks v. Franks,* 153 N.C. App. 793, 571 S.E.2d 276 (2002) (rejecting husband's argument that wife was required to amend her inventory affidavit before trial).]
        iii. Where husband presented no evidence to establish the number of years his 401(k) account existed prior to the marriage and stated in the inventory affidavit that the account was marital property and put "none" under the affidavit section on separate property, trial court did not abuse its discretion when it awarded wife one-half of the account. [*Helms v. Helms,* 191 N.C. App. 19, 661 S.E.2d 906 (wife's testimony at earlier ED proceeding that she and her attorney had determined that she was entitled to a lesser percentage of the account was not binding, given husband's failure to meet burden of showing what portion of the account was separate property), *review denied,* 362 N.C. 681, 670 S.E.2d 233 (2008).]
        iv. Local rules can make an inventory affidavit binding. [*See Young v. Young*, 133 N.C. App. 332, 515 S.E.2d 478 (1999) (husband who failed to object to wife's classification of credit card debt as marital on local forms required by local discovery rules was deemed to have stipulated that debt was marital; trial court need not hear evidence either to prove or disprove issue).]

d. The court may extend the time for filing the inventories upon good cause shown. [G.S. 50-21(a).] Otherwise, the requirements in G.S. 50-21(a) cannot be waived. [*Ward v. Ward,* 225 N.C. App. 268, 736 S.E.2d 647 (**unpublished**), *review denied,* 366 N.C. 580, 739 S.E.2d 846, 366 N.C. 580, 739 S.E.2d 852 (2013).]

e. The inventory affidavits are in the nature of answers to interrogatories propounded to the parties and are subject to the requirements of Rule 11. [G.S. 50-21(a).]

f. Any party failing to provide the required affidavits is subject to sanctions pursuant to G.S. 1A-1, Rules 26, 33, and 37. [G.S. 50-21(a). *See Ward v. Ward,* 225 N.C. App. 268, 736 S.E.2d 647 (**unpublished**) (wife's ED claim dismissed some four years after her noncompliance with 2007 order requiring her to file an inventory affidavit and attend a pretrial conference; dismissal not as a sanction under above cited rules but pursuant to a stipulation in the 2007order that noncompliance of either party would result in dismissal), *review denied,* 366 N.C. 580, 739 S.E.2d 846, 366 N.C. 580, 739 S.E.2d 852 (2013). *But cf. Green v. Green*, 236 N.C. App. 526, 763 S.E.2d 540 (2014) (trial court erred in sanctioning defendant for failure to file inventory affidavit where plaintiff filed no motion requesting sanctions and where court never had ordered defendant to file the affidavits by a particular date).]

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

i. Trial court erred in failing to classify, value, and distribute wife's profit-sharing plan, even though she had not listed the plan in her affidavit filed with the court and it was not included in the pretrial order. [*Fitzgerald v. Fitzgerald,* 161 N.C. App. 414, 588 S.E.2d 517 (2003) (existence of the plan disclosed during the ED hearing).]

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

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

b. At the conference, the court must adopt a discovery schedule, rule on any motions for appointment of expert witnesses or on other applications, including applications to determine the date of separation, and set a date for the initial pretrial conference. [G.S. 50-21(d).]

c. At the initial pretrial conference, the court must determine the status of the case, set a date for completion of discovery and a mediated settlement conference, if applicable, and a date for the filing and service of all motions, and set a date for a final pretrial conference and a date after which the case shall proceed to trial. [G.S. 50-21(d).]

d. A final pretrial conference must be conducted in accordance with the Rules of Civil Procedure and the General Rules of Practice applicable to district or superior court. At the final pretrial conference, the court must rule on any matter reasonably necessary to effect a fair and prompt disposition of the case. [G.S. 50-21(d).]

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

a. Prior to Mar. 1, 2006, a chief district court judge was authorized but not required to mandate settlement procedures in his district. [G.S. 7A-38.4A(c).]

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

i. At the scheduling conference mandated by G.S. 50-21(d) in all ED actions in all judicial districts, or at such earlier time as specified by local rule, the court shall include in its scheduling order a requirement that the parties and their counsel attend a mediated settlement conference or, if the parties agree, other settlement procedure conducted pursuant to the Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases (FFS Rules), unless excused by the court pursuant to FFS Rule 1.C(6) or by the court or mediator pursuant to FFS Rule 4.A(2). [FFS Rule 1.C(1).]

ii. The court shall dispense with the requirement to attend a mediated settlement conference or other settlement procedure only for good cause shown. [FFS Rule 1.C(1).]

iii. In the mediated settlement conference or other settlement procedure, all other financial issues between the parties, including alimony, postseparation support, or claims arising out of contracts between the parties under G.S. 52-10, 52-10.1, or Chapter 52B, as well as child support, may be discussed, negotiated, or decided at the settlement proceeding. [FFS Rule 1.C(2).]

c. The FFS Rules (Apr. 1, 2014) implementing G.S. 7A-38.4A may be found in N.C.G.S. Annotated Rules of North Carolina and at N.C. Court System, *Courts*, "Program Rules," www.nccourts.org/Courts/CRS/Councils/DRC/FFS/Rules.asp.

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

a. Upon motion of either party or upon the court's own initiative, the court **shall** impose an appropriate sanction on a party when it finds both that:

i. The party has willfully obstructed or unreasonably delayed, or attempted to obstruct or unreasonably delay, discovery proceedings or any pending ED proceeding and

ii. The willful obstruction or unreasonable delay of the proceedings is or would be prejudicial to the interests of the opposing party. [G.S. 50-21(e).]

b. Sanctions for delay of the proceedings may include an order:

i. To pay the other party the amount of the reasonable expenses and damages incurred because of the willful obstruction or unreasonable delay, including a reasonable attorney fee, and

ii. To appoint, at the offending party's expense, an accountant, appraiser, or other expert whose services the court finds necessary in order for discovery or other ED proceeding to be timely conducted. [G.S. 50-21(e); *Liberatore v. Liberatore*, 230 N.C. App. 410, 753 S.E.2d 397 (2013) (**unpublished**) (appointment under G.S. 50-21(a) and (e) of an agent to oversee and monitor the accounts of defendant's podiatry practice upheld based on defendant's past dissipation of marital property and withdrawal of funds in excess of $25,000 from the practice's business accounts).]

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

d. Whether to impose sanctions under G.S. 50-21(e) and which sanctions to impose are decisions vested in the trial court and are reviewable on appeal for abuse of discretion. [*Wirth v. Wirth,* 193 N.C. App. 657, 668 S.E.2d 603 (2008); *Zaliagiris v. Zaliagiris,* 164 N.C. App. 602, 596 S.E.2d 285 (2004), *review on additional issues denied,* 359 N.C. 643, 617 S.E.2d 662 (2005); *Crutchfield v. Crutchfield*, 132 N.C. App. 193, 511 S.E.2d 31 (1999).]

   i. A finding of contempt is not required before a court can impose sanctions under G.S. 50-21(e). [*Wirth v. Wirth,* 193 N.C. App. 657, 668 S.E.2d 603 (2008).]

   ii. Trial court did not abuse its discretion in awarding wife a portion of her attorney fees as a sanction where husband unreasonably delayed ED proceedings by refusing to produce documents for a period of at least nineteen months. [*Wirth v. Wirth,* 193 N.C. App. 657, 668 S.E.2d 603 (2008).]

   iii. Trial court did not err when it awarded wife attorney fees for husband's failure to appear at any hearing in the matter, including court-ordered mediation. [*Dalgewicz* (*Hearten*) *v. Dalgewicz,* 167 N.C. App. 412, 606 S.E.2d 164 (2004).]

   iv. Trial court did not abuse its discretion when it awarded plaintiff attorney fees as a sanction for defendant's willful delay or attempted delay of discovery and ED proceedings. [*Crutchfield v. Crutchfield*, 132 N.C. App. 193, 511 S.E.2d 31 (1999) (defendant and her counsel failed to attend hearings).]

   v. Plaintiff's failure to negotiate a settlement with defendant's counsel was not a basis for awarding attorney fees to defendant in an equitable distribution case. [*Eason v. Taylor*, 784 S.E.2d 200, 205 (N.C. Ct. App. 2016) ("Even if defendant made a generous offer, plaintiff was not obliged to accept it, nor would their negotiations, if they occurred, been a proper matter for the court to consider".]

e. Notice of sanctions required.

   i. G.S. 50-21(e) is silent as to what type of notice is required under the statute and how far in advance notice must be given to a party facing sanctions. [*Wirth v. Wirth,* 193 N.C. App. 657, 668 S.E.2d 603 (2008); *Megremis v. Megremis,* 179 N.C. App. 174, 633 S.E.2d 117 (2006).]

   ii. A party has a due process right to notice in advance of the hearing, both of the fact that sanctions may be imposed and of the alleged grounds for the imposition of sanctions. [*Zaliagiris v. Zaliagiris,* 164 N.C. App. 602, 596 S.E.2d 285 (2004) (it was error under G.S. 50-21(e) for the trial court to summarily assess expert witness costs as a sanction against defendant, where defendant was given no notice that he was subject to such a sanction or the grounds upon which such sanction would be imposed), *review on additional issues denied,* 359 N.C. 643, 617 S.E.2d 662 (2005). *See also Green v. Green*, 236 N.C. App. 526, 763 S.E.2d 540 (2014) (trial court erred in sanctioning defendant for failure to file inventory affidavit where plaintiff filed no motion requesting sanctions and where court never had ordered defendant to file the affidavits by a particular date).]

f. Notice sufficient.

   i. Where husband had notice of and submitted an argument against wife's request for sanctions more than two months before the court imposed sanctions,

husband had sufficient notice of the possibility of sanctions. [*Wirth v. Wirth*, 193 N.C. App. 657, 668 S.E.2d 603 (2008) (wife's counsel filed a written closing argument with the trial court in which she requested fees pursuant to G.S. 50-21(e), set out the amount thereof, and stated that the requested fees related to additional time, effort, and cost to wife and her attorneys in obtaining necessary documentation that husband had failed to provide, to which husband's counsel submitted a written closing argument in which he argued against wife's request for sanctions).]

g. Notice not sufficient.

   i. Defendant's due process rights were violated when there was no written request for sanctions, no separate hearing on sanctions, and defendant received no notice regarding sanctions prior to the ED trial at which sanctions were imposed. [*Megremis v. Megremis*, 179 N.C. App. 174, 633 S.E.2d 117 (2006). *See Wirth v. Wirth*, 193 N.C. App. 657, 668 S.E.2d 603 (2008) (stating that *Megremis* stands for the proposition that a party must have notice regarding the imposition of sanctions before the date on which sanctions are imposed); *see also Green v. Green*, 236 N.C. App. 526, 763 S.E.2d 540 (2014) (trial court erred in sanctioning defendant for failure to file inventory affidavit where plaintiff filed no motion requesting sanctions and where court never had ordered defendant to file the affidavits by a particular date).]

h. Notice has been found not to have been provided by:

   i. The fact that a party against whom sanctions were imposed took part in the hearing and did the best he could do without knowing in advance the sanctions that might be imposed. [*Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 596 S.E.2d 285 (2004), *review on additional issues denied,* 359 N.C. 643, 617 S.E.2d 662 (2005); *Megremis v. Megremis,* 179 N.C. App. 174, 633 S.E.2d 117 (2006) (citing *Zaliagiris*).]

   ii. Language in an ED pretrial order that recited the operative language of G.S. 50-21(e) as a distributional factor and not as a ground for sanctions and did not specify sanctions or cite the sanctions statute. [*Megremis v. Megremis,* 179 N.C. App. 174, 633 S.E.2d 117 (2006).]

   iii. Statements by plaintiff's counsel,

      (a) At a hearing on motions by defendant and her counsel unrelated to the issue of sanctions against defendant, that defendant's conduct "amount[ed] to an effort to postpone" the trial, when plaintiff's counsel did not mention sanctions, the statute, or any operative language of the statute. [*Megremis v. Megremis,* 179 N.C. App. 174, 180, 633 S.E.2d 117, 122 (2006).]

      (b) During plaintiff's counsel's opening statement at trial that forecast evidence of defendant's conduct that plaintiff's counsel contended was "a willful obstruction and delay of the equitable distribution trial and which should subject [defendant] to sanctions," and that asked the trial court "to consider the delay and obstruction of [defendant] . . . under [G.S.] 50-21(e)," when there was no written motion for sanctions and no separate hearing on the issue of sanctions but the issue of sanctions was decided as part of the

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

5. Temporary orders pursuant to G.S. 50-21(a).
   a. During the pendency of the ED action, discovery may proceed and the trial court shall enter temporary orders as appropriate and necessary for the purpose of preventing the disappearance, waste, or destruction of marital or separate property, or to secure the possession thereof. [G.S. 50-21(a). *See Liberatore v. Liberatore*, 230 N.C. App. 410, 753 S.E.2d 397 (2013) (**unpublished**) (appointment under G.S. 50-21(a) and (e) of an agent to oversee and monitor the accounts of defendant's podiatry practice upheld based on defendant's past dissipation of marital property and withdrawal of funds in excess of $25,000 from the practice's business accounts).]

V. Stipulations

A. Generally

1. Stipulations are different from consent judgments.
   a. For a stipulation to be effective, it must either be signed by the parties or meet the requirements of *McIntosh v. McIntosh,* 74 N.C. App. 554, 328 S.E.2d 600 (1985). The requirements in *McIntosh* are set out in Section V.B, below.
   b. There can be no entry of a consent judgment unless the terms of the judgment are reduced to writing, signed by the judge, and filed with the clerk of court. [G.S. 1A-1, Rule 58.] For more on consent judgments, see Section III.N.4, above.
2. Stipulations are judicial admissions which, unless limited as to time or application, continue in full force for the duration of the controversy. [*Smith v. Smith*, 786 S.E.2d 12 (N.C. Ct. App. 2016); *Fox v. Fox*, 114 N.C. App. 125, 441 S.E.2d 613 (1994). *See Sharp v. Sharp*, 116 N.C. App. 513, 449 S.E.2d 39 (stipulation of value of real property at hearing before referee still in force when equitable distribution (ED) judgment entered two years later, despite defendant's argument that value had changed; defendant had not sought to set aside the stipulation and had not presented evidence to trial court as to the value of the property at the date of distribution), *review denied*, 338 N.C. 669, 453 S.E.2d 181 (1994).] For more on stipulations, see *Valuation*, Part 3 of this Chapter, Section III.A.
   a. In equitable distribution actions, "our courts favor *written stipulations* which are duly executed and acknowledged by the parties." [*Smith v. Smith*, 786 S.E.2d 12, 33 (N.C. Ct. App. 2016) (emphasis in original) (quoting *Fox v. Fox*, 114 N.C. App. 125, 132, 441 S.E.2d 613, 617 (1994)).] See Section V.A.6, below, for more discussion on preference for a written stipulation.
3. Effect of a stipulation.
   a. A stipulation, once made and of record, is binding on the parties in the absence of fraud or mutual mistake. [*Lawing v. Lawing,* 81 N.C. App. 159, 344 S.E.2d 100 (1986).]
   b. A stipulation is binding in every sense, preventing the parties from introducing evidence to dispute it and relieving them from the necessity of producing evidence

to establish the admitted fact. [*Young v. Young*, 133 N.C. App. 332, 515 S.E.2d 478 (1999); *Quesinberry v. Quesinberry,* 210 N.C. App. 578, 709 S.E.2d 367 (2011) (stipulation is a judicial admission recognized and enforced as a substitute for legal proof).]

i. A stipulation that appreciation of a home in the amount of $181,000 between date of purchase and time of trial and distribution was the result of market forces alone resulted in the classification of the appreciation as divisible property. [*Brackney v. Brackney,* 199 N.C. App. 375, 682 S.E.2d 401 (2009), *review withdrawn,* 363 N.C. 853, 694 S.E.2d 200 (2010).]

ii. When husband had stated in his inventory affidavit that his 401(k) account was marital property and put "none" under the affidavit section on separate property, trial court did not abuse its discretion when it awarded wife one-half of the account, even though wife had testified in earlier ED proceeding that she and her attorney had determined that she was entitled to a lesser percentage of the account. [*Helms v. Helms,* 191 N.C. App. 19, 661 S.E.2d 906 (wife's testimony at earlier proceeding was not binding, given husband's failure to meet burden of showing what portion of the account was separate property), *review denied,* 362 N.C. 681, 670 S.E.2d 233 (2008).]

iii. A party's failure to object to the other party's classification of debt as marital was deemed by local rule to be a stipulation that the party's listing was undisputed. [*Young v. Young*, 133 N.C. App. 332, 515 S.E.2d 478 (1999) (husband who failed to object to wife's classification of credit card debt as marital on local forms required by local discovery rules was deemed to have stipulated that debt was marital; trial court need not hear evidence either to prove or disprove issue).]

iv. Stipulation in a pretrial order that all assets on a lengthy itemized list were marital assets precluded husband from asserting for the first time on appeal that eleven of the listed assets were owned by marital corporation. [*Quesinberry v. Quesinberry,* 210 N.C. App. 578, 709 S.E.2d 367 (2011).]

v. Stipulation in a pretrial order that property acquired subsequent to reconciliation was included in wife's ED claim prevented husband from arguing that a separation agreement and property settlement barred wife's ED claim. [*Inman v. Inman*, 136 N.C. App. 707, 525 S.E.2d 820, *cert. denied,* 351 N.C. 641, 543 S.E.2d 870 (2000).]

vi. Where the parties stipulate that an equal division of the marital property is equitable, it is not only unnecessary but improper for the trial court to consider, in making that distribution of marital property, any of the distributional factors in G.S. 50-20(c). [*Miller v. Miller,* 97 N.C. App. 77, 387 S.E.2d 181 (1990) (because of stipulation, trial court correctly refused to give husband credit for mortgage payments he made after separation or to consider payments as a distributional factor). *Cf. Stovall v. Stovall,* 205 N.C. App. 405, 409, 698 S.E.2d 680, 684 (2010) (filed after category of divisible property was created) (where parties stipulated in pretrial order that "an equal division would be equitable" but further stipulated that trial court was to decide which party should receive credit for post-separation payment of certain listed debts, which trial court considered contradictory, there was no abuse of discretion when trial court, by giving husband

credit for his postseparation mortgage payments of $160,000 on one of the listed debts, a warehouse, distributed the divisible property related to the warehouse unequally).]

vii. Trial court did not err in failing to classify and distribute divisible debt associated with the marital residence where parties stipulated that, upon the sale of the residence, all net proceeds would be shared equally by the parties, meaning that there was no divisible interest to be divided. [*Smith v. Smith*, 786 S.E.2d 12 (N.C. Ct. App. 2016).]

c. A trial judge is to follow a stipulation unless the trial judge sets it aside after giving the parties notice and an opportunity to be heard. [*Plomaritis v. Plomaritis*, 222 N.C. App. 94, 730 S.E.2d 784 (2012) (trial court erred when it set aside a pretrial order containing the parties' stipulations regarding many items of marital and divisible property, on its own motion and some eighteen months after the ED case had been tried in reliance upon the pretrial order, without giving the parties notice and an opportunity to be heard).]

d. A stipulation binding at trial is binding on appeal. [*Wall v. Wall,* 140 N.C. App. 303, 310–11, 536 S.E.2d 647, 652 (2000) (citing *Inman v. Inman*, 136 N.C. App. 707, 525 S.E.2d 820, *cert. denied,* 351 N.C. 641, 543 S.E.2d 870 (2000)) (parties are not free to enter into stipulations for trial purposes, "then abandon those agreements and chart a different course when they sail into appellate waters").]

4. Pretrial orders.

a. If a pretrial conference is held, the judge must enter a pretrial order reciting, among other things, the agreements made by the parties as to any of the matters considered at the pretrial conference. When entered, the pretrial order controls the subsequent course of the action, unless modified at trial to prevent manifest injustice. [G.S. 1A-1, Rule 16(a). *See Inman v. Inman*, 136 N.C. App. 707, 525 S.E.2d 820 (pretrial order, freely consented to by plaintiff while represented by counsel, set out the issues before the trial court; plaintiff could not take an inconsistent position on appeal), *cert. denied,* 351 N.C. 641, 543 S.E.2d 870 (2000); *Stovall v. Stovall,* 205 N.C. App. 405, 698 S.E.2d 680 (2010) (construing stipulations in pretrial orders in the same manner as a contract between the parties).]

b. For a stipulation in a pretrial order to be binding, the parties must use unequivocal and mandatory language that definitively expresses their intent. [*Despathy v. Despathy,* 149 N.C. App. 660, 562 S.E.2d 289 (2002) (where parties in a pretrial order provided how vehicles "should" be distributed between the parties, the trial court was free to disregard the stipulation and to distribute the vehicles differently than the stipulation provided; the appellate court noted, however, that the better practice would have been for the trial judge to notify the parties of his intent to deviate from their stipulation, allowing the parties an opportunity to reevaluate and agree on a final award).] When the intent of the parties is clear, if the trial court deviates from the stipulation without setting out its rationale for doing so, the appellate court will presume the trial court made a mistake. [*See Schweizer v. Patterson,* 220 N.C. App. 416, 725 S.E.2d 474 (2012) (**unpublished**) (citing *Despathy*) (parties had stipulated in pretrial order that a vehicle was plaintiff's separate property but trial court classified

and treated it in distribution decision as marital property; while recognizing that a trial court may deviate from a stipulation if it provides a rationale for doing so, when rationale was lacking, mistake was assumed by appellate court and trial court's treatment of the vehicle was reversed).] See Section V.C, below, on setting aside a stipulation.

c. Where parties stipulated in a pretrial order that a refund resulting from a 2009 joint tax return was divisible property, the trial court erred in concluding that the tax refund was not marital or divisible property; on remand, the trial court was instructed to classify the refund in accordance with the stipulation. [*Zurosky v. Shaffer*, 236 N.C. App. 219, 763 S.E.2d 755 (2014).]

d. Stipulation in pretrial order, that the issue of whether certain property was separate or marital by virtue of a prenuptial agreement was an issue to be decided by the trial court, served as the basis for allowing husband to amend his answer to include the prenuptial agreement, even though court had determined that husband should have pled the agreement in his answer as an affirmative defense. [*Weaver-Sobel v Sobel,* 175 N.C. App. 596, 624 S.E.2d 432 (2006) **(unpublished**) (not paginated on Westlaw) (prenuptial agreement could have affected whether certain assets were separate or marital property, thus it constituted a matter in "avoidance or affirmative defense" and was required to be pled in defendant's answer).]

e. Local rules can result in binding stipulations. [*See Young v. Young*, 133 N.C. App. 332, 515 S.E.2d 478 (1999) (husband who failed to object to wife's classification of credit card debt as marital on local forms required by local discovery rules was deemed to have stipulated that debt was marital; trial court need not hear evidence either to prove or disprove issue).]

f. Even though it denied a request to modify a pretrial order, one court has considered an alleged misclassification as a distributional factor. [*See White v. Davis,* 163 N.C. App. 21, 592 S.E.2d 265 (trial court, citing fairness considerations and acting in the spirit of *Inman v. Inman*, 136 N.C. App. 707, 525 S.E.2d 820, *cert. denied,* 351 N.C. 641, 543 S.E.2d 870 (2000), allowed the misclassification of husband's medical practice in a pretrial order to be considered as a distributional factor in his favor under G.S. 50-20(c)(12)), *review denied,* 358 N.C. 739, 603 S.E.2d 127 (2004).]

g. Trial court erred in failing to classify, value, and distribute wife's profit-sharing plan, even though she had not listed the plan in her affidavit filed with the court and it was not included in the pretrial order. [*Fitzgerald v. Fitzgerald,* 161 N.C. App. 414, 588 S.E.2d 517 (2003) (existence of the plan disclosed during the ED hearing).]

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

a. A trial court properly classified a tax refund as marital property, even though the parties had not included the refund in their stipulated list of marital property. [*Allen v. Allen,* 168 N.C. App. 368, 607 S.E.2d 331 (2005) (court holding that there was no waiver of equitable distribution of property not listed in the stipulation).]

6. In ED actions, parties' agreement regarding distribution of their property should be in writing, duly executed, and acknowledged. [*McIntosh v. McIntosh,* 74 N.C. App. 554, 328

S.E.2d 600 (1985); *Quesinberry v. Quesinberry,* 210 N.C. App. 578, 709 S.E.2d 367 (2011) (citing *McIntosh*).]

a. North Carolina courts "favor *written stipulations* which are duly executed and acknowledged by the parties." [*Smith v. Smith*, 786 S.E.2d 12, 33 (N.C. Ct. App. 2016) (emphasis in original) (quoting *Fox v. Fox*, 114 N.C. App. 125, 132, 441 S.E.2d 613, 617 (1994)); *Heath v. Heath*, 132 N.C. App. 36, 509 S.E.2d 804 (1999); *Fox*. *See also Robinson v. Robinson,* 210 N.C. App. 319, 707 S.E.2d 785 (2011) (trial court erred in relying on statements of counsel regarding stipulations when stipulations had not been reduced to writing).]

b. But written stipulations have been upheld even though not acknowledged and executed by the parties. [*Eubanks v. Eubanks,* 109 N.C. App. 127, 425 S.E.2d 742 (1993) (written stipulation signed by attorneys for both parties and read into the record in the presence of the parties without objection was binding on the parties, even though neither actually signed the document); *Hodges v. Hodges,* 200 N.C. App. 617, 687 S.E.2d 710 (2009) (**unpublished**) (undated, handwritten factual stipulations that were not acknowledged but were signed by the parties and admitted into the record by the trial court in the presence of both parties and without objection were competent evidence to support classification of property as a mixed asset).]

c. An evidentiary stipulation that did not "directly deal with the actual distribution of marital property" of the parties, made during trial, was not subject to the requirements in *McIntosh v. McIntosh,* 74 N.C. App. 554, 328 S.E.2d 600 (1985), and was binding even though not in writing. [*Lane v. Lane*, 218 N.C. App. 455, 721 S.E.2d 762 (**unpublished**) (at trial conference with judge and attorneys, parties orally stipulated that testimony from each spouse as to the fair market value of a tract of land would be considered as both date of separation and date of trial values; appellate court distinguished an evidentiary stipulation during trial from an agreement to distribute property governed by G.S. 50-20(d), which requires a writing), *review denied*, 366 N.C. 234, 731 S.E.2d 154 (2012).]

B. If Stipulations Are Not Written, Requirements Set Out in *McIntosh v. McIntosh*, 74 N.C. App. 554, 328 S.E.2d 600 (1985), Must Be Met

1. Oral stipulations are binding if the record affirmatively demonstrates that the court made contemporaneous inquiries of the parties at the time the stipulations were entered into. [*McIntosh v. McIntosh,* 74 N.C. App. 554, 328 S.E.2d 600 (1985); *Quesinberry v. Quesinberry,* 210 N.C. App. 578, 709 S.E.2d 367 (2011) (citing *McIntosh*).] It should appear that:

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

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

   c. The parties agree to abide by the terms of the stipulations of their own free will. [*McIntosh v. McIntosh,* 74 N.C. App. 554, 328 S.E.2d 600 (1985). *See also Heath v. Heath*, 132 N.C. App. 36, 509 S.E.2d 804 (1999), and *Fox v. Fox,* 114 N.C. App. 125, 441 S.E.2d 613 (1994) (requiring record to show that trial court read stipulated terms to parties and that parties understood effects of their agreement).]

2. Some decisions have not construed *McIntosh v. McIntosh,* 74 N.C. App. 554, 328 S.E.2d 600 (1985), to require that the trial court read the stipulations to the parties. [*Chance v. Henderson*, 134 N.C. App. 657, 518 S.E.2d 780 (1999).]
   a. *McIntosh v. McIntosh,* 74 N.C. App. 554, 328 S.E.2d 600 (1985), has been construed to require **either** that the trial court read the agreement in open court **or** that it be reasonably apparent from the record that both parties either read or understood the stipulated terms. [*Chance v. Henderson*, 134 N.C. App. 657, 518 S.E.2d 780 (1999) (*McIntosh* not violated when counsel for one of the parties recited the stipulated terms).]
   b. When the parties were present in court, represented by counsel, and indicated that they either read or understood the terms of the proposed distribution, subsequent ED order was affirmed even though trial judge did not read to the parties the terms of the proposed distribution of marital property. [*Watson v. Watson*, 118 N.C. App. 534, 455 S.E.2d 866 (1995) (*McIntosh v. McIntosh,* 74 N.C. App. 554, 328 S.E.2d 600 (1985), does not require the trial judge to read terms to the parties in open court under these circumstances).]
3. If the parties themselves are not present in court, oral stipulations made on their behalf are not valid. [*Hurley v. Hurley,* 123 N.C. App. 781, 474 S.E.2d 796 (1996) (stipulations entered in open court by parties' attorneys not valid).]
4. Trial court's finding of fact that parties in equitable distribution (ED) case stipulated as to the division of certain retirement accounts must be affirmatively reflected in the record for the ED judgment to be upheld on appeal. [*Heath v. Heath*, 132 N.C. App. 36, 509 S.E.2d 804 (1999) (citing *Fox v. Fox*, 114 N.C. App. 125, 441 S.E.2d 613 (1994)) (where close review of the transcript reflected no written stipulation as to the division of certain retirement accounts and no oral stipulation meeting the requirements to be binding, appellate court concluded that no stipulation authorized the trial court's distributive award of the accounts, despite the trial court's finding of fact to that effect). *See also Robinson v. Robinson,* 210 N.C. App. 319, 707 S.E.2d 785 (2011) (citing *McIntosh v. McIntosh,* 74 N.C. App. 554, 328 S.E.2d 600 (1985)) (finding based on oral representation of wife's counsel that the parties had agreed that each should keep the household furniture and vehicles in his/her possession and had agreed to divide their three checking accounts was not supported by the evidence when there was no stipulation in the record on appeal and the trial court made no inquiry of the parties as to their understanding; it was noted earlier in the opinion that neither husband nor his counsel were present at the ED trial, but that fact was not mentioned in the review of this challenge to the ED order).]

C. Procedure to Set Aside a Stipulation

1. A party to a stipulation who desires to have it set aside should seek to do so by some direct proceeding. Ordinarily, such relief may or should be sought by a motion to set aside the stipulation in the court in which the action is pending, on notice to the opposing party. [*Sharp v. Sharp*, 116 N.C. App. 513, 449 S.E.2d 39 (citing *Moore v. Richard West Farms, Inc.,* 113 N.C. App. 137, 437 S.E.2d 529 (1993)), *review denied*, 338 N.C. 669, 453 S.E.2d 181 (1994).]

2. A trial court erred when it set aside a pretrial order, containing the parties' stipulations regarding many items of marital and divisible property, on its own motion and some eighteen months after the equitable distribution (ED) case had been tried in reliance upon the pretrial order, without giving the parties notice and an opportunity to be heard. [*Plomaritis v. Plomaritis*, 222 N.C. App. 94, 105, 730 S.E.2d 784, 791 (2012) (trial judge set aside the pretrial order some eighteen months after trial of ED issues and before entry of an ED judgment, based on judge's determination that "strictly following the Pretrial Order distributions will require Defendant to pay a distributive award far in excess of his ability to do so" and because implementation would require parties to agree on certain issues and parties had demonstrated an "inability to agree on major issues").]

VI. Agreements in Bar of Equitable Distribution (ED)

A. Parties May Provide for the Distribution of Marital and/or Divisible Property by Written Agreement Executed Before, During, or After Marriage [G.S. 50-20(d).]

1. An agreement to distribute marital or divisible property must be duly executed and acknowledged in accordance with G.S. 52-10 and 52-10.1 or be valid in the jurisdiction where executed. [G.S. 50-20(d). *See Prevatte v. Prevatte,* 104 N.C. App. 777, 411 S.E.2d 386 (1991) (antenuptial agreement executed in Virginia operated as a bar to wife's claim for ED); *cf. Atassi v. Atassi*, 117 N.C. App. 506, 451 S.E.2d 371 (Syrian marriage contract not sufficient to bar wife's right to ED because agreement did not comply with the Uniform Premarital Agreement Act), *review denied,* 340 N.C. 109, 456 S.E.2d 310 (1995).]
   a. G.S. 52-10. This statute validates contracts between husbands and wives that are not inconsistent with public policy. It allows married persons, or persons of "full age" about to be married, to agree to release all property rights arising from the marriage, with or without consideration. Contracts affecting real estate, or income therefrom for more than three years, made during the marriage must be in writing and acknowledged by both parties before a certifying officer.
   b. G.S. 52-10.1. This statute authorizes the execution of a separation agreement by married persons that is not inconsistent with public policy, provided that the agreement is in writing and acknowledged by both parties before a certifying officer.
   c. Agreements not acknowledged in accordance with the provisions of G.S. 52-10 and -10.1 are not binding upon the court. [*McLean v. McLean*, 88 N.C. App. 285, 363 S.E.2d 95 (1987) (trial court did not err in distributing property in a manner different than provided in a handwritten memorandum signed by the parties where the agreement was not acknowledged in front of a certifying officer), *aff'd,* 323 N.C. 543, 374 S.E.2d 376 (1988). *But cf. Moore v. Moore*, 108 N.C. App. 656, 424 S.E.2d 673 (party estopped from asserting invalidity of notarization of a separation agreement where party treated the agreement as valid for more than two years and enjoyed the benefits of the agreement), *aff'd per curiam*, 334 N.C. 684, 435 S.E.2d 71 (1993).]
   d. A conveyance is not an agreement between the parties to distribute real property. [*Beroth v. Beroth,* 87 N.C. App. 93, 359 S.E.2d 512 (quitclaim deed conveying wife's

interest in entirety property to husband before separation did not remove property from equitable distribution), *review denied*, 321 N.C. 296, 362 S.E.2d 778 (1987), *disapproved of on other grounds by Armstrong v. Armstrong*, 322 N.C. 396, 368 S.E.2d 595 (1988).]

2. Agreement can be executed at any time before, during, or after marriage.
   a. Property settlements may be executed at any time before, during, or after marriage. [G.S. 50-20(d); *Stegall v. Stegall*, 100 N.C. App. 398, 397 S.E.2d 306 (1990), *review denied,* 328 N.C. 274, 400 S.E.2d 461 (1991).]
   b. However, "pure" separation agreements are void as against public policy unless the parties are living apart at the time of execution or they plan to separate shortly thereafter. [*Stegall v. Stegall,* 100 N.C. App. 398, 397 S.E.2d 306 (1990), *review denied,* 328 N.C. 274, 400 S.E.2d 461 (1991).] See *Spousal Agreements,* Bench Book, Vol. 1, Chapter 1 for distinction between property settlements and "pure" separation agreements.
   c. Premarital agreements executed on or after July 1, 1987, must comply with the Uniform Premarital Agreement Act, G.S. 52B-1 *et seq*. [*Huntley v. Huntley*, 140 N.C. App. 749, 538 S.E.2d 239 (2000); *Atassi v. Atassi,* 117 N.C. App. 506, 451 S.E.2d 371, *review denied,* 340 N.C. 109, 456 S.E.2d 310 (1995). *See Howell v. Landry*, 96 N.C. App. 516, 386 S.E.2d 610 (1989) (holding that the Uniform Premarital Agreement Act does not require acknowledgment of premarital agreements), *review denied*, 326 N.C. 482, 392 S.E.2d 90 (1990).]
3. Agreements must be in writing.
   a. Oral agreements concerning the distribution of property are not binding on the parties. [*Wiencek-Adams v. Adams*, 331 N.C. 688, 417 S.E.2d 449 (1992); *Holder v. Holder,* 87 N.C. App. 578, 361 S.E.2d 891 (1987); *Weaver v. Weaver*, 72 N.C. App. 409, 324 S.E.2d 915 (1985), *disapproved of on other grounds by Armstrong v. Armstrong*, 322 N.C. 396, 368 S.E.2d 595 (1988). But see Section V, above, on stipulations for discussion of *McIntosh v. McIntosh*, 74 N.C. App. 554, 328 S.E.2d 600 (1985) (oral stipulations during court hearing may be binding if court makes proper inquiries before accepting agreement).]
   b. Written agreements must be signed by both parties. [*Collar v. Collar*, 86 N.C. App. 105, 356 S.E.2d 407 (1987) (refusal of defendant to sign agreement that had been properly acknowledged prevented the agreement from being "duly executed" as required by G.S. 50-20(d)).]
4. See *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1 for discussion of the choice of law governing the interpretation and enforceability of agreements, the effect of reconciliation of the parties, and grounds for rescission of agreements.

B. Terms of the Agreement Will Control the Distribution of Property

1. Agreement controls property distribution. [*See, e.g., Torres v. McClain,* 140 N.C. App. 238, 535 S.E.2d 623 (2000) (trial court properly divided military benefits in accordance with terms of written agreement between the parties); *Stewart v. Stewart,* 141 N.C. App. 236, 541 S.E.2d 209 (2000) (court properly applied definition of separate property contained in agreement); *Franzen v. Franzen*, 135 N.C. App. 369, 520 S.E.2d 74 (1999) (court bound by definitions of marital and separate property contained in the agreement).]

2. Agreements intended by the parties to be a full and final distribution of all property bar equitable distribution (ED). [G.S. 50-20(d) (properly executed agreements providing for distribution of marital or divisible property shall be binding on the parties); *Hagler v. Hagler,* 319 N.C. 287, 354 S.E.2d 228 (1987) (comprehensive property settlement provisions in separation agreement established parties' intent to fully dispose of their respective property rights and were held sufficient to bar ED, even though agreement did not mention ED); *Anderson v. Anderson,* 145 N.C. App. 453, 550 S.E.2d 266 (2001) (agreement clearly intended to be a full settlement even though it did not divide husband's pension); *McArthur v. McArthur,* 68 N.C. App. 484, 315 S.E.2d 344 (1984) (general release provisions of agreement executed before enactment of ED statute were sufficient to waive ED).]
   a. When language is unambiguous, the determination of whether the parties intended the agreement to be a full and final settlement is a matter of law to be determined by the court. [*Anderson v. Anderson,* 145 N.C. App. 453, 550 S.E.2d 266 (2001) (trial court did not err in refusing to allow evidence on the issue of whether the agreement barred the equitable distribution of husband's pension rights); *Rabon v. Rabon,* 102 N.C. App. 452, 402 S.E.2d 461 (1991) (whether agreement fully disposes of the parties' property is a factual issue to be determined by examining the agreement).]
   b. Determination of whether the agreement is ambiguous is a question to be determined by the court. [*Tyndall-Taylor v. Tyndall,* 157 N.C. App. 689, 580 S.E.2d 58 (2003); *Anderson v. Anderson,* 145 N.C. App. 453, 550 S.E.2d 266 (2001).] In making this determination, "words are to be given their usual and ordinary meaning and all the terms of the agreement are to be reconciled if possible." [*Anderson,* 145 N.C. App. at 458, 550 S.E.2d at 269–70 (quoting *Piedmont Bank & Tr. Co. v. Stevenson,* 79 N.C. App. 236, 240, 339 S.E.2d 49, 52 (1986)).]
   c. When terms are ambiguous, interpretation is for the trier of fact. [*Smith v. Childs*, 112 N.C. App. 672, 437 S.E.2d 500 (1993) (interpretation of ambiguous terms is for the jury); *Robertson v. Hartman*, 90 N.C. App. 250, 368 S.E.2d 199 (1988) (same).] For factual issues in ED proceedings, the judge rather than the jury is the trier of fact. [*McCall v. McCall*, 138 N.C. App. 706, 531 S.E.2d 894 (2000).] See Section VI.C.5, below.
   d. An agreement is ambiguous when the terms of the contract are reasonably susceptible to either of the differing interpretations proffered by the parties. [*McIntyre v. McIntyre,* 188 N.C. App. 26, 654 S.E.2d 798 (where both parties had offered reasonable, albeit differing, interpretations of the agreement, agreement was ambiguous), *aff'd per curiam,* 362 N.C. 503, 666 S.E.2d 749 (2008).]
3. Agreements that waive all property rights bar ED. [*See Porter v. Porter,* 217 N.C. App. 629, 720 S.E.2d 778 (2011) (agreement executed in 1988, in which parties relinquished and released all rights in each other's real and personal property, barred ED even though parties reconciled following execution of the agreement and lived together until their final separation in 2005; 1988 agreement, incorporated in 2007 divorce judgment, provided that it remained in effect if the parties reconciled unless otherwise provided by the parties in writing after reconciliation); *Prevatte v. Prevatte,* 104 N.C. App. 777, 411 S.E.2d 386 (1991) (a general release of property rights in a premarital agreement was sufficient to bar ED); *Small v. Small,* 93 N.C. App. 614, 379 S.E.2d 273 (right to ED may be released even if it is not specifically enumerated in a release of spousal rights and even if release was

executed before the adoption of G.S. 50-20(d)), *review denied*, 325 N.C. 273, 384 S.E.2d 519 (1989); *Blount v. Blount*, 72 N.C. App. 193, 323 S.E.2d 738 (1984) (general relinquishment of all property rights in a 1976 separation agreement was a bar to ED even though the agreement did not list property owned by husband), *review denied*, 313 N.C. 506, 329 S.E.2d 389 (1985); *Hartman v. Hartman,* 80 N.C. App. 452, 343 S.E.2d 11 (1986) (general waivers in agreement were sufficient to bar ED even though agreement made no reference to specific real property).]

4. Agreements that waive a spouse's interest in certain property bar equitable distribution of that property. [*See Herring v. Herring,* 231 N.C. App. 26, 752 S.E.2d 190 (2013) (separation agreement that provided that wife was to retain her state retirement accounts as her separate property precluded trial court from valuing and distributing those accounts); *Stewart v. Stewart,* 141 N.C. App. 236, 259, 541 S.E.2d 209, 218 (2000) (husband's interest in a medical practice was husband's separate property when parties specifically acknowledged in a premarital agreement that husband "is the owner" and that the interest "shall remain the sole and separate property" of husband; same language supported conclusion that any appreciation of that interest during the marriage was husband's separate property; unambiguous language in premarital agreement providing that the parties' retirement accounts were to remain their separate property was a valid waiver under state law, as well as under the federal Employee Retirement Income Security Act, of wife's interest in husband's retirement account).]

5. An agreement that contained a limited or incomplete waiver or release was held not to bar ED. [*McIntyre v. McIntyre,* 188 N.C. App. 26, 654 S.E.2d 798 (1986 premarital agreement that provided that each party "releases" certain rights, including "all marital rights in the real estate and personal property" of the other spouse, and that each party would be able to purchase, sell, encumber, dispose of, and convey real and personal property throughout the marriage as though unmarried and without the other's consent, did not waive either party's right to ED; rather, the agreement was a "free trader" agreement that allowed each spouse to buy and sell property without the consent or interference of the other during the marriage; 1986 agreement did not specifically reference property that might be acquired during marriage, did not expressly waive ED, and did not dispose of property in the event of divorce) (Uniform Premarital Agreement Act not applicable), *aff'd per curiam,* 362 N.C. 503, 666 S.E.2d 749 (2008).]

6. An action to enforce a separation agreement that results in a distribution of property does not constitute an action for ED prohibited by the separation agreement. [*Gilmore v. Garner,* 157 N.C. App. 664, 580 S.E.2d 15 (2003) (specific performance of a separation agreement that enforced provision granting wife a portion of husband's railroad retirement benefits did not convert the action into a prohibited action for ED).]

7. Until the court enters an order finding that the agreement bars ED, the court has jurisdiction to enter preliminary orders pursuant to the ED statute. [*McKissick v. McKissick*, 129 N.C. App. 252, 497 S.E.2d 711 (1998) (trial court was authorized to enter order pursuant to G.S. 50-20(i) requiring husband to return wife's separate property, even though trial court later determined that ED was barred by premarital agreement; appellate court did not address whether trial court would have had jurisdiction to enter the order under G.S. 50-20(i) after dismissal of the ED claim).]

8. If an agreement provides for less than a complete distribution or waiver, ED may proceed as to assets not covered by the agreement. [*Hamby v. Hamby*, 143 N.C. App. 635, 547 S.E.2d 110 (agreement controlled classification and distribution of a vehicle owned by the parties, but trial court divided other assets in accordance with ED statute), *review denied,* 552 S.E.2d 163 (N.C.), 354 N.C. 69, 553 S.E.2d 39 (2001); *Rabon v. Rabon*, 102 N.C. App. 452, 402 S.E.2d 461 (1991) (trial court erred in dismissing claim for ED due to separation agreement where trial court did not examine agreement to determine whether it was intended to be a full and final settlement of property issues). *See also Morrison v. Morrison,* 102 N.C. App. 514, 402 S.E.2d 855 (1991) (where executory provisions of agreement were rescinded by reconciliation, wife was entitled to equitable distribution of all property acquired since reconciliation and of any property owned by the parties at the time the agreement was executed that was not divided by the agreement).]
9. When an agreement provides that a specific asset will be addressed at a later date, a trial court is authorized to enter a subsequent order with respect to that asset. [*Brenenstuhl v. Brenenstuhl*, 169 N.C. App. 433, 610 S.E.2d 301 (2005) (trial court did not err in dividing a military pension some four years after divorce pursuant to an incorporated agreement reserving issue of retirement for a future date).]
10. Parties can agree to a distribution that gives a party greater rights than allowed by ED statutes. [*See, e.g., Torres v. McClain,* 140 N.C. App. 238, 535 S.E.2d 623 (2000) (trial court properly distributed husband's nonvested military pension pursuant to an unincorporated separation agreement governed by Illinois law, even though North Carolina law at the time did not provide for equitable distribution of nonvested pensions).]

C. Procedure

1. Pleading in the alternative is allowed pursuant to G.S. 1A-1, Rule 8(e)(2). A party may seek enforcement of a separation agreement and also seek equitable distribution (ED) in the event the agreement is not found to be a bar. [*Hendrix v. Hendrix*, 67 N.C. App. 354, 313 S.E.2d 25 (1984).]
2. Agreement as an affirmative defense under G.S. 1A-1, Rule 8(c).
    a. A contract governing property entered into during the marriage was not an affirmative defense but was, rather, a piece of evidence to be considered in settling the action for ED in a proceeding where plaintiff filed claim for ED but alleged that contract prohibited trial court from distributing the real property acquired by the parties during the marriage. [*Street v. Street,* 191 N.C. App. 815, 664 S.E.2d 69 (2008).]
    b. *But see Weaver-Sobel v. Sobel,* 175 N.C. App. 596, 624 S.E.2d 432 (2006) (**unpublished**) (not paginated on Westlaw) (since prenuptial agreement could have affected whether certain assets were separate or marital property, it constituted a matter in "avoidance or affirmative defense" and was required to be pled in defendant's answer; husband allowed to amend his answer to include the prenuptial agreement, since parties stipulated in the pretrial order that the issue of whether certain property was separate or marital by virtue of the prenuptial agreement was an issue to be decided by the trial court).
3. Summary judgment dismissing a claim for ED is appropriate if the pleadings and other materials before the court show an agreement that fully disposes of property or waives all

rights to ED. [*Anderson v. Anderson,* 145 N.C. App. 453, 550 S.E.2d 266 (2001). *See Dean v. Dean,* 68 N.C. App. 290, 314 S.E.2d 305 (1984) (separation agreement that disposed of all property was an "insurmountable bar" to ED); *see also Case v. Case*, 73 N.C. App. 76, 325 S.E.2d 661 (summary judgment appropriate even before the completion of discovery where all evidence showed a valid separation agreement disposing of all property between the parties), *review denied,* 313 N.C. 597, 330 S.E.2d 606 (1985).]

4. If there are issues of material fact concerning the validity or enforceability of the agreement, or the effect of reconciliation, summary judgment is not appropriate. [*See Carlton v. Carlton,* 74 N.C. App. 690, 694, 329 S.E.2d 682, 685 (1985) (order granting summary judgment reversed when there was a "fundamental conflict in the pleadings and the evidence" as to date of separation and whether parties reconciled); *Atassi v. Atassi*, 117 N.C. App. 506, 451 S.E.2d 371 (whether a Syrian divorce barred plaintiff's claims for alimony and ED and whether defendant's domicile was in North Carolina or Syria raised issues of fact, making summary judgment inappropriate), *review denied*, 340 N.C. 109, 456 S.E.2d 310 (1995).] Generally, property settlement agreements are not affected by reconciliation. [*See Porter v. Porter,* 217 N.C. App. 629, 720 S.E.2d 778 (2011) (agreement executed in 1988, in which parties relinquished and released all rights in each other's real and personal property, barred ED even though parties reconciled following execution of the agreement and lived together until their final separation in 2005; 1988 agreement, incorporated in 2007 divorce judgment, provided that it remained in effect if the parties reconciled unless otherwise provided by the parties in writing after reconciliation).]
   a. For agreements executed during separation pursuant to G.S. 52-10(a1) on or after June 19, 2013, reconciliation will not completely void any waiver, release, or establishment of support rights and obligations. Any such waiver, release, or establishment will remain valid following a period of reconciliation and subsequent separation. [G.S. 52-10(a1).] It is unclear whether this provision has any effect on the law relating to separation agreements entered pursuant to G.S. 52-10.1.
   b. See *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1 for discussion of the effect of reconciliation of the parties.
5. When a separation or other agreement is raised in bar to ED, there is probably no right to a jury trial on issues relating to the enforceability or interpretation of the agreement. [*See McCall v. McCall*, 138 N.C. App. 706, 531 S.E.2d 894 (2000) (upholding trial court's denial of a jury trial on the issue of the date of separation, finding that there is no right to a jury trial on any issue of fact in an ED hearing); *Sharp v. Sharp,* 351 N.C. 37, 519 S.E.2d 523 (third parties not entitled to a jury trial in an ED case on issue of imposition of constructive trust on property to which the third parties held legal title), *rev'g per curiam for reasons stated in dissenting opinion in* 133 N.C. App. 125, 514 S.E.2d 312 (1999) (Timmons-Goodson, J., dissenting).]
6. Choice of law provisions contained in an agreement are valid and must be given effect. [*Franzen v. Franzen*, 135 N.C. App. 369, 520 S.E.2d 74 (1999) (where parties specified Ohio law as controlling, court looked to Ohio law to construe the agreement); *Torres v. McClain,* 140 N.C. App. 238, 535 S.E.2d 623 (2000) (applying Illinois law after finding that it did not violate North Carolina public policy to divide a military pension pursuant to a separation agreement containing an Illinois choice-of-law provision; fact that both parties were domicilaries of Illinois when agreement was executed made Illinois law a

reasonable choice).] See *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1 for more on choice of law.

7. A district court lacks subject matter jurisdiction over a declaratory judgment action to interpret a distributive award provision in an incorporated separation and property settlement agreement. [*Fucito v. Francis*, 175 N.C. App. 144, 622 S.E.2d 660 (2005) (while declaratory judgment statute cannot be used to interpret a court order, the trial court may construe or interpret the provision as part of an action for contempt).]

VII. Effect of Bankruptcy

Important Note: Except as noted, this section describes provisions of the federal bankruptcy law effective Oct. 17, 2005.

A. Bankruptcy Reform Legislation

1. On Apr. 20, 2005, the federal Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [Pub. L. No. 109-8, 119 Stat. 23 (2005) (hereinafter Bankruptcy Reform Act).] was signed into law. It amended certain provisions of the Bankruptcy Code. The amendments relating to family law were effective Oct. 17, 2005, and apply to bankruptcy cases commenced on or after that date.
2. For an overview of the Bankruptcy Reform Act in the area of family law, see John L. Saxon, *Impact of the New Bankruptcy Reform Act on Family Law in North Carolina*, Fam. L. Bull. No. 20 (UNC School of Government, June 2005) (hereinafter 2005 Saxon Bulletin).
3. The provisions of the Bankruptcy Code in effect before passage of the Bankruptcy Reform Act relating to equitable distribution and other family law matters continue to apply in bankruptcy cases filed before Oct. 17, 2005, and pending on or after that date.
4. Additionally, provisions of the Bankruptcy Code in effect before passage of the Bankruptcy Reform Act that were not amended or repealed will continue to apply in bankruptcy cases that are filed on or after Oct. 17, 2005.

B. Automatic Stay

1. When a debtor files a bankruptcy petition, federal law automatically and immediately imposes a stay precluding the debtor's creditors (including spouses and former spouses) and others (including state courts) from taking certain actions against the debtor, the debtor's property, or property of the bankruptcy estate. [*See* 11 U.S.C. § 362(a).]
   a. In the equitable distribution context, an equitable distribution (ED) claim is stayed if it was or could have been commenced before bankruptcy or if the claim affects property of the estate.
   b. For specific stay provisions, see 11 U.S.C. § 362(a).

2. The automatic stay does not apply to an action for the dissolution of a marriage, except to the extent that the proceeding seeks to determine the division of property that is property of the bankruptcy estate. [11 U.S.C. § 362(b)(2)(A)(iv).]
3. Nondebtor spouse's options in bankruptcy court to allow the state court to proceed with ED. The nondebtor spouse may:
    a. Request relief from the stay pursuant to 11 U.S.C. § 362(d) to continue the state court action for ED or
    b. Request that the bankruptcy court abstain from exercising jurisdiction over the matter pursuant to 28 U.S.C. § 1334(c)(1). [*See Perlow v. Perlow*, 128 B.R. 412 (E.D.N.C. 1991).]
4. If the bankruptcy court lifts the stay:
    a. The state court can proceed to determine in the ED action the amount of the nondebtor spouse's claim to the marital (and divisible) property in question. [*In re Robbins*, 964 F.2d 342 (4th Cir. 1992).]
    b. The lifting of the automatic stay to allow adjudication in state court of the parties' property interests does not automatically include authority for the parties to enter into any form of consensual property settlement agreement that affects property of the bankruptcy estate without prior approval of the bankruptcy court. [*In re Hohenberg*, 143 B.R. 480 (W.D. Tenn. 1992) (court concerned about possible collusion between the parties).]
    c. Once the state court has made a determination as to the equitable distribution of the parties' marital and divisible property, the nondebtor spouse may enforce the judgment as to property not constituting the bankruptcy estate, if there is any. [See 11 U.S.C. § 541(b) for list of property that is not included in property of the bankruptcy estate).]
    d. For property awarded that is part of the bankruptcy estate, the case is returned to the bankruptcy court for a determination of the extent to which the state ED judgment may be enforced against the debtor spouse. [*In re Robbins*, 964 F.2d 342 (4th Cir. 1992).]
5. If the bankruptcy court abstains from the exercise of jurisdiction, allowing the state court to determine the interests of the parties in property under state law, most bankruptcy courts retain jurisdiction over the property for purposes of its ultimate distribution once those interests are determined. [Henry J. Sommer et al., Collier Family Law and the Bankruptcy Code ¶ 5.01[2][d] (Alan N. Resnick & Henry J. Sommer eds., 2005).]
6. For a discussion of the application of the automatic stay to domestic support obligations and child support generally, see *Enforcement of Child Support Orders*, Bench Book, Vol. 1, Chapter 3, Part 4.

C. Property of the Bankruptcy Estate

1. Whether property is property of the estate is important because property of the estate is protected by the automatic stay as set out above. Other reasons that property of the estate may be important in the context of an ED proceeding include:
   a. The trustee or other party in control of the estate may demand that property of the estate held by others be turned over to the estate;
   b. Depending on the type of case and other factors, property of the estate may be liquidated to pay claims of creditors; and
   c. The value of the property of the estate may be important in determining the amount to be paid to creditors. [Henry J. Sommer et al., Collier Family Law and the Bankruptcy Code ¶ 2.01[2] (Alan N. Resnick & Henry J. Sommer eds., 2005).]
2. In a Chapter 7 bankruptcy case:
   a. Property of the estate includes in relevant part:
      i. All legal or equitable interests of the debtor in property as of the commencement of the case [11 U.S.C. § 541 (a)(1).] and
      ii. Any interest the debtor acquires in property within 180 days of the filing of the petition:
         (a) By bequest, devise, or inheritance;
         (b) As a result of a property settlement agreement with the debtor's spouse or of an interlocutory or final divorce decree; or
         (c) As a beneficiary of a life insurance policy or of a death benefit plan. [11 U.S.C. § 541(a)(5). Note that S.L. 2011-284, § 51 eliminated bequests from the definition of separate property, effective June 24, 2011.] For the complete list of property of the estate, see 11 U.S.C. § 541(a).
      iii. Property in which the debtor has an ownership interest is included in the debtor's estate, whether or not it would be classified as "marital property." [*Justice v. Justice*, 123 N.C. App. 733, 475 S.E.2d 225 (1996), *aff'd per curiam*, 346 N.C. 176, 484 S.E.2d 551 (1997).]
      iv. A debtor's interest in entireties property becomes part of the bankruptcy estate. [*See In re Bunker,* 312 F.3d 145 (4th Cir. 2002).]
   b. For property that is not included as property of the estate, including but not limited to funds placed in education individual retirement accounts, 529 college savings plans, and amounts withheld or placed in certain pension or retirement plans, see 11 U.S.C. § 541(b).
   c. Property that the debtor is allowed to keep as exempt is removed from the bankruptcy estate. [See 11 U.S.C. § 522 on exemptions.]
      i. IRAs and other retirement savings may be property of the estate but often are exempt pursuant to 11 U.S.C. § 522. However, the U.S. Supreme Court has held that funds in an inherited IRA are not "retirement funds" within the meaning of § 522(b)(3)(C)'s bankruptcy exemption. [*Clark v. Rameker,* 134 S. Ct. 2242 (U.S. 2014).]

3. In a Chapter 13 bankruptcy case, property of the estate includes the property included in the estate of a Chapter 7 debtor, described in Section VII.C.2, above, as well as property (including wages and income) acquired by the debtor **after** she files for bankruptcy. [*See* 11 U.S.C. § 1306(a); *In re Gellington*, 363 B.R. 497 (Bankr. N.D. Tex. 2007) (when the debtor's postconfirmation wages are provided for in, and used to fund, his Chapter 13 plan, they are considered property of the estate).]

D. Discharge

1. Generally.
   a. There are two types of divorce-related debts that are important for discharge purposes in family law cases.
   b. The first type of divorce-related debt is a domestic support obligation, defined in 11 U.S.C. § 101(14A) in relevant part as a debt to a debtor's spouse, former spouse, or child that is in the nature of alimony, maintenance, or support. The term "domestic support obligation" (DSO) was added to the Bankruptcy Code in 2005 by the Bankruptcy Reform Act. The provision of the Bankruptcy Code addressing discharge of a DSO is 11 U.S.C. § 523(a)(5).
   c. The second type of divorce-related debt is defined in 11 U.S.C. § 523(a)(15) in relevant part as a debt to a debtor's spouse, former spouse, or child that is not a DSO and is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree, or other order of a court of record. 11 U.S.C. § 523(a)(15) addresses discharge of this type of debt. A § 523(a)(15) debt is generally referred to herein as "a divorce-related debt that that does not qualify as a domestic support obligation" or as "a divorce-related debt that is not a domestic support obligation".
   d. Whether debts are classified under § 523(a)(5) as DSOs or under § 523(a)(15) as divorce-related debts that do not qualify as DSOs is significant because DSOs generally receive preferential treatment under the Bankruptcy Code. [*See* 2005 Saxon Bulletin and Section VII.D.3, below.]
   e. Before the Bankruptcy Reform Act, debts under 11 U.S.C. § 523(a)(15) were commonly referred to as being in the form of a property settlement, while debts under § 523(a)(5) were commonly referred to as claims for alimony or support. [*See In re Zeitchik*, 369 B.R. 900 (Bankr. E.D.N.C. 2007) (not subject to the Bankruptcy Reform Act).]
2. Discharge in a Chapter 7 case commenced on or after Oct. 17, 2005.
   a. A debt for a domestic support obligation (DSO) is nondischargeable in a Chapter 7 case. [11 U.S.C. § 523(a)(5); 2005 Saxon Bulletin.]
   b. A divorce-related debt that is not a DSO is nondischargeable in a Chapter 7 case. [11 U.S.C. § 727(b); 11 U.S.C. § 523(a)(15); 2005 Saxon Bulletin.]
3. Discharge in a Chapter 13 case commenced on or after Oct. 17, 2005.
   a. A debt for a domestic support obligation (DSO) is nondischargeable in a Chapter 13 case. [11 U.S.C. § 523(a)(5); 11 U.S.C. § 1328(a)(2); *In re Hutchens*, 480 B.R. 374

(Bankr. M.D. Fla. 2012) (a Chapter 13 discharge has no impact on unpaid back child support and alimony arrearages and does not discharge those debts).]

b. A divorce-related debt that is not a DSO is dischargeable in a Chapter 13 case . [11 U.S.C. § 1328(a)(2) (no exception for § 523(a)(15) debt); *In re Hutchens*, 480 B.R. 374, 386 (Bankr. M.D. Fla. 2012) (noting that "the law is now well-settled that a claim for a property settlement arising from divorce proceedings can . . . be discharged in a Chapter 13 case if a debtor makes all the required payments under a plan and receives a full compliance discharge under [11 U.S.C.] § 1328(a)."] Thus, a Chapter 13 debtor will be discharged from a § 523(a)(15) divorce-related debt that was not paid in full under the plan provided the debtor made all payments required by the Chapter 13 plan. A full compliance discharge does not mean that the creditor spouse's divorce-related debt that is not a DSO was paid in full. [*See In re Siegel*, 414 B.R. 79 (Bankr. E.D.N.C. 2009) (Chapter 13 debtor's obligation to indemnify and hold his former spouse harmless with respect to the parties' home equity line of credit debt was not a DSO entitled to priority; rather, the hold-harmless agreement was part of the parties' property settlement and, as such, was not a priority claim that had to be paid in full).] A full compliance discharge means that the debtor spouse made all payments required under the plan, and any balance due the creditor spouse after completion of the plan is discharged.

   i. Since a divorce-related debt that is not a DSO is dischargeable in a Chapter 13 case under 11 U.S.C. § 1328(a), the end result is that a debtor who receives a discharge under § 1328(a) may discharge a debt that cannot be discharged in a Chapter 7 case. Thus, whether a debt is determined to be a DSO or a divorce-related debt that is not a DSO is important in a Chapter 13 case.

c. EXCEPTION: A divorce-related debt that is not a DSO is not discharged in a Chapter 13 case when the debtor applies for and is granted a discharge pursuant to 11 U.S.C. § 1328(b), referred to sometimes as a "hardship" or "best efforts" discharge.

   i. In some cases a debtor is unable to complete the payments required by a Chapter 13 plan. If the debtor's failure to complete all plan payments is due to circumstances for which the debtor should not justly be held accountable, unsecured creditors received at least the amount that they would have received in a Chapter 7 proceeding, and if modification of the debtor's Chapter 13 plan is not practicable, the bankruptcy court may grant the debtor a discharge under 11 U.S.C. § 1328(b). [11 U.S.C. § 1328(b).]

   ii. The discharge the debtor receives pursuant to 11 U.S.C. § 1328(b) is more limited than a full compliance discharge under 11 U.S.C. § 1328(a) and does not discharge a divorce-related debt that is not a DSO. [*See* 11 U.S.C. § 1328(c) (a discharge under § 1328(b) does not discharge any debt specified in 11 U.S.C. § 523(a)); *In re Hutchens*, 480 B.R. 374, 386 n.11 (Bankr. M.D. Fla. 2012) (under a § 1328(b) discharge, "none of the debts incurred in the course of a divorce proceeding would be dischargeable, including a property division."]

d. Cases classifying debt for discharge purposes.

   i. Husband's agreement in a separation agreement to pay second deed of trust on marital residence was obligation in the nature of support, or a DSO, was not dischargeable, and had to be paid in full under husband's Chapter 13 plan.

[*In re Johnson,* 397 B.R. 289 (Bankr. M.D.N.C. 2008) (rejecting husband's argument that the agreement provided for a dischargeable property settlement and citing line of cases holding that an obligation that is essential to protect a residence constitutes a nondischargeable support obligation). *Cf. In re Wood*, No. 11-06583-8-JRL, 2012 WL 14270 (Bankr. E.D.N.C. Jan. 4, 2012) (separation agreement whereby Chapter 13 debtor spouse agreed to be primarily liable for mortgage payments on marital residence was a dischargeable property settlement agreement, not a domestic support obligation; while each party gave up any right to spousal support that he/she might have had from the other, the agreement contained no language stating that debtor's obligation for the mortgage payments were in lieu of spousal support, alimony, or maintenance, and former spouse presented no evidence that parties so intended).]

VIII. Appeal

A. Right to Take an Immediate Appeal

1. A final order may be appealed as a matter of right to the court of appeals. [G.S. 7A-27(b)(2), *added by* S.L. 2013-411, § 1, effective Aug. 23, 2013; 1-277(a).] A final judgment is one that disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. [*Hausle v. Hausle,* 226 N.C. App. 241, 739 S.E.2d 203 (2013); *Duncan v. Duncan,* 366 N.C. 544, 742 S.E.2d 799 (2013) (final judgment generally is one that ends the litigation on the merits).]
2. Generally there is no right of immediate appeal of an interlocutory order. An interlocutory order is one made during the pendency of an action that does not dispose of the case but leaves it for further action by the trial court in order to settle and determine the entire controversy. [*Hausle v. Hausle,* 226 N.C. App. 241, 739 S.E.2d 203 (2013).]
3. Immediate appeal of an interlocutory order is allowed in two instances:
   a. When the order affects a substantial right; [G.S. 7A-27(b)(3)a., *added by* S.L. 2013-411, § 1, effective Aug. 23, 2013; 1-277(a).]
      i. A substantial right is one that "will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment." [*Peters v. Peters,* 232 N.C. App. 444, 448, 754 S.E.2d 437, 440 (2014) (quoting *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000)).]
      ii. The court of appeals has taken a restrictive view of the substantial right exception in the context of equitable distribution or alimony matters and has previously recognized that interlocutory appeals that challenge only the financial repercussions of a separation or divorce generally have not been held to affect a substantial right. [*Duncan v. Duncan,* 193 N.C. App. 752, 671 S.E.2d 71 (2008) (**unpublished**) (citing *Embler v. Embler,* 143 N.C. App. 162, 545 S.E.2d 259 (2001)).]
   b. In cases involving multiple parties or claims, when the order is final as to some but not all of the claims or parties and the trial judge certifies the order for immediate

appeal by including in the order "that there is no just reason for delay." [G.S. 1A-1, Rule 54(b); *Duncan v. Duncan,* 366 N.C. 544, 742 S.E.2d 799 (2013) (certification under Rule 54(b) permits an interlocutory appeal from orders that are final as to a specific portion of the case but which do not dispose of all claims as to all parties).]

4. Note also that the court of appeals has discretion to treat an appeal as a petition for certiorari to review an interlocutory appeal. [N.C. R. App. P. 21(a)(1).]
   a. Cases finding no substantial right; immediate appeal not allowed.
      i. Appeal from an order that determined the date of marriage for all matters related to the action did not affect a substantial right and was dismissed as interlocutory. [*Duncan v. Duncan,* 193 N.C. App. 752, 671 S.E.2d 71 (2008) **(unpublished**).]
      ii. Appeal from an order establishing the date of separation for purposes of ED was dismissed as interlocutory. [*Hatmaker v. Hatmaker,* 191 N.C. App. 250, 662 S.E.2d 578 (2008) **(unpublished**) (request to treat appeal as a petition for writ of certiorari denied).]
      iii. Appeal from an ED order entered before resolution of the issues of custody, child support, or alimony did not affect a substantial right. [*Embler v. Embler,* 143 N.C. App. 162, 545 S.E.2d 259 (2001) (noting that interlocutory appeals that challenge only the financial repercussions of a separation or divorce generally do not affect a substantial right).]
      iv. Appeal from an ED order that left open the issue of alimony was dismissed as interlocutory; that appellate court decision on ED could put trial court in a better position to determine alimony or could avoid a retrial on alimony was not a "substantial right." [*McIntyre v. McIntyre,* 175 N.C. App. 558, 623 S.E.2d 828 (2006) (citing *Embler v. Embler,* 143 N.C. App. 162, 545 S.E.2d 259 (2001)).]
      v. Interim order that insurance proceeds on life of parties' deceased child were husband's separate property was not immediately appealable. [*Hunter v. Hunter*, 126 N.C. App. 705, 486 S.E.2d 244 (1997).]
      vi. No appeal from a mandatory preliminary injunction ordering wife to return property pending final determination of husband's action for divorce and ED. Injunction was intended to maintain the status quo and did not affect a substantial right. [*Dixon v. Dixon*, 62 N.C. App. 744, 303 S.E.2d 606 (1983).]
   b. Cases finding a substantial right; immediate appeal allowed.
      i. Denial of defendant's motion to amend his answer would result in forfeiture of any future claim for ED, so denial affected a substantial right and was immediately appealable. [*Goodwin v. Zeydel*, 96 N.C. App. 670, 387 S.E.2d 57 (1990).]
      ii. Order dismissing an ED counterclaim affected a substantial right. [*Small v. Small*, 93 N.C. App. 614, 379 S.E.2d 273, *review denied,* 325 N.C. 273, 384 S.E.2d 519 (1989).]
      iii. Order directing that the marital home be sold involved a substantial right. [*Soares v. Soares,* 86 N.C. App. 369, 357 S.E.2d 418 (1987).]
      iv. In the following cases, orders granting plaintiff's motion for summary judgment and dismissing defendant's counterclaim for ED were immediately appealable

as affecting a substantial right of defendant, even though other issues remained pending. [*Case v. Case,* 73 N.C. App. 76, 325 S.E.2d 661 (claims for custody, child support, and divorce remained pending), *review denied,* 313 N.C. 597, 330 S.E.2d 606 (1985); *Buffington v. Buffington,* 69 N.C. App. 483, 317 S.E.2d 97 (1984) (specific performance of a separation agreement or damages for its breach remained pending).]

5. However, for appeals taken on or after Aug. 23, 2013, G.S. 7A-27 was amended to allow for an immediate appeal when the order determines a claim prosecuted under G.S. 50-19.1. [G.S. 7A-27(b)(3)e., *added by* S.L. 2013-411, § 1, effective Aug. 23, 2013; 1-277(a).] G.S. 50-19.1 provides:
   a. Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, child custody, child support, alimony, or equitable distribution if the order or judgment would otherwise be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b), but for the other pending claims in the same action.
   b. A party does not forfeit the right to appeal under this section if the party fails to immediately appeal from an order or judgment described in G.S. 50-19.1.
   c. An appeal from an order or judgment under G.S. 50-19.1 shall not deprive the trial court of jurisdiction over any other claims pending in the same action. [G.S. 50-19.1, *added by* S.L. 2013-411, § 2, effective Aug. 23, 2013.]
6. Before the effective date of G.S. 50-19.1, final judgments of equitable distribution, alimony, child support, custody, divorce, and divorce from bed and board could not be appealed if other claims remained pending in the case, unless the trial judge certified that there is no just reason for delay pursuant to G.S. 1A-1, Rule 54(b).
7. While G.S. 50-19.1 allows for immediate appeal of an equitable distribution judgment when other claims remain pending in the trial court, that provision does not allow the appeal of injunctions and "domestic relations orders" while other matters remain pending. [*Comstock v. Comstock*, 240 N.C. App. 304, 771 S.E.2d 602 (2015).]

B. Treatment of Findings of Fact and Conclusions of Law by an Appellate Court

1. The trial court's findings are conclusive on appeal if there is evidence to support them, despite the existence of evidence in the record that might support a contrary finding. [*Casella v. Estate of Casella*, 200 N.C. App. 24, 682 S.E.2d 455 (2009).]
2. In equitable distribution (ED) actions, findings of fact are binding on the appellate court if supported by competent evidence. [*Edwards v. Edwards*, 110 N.C. App. 1, 428 S.E.2d 834, *cert. denied,* 335 N.C. 172, 436 S.E.2d 374 (1993).]
3. Findings of fact not challenged on appeal are binding. [*Peltzer v. Peltzer*, 222 N.C. App. 784, 732 S.E.2d 357, *review denied*, 366 N.C. 417, 735 S.E.2d 186 (2012); *Finney v. Finney,* 225 N.C. App. 13, 736 S.E.2d 639 (2013) (citing *Peltzer*).]
4. Conclusions of law, even if erroneously labeled as findings of fact, are reviewable de novo on appeal. [*See Wilder v. Wilder*, 146 N.C. App. 574, 553 S.E.2d 425 (2001) (citing *Carpenter v. Brooks,* 139 N.C. App. 745, 534 S.E.2d 641 (2000)); *Fletcher v. Fletcher*, 123 N.C. App.

744, 474 S.E.2d 802 (1996) (conclusions of law are not binding on appellate court and are reviewable as any question of law), *review denied,* 345 N.C. 640, 483 S.E.2d 706 (1997).]

5. If the trial court's determination is a mixture of findings of fact and conclusions of law, the determination is itself reviewable by the appellate court. [*Hall v. Hall*, 88 N.C. App. 297, 363 S.E.2d 189 (1987) (finding regarding the date of separation was mixed; appellate court to determine whether other facts found by the trial court were sufficient to support determination).]

C. Standard of Review

1. Generally.
   a. Where the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether those findings of fact supported its conclusions of law. [*Casella v. Estate of Casella*, 200 N.C. App. 24, 682 S.E.2d 455 (2009).]
   b. Equitable distribution (ED) is vested in the discretion of the trial court and is not to be disturbed absent a clear abuse of that discretion. Only a finding that the judgment was not supported by reason and could not have been a result of competent inquiry, or a finding that the trial judge failed to comply with G.S. 50-20(c), will establish an abuse of discretion. [*Simon v. Simon,* 231 N.C. App. 76, 753 S.E.2d 475 (2013) (citing *Wiencek-Adams v. Adams*, 331 N.C. 688, 417 S.E.2d 449 (1992)).] This standard has been referred to as "generous." [*Robinson v. Robinson,* 210 N.C. App. 319, 322, 707 S.E.2d 785, 789 (2011); *Simon* (quoting *Robinson*).]
   c. In complex litigation involving ED, an appellate court will not remand for obviously insignificant errors. [*Leighow v. Leighow*, 120 N.C. App. 619, 463 S.E.2d 290 (1995).]
   d. The court of appeals presumes that the proceedings in the trial court are correct until shown otherwise. The party asserting error must show from the record not only that the trial court committed error, but that the aggrieved party was prejudiced as a result. Formal errors in an ED judgment do not require reversal, particularly where the record reflects a conscientious effort by the trial judge to deal with complicated and extensive evidence. [*Lawing v. Lawing,* 81 N.C. App. 159, 344 S.E.2d 100 (1986); *Andrews v. Andrews*, 79 N.C. App. 228, 232, 338 S.E.2d 809, 812 ("[m]ere formal defects in findings ordinarily will be ignored if the substance of the judgment is sufficient"), *review denied,* 316 N.C. 730, 345 S.E.2d 385 (1986), *disapproved of on other grounds by Armstrong v. Armstrong*, 322 N.C. 396, 368 S.E.2d 595 (1988).]
2. Scope of review on appeal of jurisdiction.
   a. Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal. [*Sisk v. Sisk,* 221 N.C. App. 631, 729 S.E.2d 68 (2012) (citing *McKoy v. McKoy,* 202 N.C. App. 509, 689 S.E.2d 590 (2010)) (order for new trial under G.S. 1A-1, Rule 59 reviewed de novo), *review denied*, 366 N.C. 571, 738 S.E.2d 368 (2013).]
   b. The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record. [*Bates v. Jarrett,* 135 N.C. App. 594, 521 S.E.2d 735 (1999).]

3. Scope of review on appeal of a classification matter.
    a. Since classification of property in an ED proceeding is most appropriately considered a conclusion of law, it is reviewed de novo. [*Hunt v. Hunt*, 112 N.C. App. 722, 436 S.E.2d 856 (1993); *Mugno v. Mugno*, 205 N.C. App. 273, 695 S.E.2d 495 (2010); *Binder v. Binder*, 222 N.C. App. 634, 731 S.E.2d 275 (**unpublished**) (citing *Hunt* and *Mugno*), *review denied*, 366 N.C. 414, 735 S.E.2d 181 (2012).]
    b. Trial court's determination that specific property is to be characterized as marital, divisible, or separate property will not be disturbed on appeal if there is competent evidence to support the determination. [*Brackney v. Brackney,* 199 N.C. App. 375, 682 S.E.2d 401 (2009), *review withdrawn*, 363 N.C. 853, 694 S.E.2d 200 (2010); *Holterman v. Holterman*, 127 N.C. App. 109, 488 S.E.2d 265, *review denied*, 347 N.C. 267, 493 S.E.2d 455 (1997).]
    c. When there is conflicting testimony about an asset, the trial court's classification of the asset will be upheld if there is competent evidence in the record to support it. [*Walter v. Walter,* 149 N.C. App. 723, 561 S.E.2d 571 (2002) (trial court's implicit resolution of conflicting testimony in husband's favor, finding cash held in a safe to be husband's separate property, was upheld because it was adequately supported in the record).]
    d. Whether a trial court applied the proper burden of proof when classifying an asset as marital or separate will be reviewed under a harmless error standard. [*See Finney v. Finney,* 225 N.C. App. 13, 736 S.E.2d 639 (2013) (proper application of the burden to plaintiff's evidence that the parties opened two bank accounts during the marriage would have shifted burden to defendant to show that accounts were separate; when trial court did not shift burden and the evidence was conflicting as to whether the accounts were marital or separate, appellate court was unable to conclude that misapplication of the burden was harmless; matter was reversed and remanded).]
4. Scope of review on appeal of a valuation matter.
    a. Task of a reviewing court on appeal is to determine whether the approach used by the trial court reasonably approximates the net value of the property. [*Draughon v. Draughon*, 82 N.C. App. 738, 347 S.E.2d 871 (1986), *review denied,* 319 N.C. 103, 353 S.E.2d 107 (1987).]
    b. The trial court's valuation of marital property will not be second-guessed on appeal as long as its findings are supported by competent evidence. [*Leighow v. Leighow*, 120 N.C. App. 619, 463 S.E.2d 290 (1995); *Smith v. Smith*, 104 N.C. App. 788, 411 S.E.2d 197 (1991).]
5. Scope of review on appeal of a distribution matter.
    a. Review of trial court's application of distributional factors. The trial court has broad discretion in evaluating and applying the statutory distributional factors and will not be reversed absent a showing that its decision is manifestly unsupported by reason. [*Leighow v. Leighow*, 120 N.C. App. 619, 463 S.E.2d 290 (1995).]
    b. Review of the weight given to distributional factors.
        i. The trial court in its discretion assigns each distributional factor the particular weight appropriate for that factor in a given case, which will not be disturbed

on appeal absent an abuse of discretion. [*Godley v. Godley,* 110 N.C. App. 99, 429 S.E.2d 382 (1993) (citing *White v. White*, 312 N.C. 770, 774, 324 S.E.2d 829 (1985)) (an unequal distribution based on a single distributional factor, if supported by competent evidence, will not be disturbed on appeal absent an abuse of discretion).]

c. Review of the trial court's decision that an equal division is not equitable.

   i. The trial court's decision whether to divide the marital estate equally or unequally can be disturbed only if a clear abuse of discretion has occurred. [*Jones v. Jones*, 121 N.C. App. 523, 466 S.E.2d 342, *review denied,* 343 N.C. 307, 471 S.E.2d 72 (1996).]

   ii. The trial court's decision that an equal division is not equitable will not be disturbed on appeal unless the appellate court, upon consideration of the record, can determine that the division has resulted in an obvious miscarriage of justice. [*Troutman v. Troutman*, 193 N.C. App. 395, 667 S.E.2d 506 (2008); *Davis v. Sineath* (*Davis*), 129 N.C. App. 353, 498 S.E.2d 629 (1998).]

d. Review of the percentage awarded to a party.

   i. The division of marital property is a matter within the sound discretion of the trial court, and the trial court's ruling will be disturbed only if it is so arbitrary that it could not have been the result of a reasoned decision. [*Robertson v. Robertson*, 167 N.C. App. 567, 605 S.E.2d 667 (2004) (citing *Gagnon v. Gagnon,* 149 N.C. App. 194, 560 S.E.2d 229 (2002)); *Helms v. Helms,* 191 N.C. App. 19, 661 S.E.2d 906 (citing *Squires v. Squires,* 178 N.C. App. 251, 631 S.E.2d 156 (2006)) (standard of review of the percentage division of marital property in ED cases is abuse of discretion), *review denied,* 362 N.C. 681, 670 S.E.2d 233 (2008).]

e. Review of the trial court's distribution of property.

   i. Only when the evidence fails to show any rational basis for the distribution ordered by the court will its determination be upset on appeal. [*Brackney v. Brackney,* 199 N.C. App. 375, 682 S.E.2d 401 (2009), *review withdrawn*, 363 N.C. 853, 694 S.E.2d 200 (2010); *Finney v. Finney,* 225 N.C. App. 13, 20, 736 S.E.2d 639, 644 (2013) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)) (ED award will be reversed "only upon a showing that it [is] so arbitrary that it could not have been the result of a reasoned decision").]

   ii. The trial court's distribution will not be disturbed on appeal absent evidence that it is manifestly unsupported by reason. [*Khajanchi v. Khajanchi,* 140 N.C. App. 552, 537 S.E.2d 845 (2000); *Lawing v. Lawing*, 81 N.C. App. 159, 344 S.E.2d 100 (1986).]

f. Review of a distributive award.

   i. "[I]f a party's ability to pay a distributive award with liquid assets can be ascertained from the record, then the distributive award must be affirmed." [*Peltzer v. Peltzer*, 222 N.C. App. 784, 791, 732 S.E.2d 357, 362 (quoting *Pellom v. Pellom,* 194 N.C. App. 57, 69, 669 S.E.2d 323, 329–30 (2008)), *review denied*, 366 N.C. 417, 735 S.E.2d 186 (2012).]

6. Most other matters are reviewed under an abuse of discretion standard, including the following:
   a. Trial court's dismissal of plaintiff's ED claim for failure to prosecute when trial court had considered whether lesser sanctions were appropriate; [*Wilder v. Wilder*, 146 N.C. App. 574, 553 S.E.2d 425 (2001).]
   b. Whether to impose sanctions under G.S. 50-21(e) and which sanctions to impose; [*Wirth v. Wirth,* 193 N.C. App. 657, 668 S.E.2d 603 (2008); *Zaliagiris v. Zaliagiris,* 164 N.C. App. 602, 596 S.E.2d 285 (2004), *review on additional issues denied,* 359 N.C. 643, 617 S.E.2d 662 (2005); *Crutchfield v. Crutchfield*, 132 N.C. App. 193, 511 S.E.2d 31 (1999).]
   c. Trial court's denial of a G.S. 1A-1, Rule 60(b) motion to set aside a consent order for fraud; [*Coppley v. Coppley*, 128 N.C. App. 658, 496 S.E.2d 611, *review denied*, 348 N.C. 281, 502 S.E.2d 846 (1998).]
   d. Trial court's ruling denying appointment of an appraiser; [*Godley v. Godley*, 110 N.C. App. 99, 429 S.E.2d 382 (1993).]
   e. Whether or not to appoint an expert to assist in valuation; [*Grasty v. Grasty*, 125 N.C. App. 736, 482 S.E.2d 752, *review denied*, 346 N.C. 278, 487 S.E.2d 545 (1997).]
   f. Trial court's assessment of costs in an ED action. [*Fox v. Fox*, 114 N.C. App. 125, 441 S.E.2d 613 (1994).]

D. Effect of an Appeal on Jurisdiction

1. Pursuant to G.S. 1-294, when an appeal is perfected, the trial court is divested of jurisdiction "upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure." [G.S. 1-294, *amended by* S.L. 2015-25, § 2, effective May 21, 2015.]
2. The court below may proceed upon any other matter included in the action and not affected by the judgment appealed from. [G.S. 1-294, *amended by* S.L. 2015-25, § 2, effective May 21, 2015.] Thus, pursuant to G.S. 1-294, a trial court has jurisdiction to enter an order on matters other than equitable distribution (ED) while an ED order is on appeal.
3. Notwithstanding the provisions of G.S. 1-294, certain orders are enforceable in the trial court by civil contempt pending appeal. [G.S. 50-13.3(a) (orders for custody and visitation); 50-13.4(f)(9) (orders for child support); 50-16.7(j) (orders for alimony).] See Section IX, below, for more on contempt.

E. Procedure on Remand

1. When case is reversed or judgment vacated.
   a. Reversal by the court of appeals of the trial court's equitable distribution (ED) order vacates that judgment. [*Crowder v. Crowder,* 147 N.C. App. 677, 556 S.E.2d 639 (2001) (citing *D & W, Inc. v. Charlotte,* 268 N.C. 720, 152 S.E.2d 199 (1966)).]
   b. When appellate court did not explicitly affirm or uphold any part of an ED order, or its findings or conclusions, which constituted a blanket reversal, the trial court on remand was authorized to reconsider the value of a logging company, even though the appellate court in the first appeal did not find error in the original valuation of

the company. [*Crowder v. Crowder,* 147 N.C. App. 677, 556 S.E.2d 639 (2001) (wife argued that trial court on remand lacked authority to reconsider value, which appellate court rejected).]

c. When appellate court vacated in part the previous judgment, the vacated portions of original order "were void and of no effect," meaning that the trial court was free on remand to reconsider the evidence before it and to enter new and/or additional findings of fact based on that evidence, with the exception that the trial court was bound on remand by any portions of the previous order that the appellate court affirmed. [*Friend-Novorska v. Novorska,* 143 N.C. App. 387, 393, 545 S.E.2d 788, 793 (reviewing award of alimony), *aff'd per curiam,* 354 N.C. 564, 556 S.E.2d 294 (2001).]

d. When the court of appeals vacates an equitable distribution judgment, no part of that vacated judgment thereafter can be the law of the case, and the trial court on remand is required to conduct a trial de novo. [*Dechkovskaia v. Dechkovskaia*, 780 S.E.2d 175 (N.C. Ct. App. 2015) (citing *Alford v. Shaw*, 327 N.C. 526, 398 S.E.2d 445 (1990)).]

2. When case is remanded to trial court for additional findings.

a. When the North Carolina Supreme Court remanded for additional findings of fact in support of a valuation of a closely held corporation but did not indicate that more evidence was needed and directed only that findings of fact more fully explain the basis for the valuation, the trial court acted within its discretion on remand in determining that additional evidence on the question was not necessary and in making additional findings based on evidence from the original hearing. [*Patton v. Patton*, 88 N.C. App. 715, 364 S.E.2d 700 (1988) (citing *Harris v. Harris,* 84 N.C. App. 353, 352 S.E.2d 869 (1987)).]

b. In some cases, the appellate court will provide direction to the trial court on remand. [*See Dolan v. Dolan*, 148 N.C. App. 256, 259, 558 S.E.2d 218, 221 (stating that on remand for findings on whether postseparation rental income should be a distributional factor, trial court "may take additional evidence or make additional findings based on the existing record"), *aff'd per curiam*, 355 N.C. 484, 562 S.E.2d 422 (2002); *Cooper v. Cooper*, 143 N.C. App. 322, 545 S.E.2d 775 (2001) (citing *Fox v. Fox*, 114 N.C. App. 125, 441 S.E.2d 613 (1994)) (stating that on remand for further findings on the value of certain marital assets, trial court should rely on the existing record and receive additional evidence and entertain argument only as necessary to correct errors identified by the court of appeals).]

c. If the court of appeals finds that the record in a prior appeal was "devoid of any evidence as to the value" of the property that is the subject of the appeal, the trial court on remand should hold an evidentiary hearing, even if the parties have agreed otherwise. [*See Williamson v. Williamson,* 228 N.C. App. 361, 748 S.E.2d 775 (2013) (**unpublished**) (not paginated on Westlaw) (on remand from *Williamson I*, neither party requested an evidentiary hearing and both parties agreed that further hearing was not necessary; in appeal from second order determining value of marital residence, the "same record" was "once again in front" of the court of appeals and, consistent with its previous ruling, evidence was again found insufficient to support the trial court's finding as to the value; matter was remanded with direction for further evidentiary proceedings).]

3. When case is remanded to trial court for reconsideration of classification, valuation, or distribution.
   a. After finding a nineteen-month delay in the entry of an ED order, on remand trial court was to give the parties an opportunity to offer evidence on the changes, if any, in value of the marital property since the ED trial. [*Wall v. Wall*, 140 N.C. App. 303, 536 S.E.2d 647 (2000).]
   b. On remand for additional findings of fact on net value, reclassification, and a possible modification of the division of property, court of appeals left to the discretion of the trial court whether additional evidence or arguments of counsel would be necessary. [*Glaspy v. Glaspy,* 143 N.C. App. 435, 545 S.E.2d 782 (2001).]
   c. On remand for reconsideration of distribution, trial court is not required to admit new evidence as to all distribution factors but should allow new evidence as to any factor that has changed at the time of the new ED hearing. [*Fox v. Fox*, 114 N.C. App. 125, 441 S.E.2d 613 (1994) (further noting that stipulations as to date-of-trial value from first trial not binding at new hearing).]
   d. On remand for redetermination of what constitutes an equitable distribution, the trial court was to rely on the existing record but could hear additional arguments from the parties and take such additional evidence as the court found necessary. [*Smith v. Smith*, 111 N.C. App. 460, 433 S.E.2d 196 (1993), *rev'd in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994).]
   e. When court of appeals upheld trial court's equal division but remanded for reclassification and valuation, it stated that its affirmance of the equal division should not be considered as the law of the case and binding on the trial court in making its new determination as to the appropriate disposition of the parties' property. Upon remand, the trial court must decide de novo the manner in which the marital property should be divided, including whether an equal distribution is equitable. [*Hall v. Hall*, 88 N.C. App. 297, 363 S.E.2d 189 (1987).]

IX. Enforcement of Judgment by Civil Contempt

A. Civil Contempt Available for Enforcement

1. For more on civil or criminal contempt generally and for a checklist for use when finding a party in either civil or criminal contempt, see *Contempt of Court,* Bench Book, Vol. 2, Chapter 4.
2. For an online module on contempt, see Michael Crowell, *Contempt of Court* (UNC School of Government, Nov. 2010), https://sog.adobeconnect.com/p30019876/.
3. Failure to comply with an order for equitable distribution (ED) is a continuing civil contempt as long as:
   a. The order remains in force,
   b. The purpose of the order may still be served by the party's compliance with the order,
   c. The party's failure to comply with the order is willful, and

d. The party has the present ability to comply with the order (in whole or in part) or is able to take reasonable measures that would enable her to comply with the order (in whole or in part). [G.S. 5A-21(a).]

4. Contempt proceedings initiated pursuant to G.S. 5A-23(a) (with a finding of probable cause).

   a. G.S. 5A-23(a) requires that a judicial official issue the requested order or notice requiring defendant to show cause why he should not be held in contempt. A judicial official is defined in G.S. 5A-23(d) as "the trier of facts at the show cause hearing." Therefore, a clerk cannot issue a show cause order pursuant to G.S. 5A-23(a) unless in a situation where a clerk is statutorily authorized to exercise contempt authority. [*Moss v. Moss*, 222 N.C. App. 75, 730 S.E.2d 203 (2012).]

   b. If an order to show cause is issued, the alleged contemnor is directed to appear and show cause why she should not be held in contempt. [G.S. 5A-23(a).] This requires the defendant to personally appear at the hearing or risk being found in contempt for failure to appear. [*See Cox v. Cox,* 92 N.C. App. 702, 376 S.E.2d 13 (1989) (defendant found in indirect criminal contempt for failure to appear; appearance of defendant's counsel not sufficient to satisfy a show cause order that specifically ordered defendant to appear).]

   c. In a proceeding initiated pursuant to G.S. 5A-23(a), the burden of proof is on the defendant to show cause why he should not be held in contempt. [G.S. 5A-23(a); *Moss v. Moss*, 222 N.C. App. 75, 730 S.E.2d 203 (2012).]

5. Contempt proceedings initiated by an aggrieved party pursuant to G.S. 5A-23(a1) (without a finding of probable cause).

   a. When a contempt proceeding is initiated by motion pursuant to G.S. 5A-23(a1), an aggrieved party must serve a copy of the motion accompanied by a sworn statement or affidavit and notice of hearing on the alleged contemnor pursuant to G.S. 1A-1, Rule 5 at least five days before the scheduled hearing, absent good cause. [G.S. 5A-23(a1) and *Trivette v. Trivette*, 162 N.C. App. 55, 590 S.E.2d 298 (2004) (pursuant to G.S. 5A-23(a1), service at least five days in advance of the hearing is adequate notice of a contempt proceeding).] There is no show cause order issued and no finding of probable cause. [*See Trivette* (when contempt proceeding is initiated by motion and notice of aggrieved party, there is no judicial finding of probable cause).]

   b. Because there has been no judicial finding of probable cause, the burden of proof is on the aggrieved party. [G.S. 5A-23(a1); *Moss v. Moss,* 225 N.C. App. 75, 730 S.E.2d 203 (2012) (citing *Trivette v. Trivette,* 162 N.C. App. 55, 590 S.E.2d 298 (2004)).]

   c. A misapplication of the burden of proof is a procedural defect that is waived if not raised. [*Moss v. Moss,* 225 N.C. App. 75, 730 S.E.2d 203 (2012) (after a proceeding purportedly initiated pursuant to G.S. 5A-23(a) was deemed to be a proceeding initiated pursuant to G.S. 5A-23(a1) because the order to show cause was signed by the clerk and not a judicial official, the judge improperly placed the burden of proof on defendant; however, defendant waived the right to raise the issue on appeal when she failed to object when the trial judge indicated that she had the burden of proof at the show cause hearing).]

6. The court may enforce a judgment of ED by civil contempt. [*Moss v. Moss,* 225 N.C. App. 75, 730 S.E.2d 203 (2012) (wife in contempt of ED consent order); *Conrad v. Conrad*, 82 N.C. App. 758, 348 S.E.2d 349 (1986) (defendant in civil contempt for refusal to comply with an ED judgment); *Watson v. Watson,* 187 N.C. App. 55, 652 S.E.2d 310 (2007) (finding defendant in civil contempt of provisions in an ED consent order), *review denied,* 362 N.C. 373, 662 S.E.2d 551 (2008); *Hartsell v. Hartsell,* 99 N.C. App. 380, 393 S.E.2d 570 (1990) (enforcing by contempt a prior consent judgment for ED), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991); *Kinney v. Kinney,* 222 N.C. App. 634, 731 S.E.2d 276 (2012) (**unpublished**) (husband in civil contempt of ED order requiring him to pay in full the joint debts of the parties; husband's settlement before show cause hearing of a credit card debt for approximately $10,000 less than the amount owed did not warrant finding of no contempt, as defendant had been ordered to pay debt in full and acknowledged at hearing that his failure to pay debt in full had damaged wife's credit rating).]
7. When contempt proceedings were clearly civil in nature, wife was not entitled to the procedural and evidentiary safeguards required in a criminal contempt proceeding. Notice was adequate, even though the notice of hearing did not clearly state whether the proceedings were criminal or civil. [*Watson v. Watson,* 187 N.C. App. 55, 652 S.E.2d 310 (2007) (citing *Hartsell v. Hartsell,* 99 N.C. App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991)), *review denied,* 362 N.C. 373, 662 S.E.2d 551 (2008).]
8. A party can be found in contempt for violating the spirit and intent of an ED order. [*Middleton v. Middleton,* 159 N.C. App. 224, 583 S.E.2d 48 (2003) (trial court properly found husband in contempt of a consent judgment ordering sale of marital residence when he took willful and deliberate action to make the house unattractive and undesirable to prospective purchasers, rejecting husband's argument that he did not violate any specific provision of the consent agreement).]
9. The use of contempt to enforce an ED judgment is limited to matters over which the district court has jurisdiction. [*See Guerrier v. Guerrier,* 155 N.C. App. 154, 574 S.E.2d 69 (2002) (vacating portions of contempt and enforcement orders that removed father as custodian of Uniform Transfer to Minors Act accounts and required him to reimburse mother for funds he removed from those accounts; clerk of court had jurisdiction).]
10. A party who has complied with the previous court order by the time of the contempt hearing cannot be held in civil contempt. [*Ghandi v. Ghandi*, 779 S.E.2d 185 (N.C. Ct. App. 2015).]
11. In a contempt proceeding initiated to compel a party to pay a distributive award, the trial court erred in modifying the consent judgment to extend the time within which the distributive award must be paid. [*Ghandi v. Ghandi*, 779 S.E.2d 185 (N.C. Ct. App. 2015) (while G.S. 1A-1, Rule 6 allows a court to extend time limits imposed by the Rules of Civil Procedure, that rule does not apply to allow a court to extend time provided by a court order).]

B. Findings

1. In order to support the conclusion of willfulness necessary to support a judgment of civil contempt, the court must find that the contemnor has the present ability to comply with the court's order. [*Hartsell v. Hartsell,* 99 N.C. App. 380, 385, 393 S.E.2d 570, 574 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991).]
2. Specific findings as to the contemnor's present means are preferable. [*Hartsell v. Hartsell,* 99 N.C. App. 380, 385, 393 S.E.2d 570, 574 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991).]
3. Finding that wife had the present means and ability to satisfy credit card obligations that she had assumed responsibility for in a consent order was supported by competent evidence that wife had in excess of $580,000 of equity in real estate in her name individually. [*Watson v. Watson,* 187 N.C. App. 55, 652 S.E.2d 310 (2007), *review denied,* 362 N.C. 373, 662 S.E.2d 551 (2008).]

C. Sanctions for Civil Contempt

1. Imprisonment is the only authorized sanction for civil contempt. [G.S. 5A-21(b).]
2. A person who is found in civil contempt is not subject to the imposition of a fine. [G.S. 5A-21(d), *added by* S.L. 2015-210, § 1, effective Oct. 1, 2015, and applicable to civil contempt orders entered on or after that date).] The 2015 amendment changed the result in *Tyll v. Berry,* 234 N.C. App. 96, 758 S.E.2d 411 (a fine is a "statutorily permitted" sanction for civil contempt proceedings), *review denied, appeal dismissed*, 367 N.C. 532, 762 S.E.2d 207 (2014).
3. A trial court has no authority to amend the underlying property settlement judgment in a contempt proceeding initiated to enforce that judgment. [*Ghandi v. Ghandi*, 779 S.E.2d 185 (N.C. Ct. App. 2015).]
4. Compensatory damages are not available.
   a. In *Hartsell v. Hartsell,* 99 N.C. App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991), the court of appeals found that the trial court erred when it awarded the wife compensatory damages for repair and clean-up of a home the husband was to deliver in "tidy" condition. [*Hartsell,* 99 N.C. App. at 391–92, 393 S.E.2d at 577 (noting numerous cases holding that compensatory damages are not available in civil contempt proceedings), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991).]
   b. The court in *Hartsell v. Hartsell,* 99 N.C. App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991), distinguished *Conrad v. Conrad*, 82 N.C. App. 758, 348 S.E.2d 349 (1986), where, as a condition of purging himself from contempt for refusing to deliver certain stock certificates, the court ordered husband to pay wife the present value of that stock, which compensated her for any stock splits and dividends she would have received had husband complied with the original order. Limiting *Conrad* to its facts, the *Hartsell* court reconciled the *Conrad* case by noting that an order requiring transfer of the actual stock certificates would have accomplished the same thing, as the transfer would necessarily have included passive appreciation of the stock.

D. Award of Attorney Fees in a Contempt Proceeding to Enforce an Equitable Distribution (ED) Order

1. The court may award reasonable attorney fees to the party seeking to enforce an ED order by contempt proceedings, although there can be no award for fees incurred in obtaining the ED order in the first instance. [*Hartsell v. Hartsell,* 99 N.C. App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991).]
2. Contemnor can be required to pay an award of attorney fees as a condition of purging himself of contempt. [*Watson v. Watson,* 187 N.C. App. 55, 652 S.E.2d 310 (2007) (wife ordered to pay $11,235.53 towards plaintiff's counsel fees as a condition of purging herself of contempt), *review denied,* 362 N.C. 373, 662 S.E.2d 551 (2008); *Conrad v. Conrad*, 82 N.C. App. 758, 760, 348 S.E.2d 349, 350 (1986) (contempt power includes the authority to order a person "to pay attorney fees in order to purge oneself from a previous order of contempt for failing and refusing to comply" with an ED order); *Middleton v. Middleton,* 159 N.C. App. 224, 583 S.E.2d 48 (2003) (district court authorized to award attorney fees as a condition of purging contempt for failure to comply with an ED order).]
3. While it is proper for a court to award attorney fees in a contempt proceeding, a court has no authority to award costs to a private party. Order for wife to pay cost of husband's CPA expert witness reversed. [*Watson v. Watson,* 187 N.C. App. 55, 652 S.E.2d 310 (2007), *review denied,* 362 N.C. 373, 662 S.E.2d 551 (2008).]

E. Appeal of an Order for Civil Contempt

1. To whom directed.
   a. An aggrieved party may appeal the district court's order in a civil contempt proceeding to the court of appeals by filing a notice of appeal within thirty days after the order is entered. [*See* N.C. R. App. P. 3(c); G.S. 5A-24 and 7A-27(b)(2).]
   b. A motion to stay an obligor's incarceration under a civil contempt order must be directed initially to the district court. [N.C. R. App. P. 8(a).]
2. Standard of review on appeal.
   a. The standard of review the court of appeals follows in a contempt proceeding is limited to determining whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law. [*Middleton v. Middleton*, 159 N.C. App. 224, 583 S.E.2d 48 (2003) (citing *Miller* (*Sikes*) *v. Miller*, 153 N.C. App. 40, 568 S.E.2d 914 (2002)).]

F. Contempt After Appeal of an Equitable Distribution (ED) Order Is Filed

1. Pursuant to G.S. 1-294, when an appeal is perfected, the trial court is divested of jurisdiction "upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure." [G.S. 1-294, *amended by* S.L. 2015-25, § 2, effective May 21, 2015. *See Lowder v. All Star Mills, Inc.,* 301 N.C. 561, 273 S.E.2d 247 (1981) (noting as "well settled" that an appeal, even of an appealable interlocutory order, operates as a stay of all proceedings relating to issues included therein until the matters are determined on appeal; further noting that jurisdiction of the trial court is divested from the date that notice of appeal was given).]

2. An ED judgment is not enforceable by contempt pending appeal. [*Guerrier v. Guerrier,* 155 N.C. App. 154, 159 n.4, 574 S.E.2d 69, 72 n.4 (2002) (noting in dicta that appeal of an order finding father in contempt of an equitable distribution (ED) judgment for removing funds from children's investment accounts left the trial court without jurisdiction to address issues in an enforcement order, such as reimbursement of the funds removed or removal of father as custodian of the accounts; enforcement order was vacated on other grounds, but court noted that unlike child support, child custody, and alimony, no statute provides that an ED order remains enforceable pending appeal).]
3. Even though a party generally cannot be held in contempt of an order pending appeal of the order, the state supreme court has cautioned parties that there may be consequences for violation of an order pending appeal. In *Joyner v. Joyner*, 256 N.C. 588, 591, 124 S.E.2d 724, 727 (1962), the court noted that while an appeal stays contempt proceedings until the validity of the judgment is determined, taking an appeal "does not authorize a violation of the order" and, further, that a party "who wilfully violates an order does so at his peril" because, if the order is upheld, a violation "may be inquired into" upon remand.

G. Use of Criminal Contempt

1. Most cases brought to enforce an equitable distribution (ED) order have resulted in an order for civil contempt. [*See Hartsell v. Hartsell,* 99 N.C. App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam,* 328 N.C. 729, 403 S.E.2d 307 (1991); *Watson v. Watson,* 187 N.C. App. 55, 652 S.E.2d 310 (2007), *review denied,* 362 N.C. 373, 662 S.E.2d 551 (2008); and other cases cited above.]
2. However, no North Carolina case has held that an ED order may not be enforced by criminal contempt. Under G.S. 5A-11(a)(3), the willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction, or its execution, is a basis for criminal contempt.
3. Criminal contempt requires the trial court to follow different procedures than in civil contempt proceedings; the legal rights accorded to the alleged contemnor are different; and the elements, the burden of proof, and the available sanctions and remedies are different in proceedings in criminal contempt. For more on these differences, see *Contempt of Court,* Bench Book, Vol. 2, Chapter 4.

X. Enforcement of Distributive Award by Execution

A. Enforcement as a Money Judgment

1. An equitable distribution judgment that orders payment of a distributive award by periodic payments is a judgment directing the payment of money under G.S. 1-289 and, therefore, is subject to enforcement through execution. [*Romulus v. Romulus,* 216 N.C. App. 28, 715 S.E.2d 889 (2011) (citing *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982)).]

2. A distributive award is not subject to a debtor's exemptions.
   a. For purposes of execution, G.S. 1C-1601(e)(9) provides that the personal exemptions allowed by G.S. 1C-1601 are not applicable to execution on child support, alimony or distributive award judgments.
   b. *But cf. Kinlaw v. Harris,* 364 N.C. 528, 702 S.E.2d 294 (2010) (pursuant to G.S. 1C-1601(a)(9), corpus of individual retirement accounts received by husband and held in his name as part of equitable distribution (ED) agreement with former spouse exempt from execution by nonspouse judgment creditor).
3. Effect of an appeal of the equitable distribution (ED) judgment on execution.
   a. A judgment directing the payment of money is subject to execution even while the judgment is on appeal, unless the party against whom the execution will issue posts a bond to stay execution pursuant to G.S. 1-289. [G.S. 1-289(a); *Romulus v. Romulus*, 216 N.C. App. 28, 715 S.E.2d 889 (2011) (citing *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982), and *Joyner v. Joyner*, 256 N.C. 588, 124 S.E.2d 724 (1962)) (orders for the payment of alimony, child support, or a distributive award, as judgments under G.S. 1-289, may be enforced by execution during an appeal, unless stay or supersedeas is ordered).]
   b. However, as to the amount for which execution may issue after notice of appeal of the underlying order, when a distributive award is payable over time, only the amount presently due and owing when the appeal is filed is subject to execution. [*See Romulus v. Romulus,* 216 N.C. App. 28, 715 S.E.2d 889 (2011).] While an ED judgment is on appeal, the trial court has no jurisdiction (1) to determine the amount of periodic payments that have come due under the distributive award and remain unpaid since notice of appeal was given and (2) to reduce that sum to a judgment enforceable by execution. [*Romulus v. Romulus,* 216 N.C. App. 28, 715 S.E.2d 889 (2011) (citing *Carpenter v. Carpenter*, 25 N.C. App. 307, 212 S.E.2d 915 (1975)) (treating past due distributive award payments and past due alimony payments the same for purposes of G.S. 1-289).] Thus, while a distributive award is "theoretically" enforceable by execution during appeal when the appealing spouse does not post an execution bond, a trial court may not reduce to judgment, and execution may not issue for, amounts that come due during the appeal. While statutes make contempt a "satisfactory answer" during appeal of orders for child support, alimony, and custody, the legislature has provided "no answer as to equitable distribution distributive awards." [*Romulus v. Romulus,* 216 N.C. App. 28, 38, 715 S.E.2d 889, 896 (2011) (discussing execution for payments due under a distributive award payable over time).]
   c. For more on execution and proceedings supplemental to execution, see Joan Brannon & Ann Anderson, North Carolina Clerk of Superior Court Procedures Manual Vol. 1, Pt. III (Civil Procedures), ch. 38 (Execution), ch. 36 (Proceedings Supplemental to Execution) (UNC School of Government, 2012).