

# Chapter 6: Equitable Distribution

## Part 2. Classification

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## Part 2. Classification

### I. Introduction to Classification

#### A. Three-Step Process

1. Classification of property is the first step in a three-step process.
2. A trial court must first classify property and debt as either marital, separate, or divisible, then must find the net value of marital property as of the date of separation and divisible property as of the date of distribution, and finally must distribute all marital and divisible property and debt based upon the equitable goals of G.S. 50-20 and the various factors specified therein. [*Zurosky v. Shaffer*, 236 N.C. App. 219, 763 S.E.2d 755 (2014) (citing *Mugno v. Mugno*, 205 N.C. App. 273, 695 S.E.2d 495 (2010)); *Lawrence v. Lawrence*, 75 N.C. App. 592, 331 S.E.2d 186, review denied, 314 N.C. 541, 335 S.E.2d 18 (1985); G.S. 50-20.]

#### B. Classification of Property Is a Legal Conclusion [*Hunt v. Hunt*, 112 N.C. App. 722, 436 S.E.2d 856 (1993); *Romulus v. Romulus*, 215 N.C. App. 495, 715 S.E.2d 308 (2011) (citing *Hunt*).]

1. The conclusion that property is either marital, separate, or nonmarital must be supported by written findings of fact. [*Simon v. Simon*, 231 N.C. App. 76, 753 S.E.2d 475 (2013) (citing *Hunt v. Hunt*, 112 N.C. App. 722, 436 S.E.2d 856 (1993)).] See [Section II.B](#), below, on findings.
2. Classification may be accomplished by stipulation of the parties. [*Byrd v. Owens*, 86 N.C. App. 418, 358 S.E.2d 102 (1987); *Zurosky v. Shaffer*, 236 N.C. App. 219, 763 S.E.2d 755 (2014) (citing *Sharp v. Sharp*, 116 N.C. App. 513, 449 S.E.2d 39 (1994)).] See [Equitable Distribution Overview and Procedure](#), Part 1 of this Chapter, [Section V](#) for more on stipulations. For stipulations as to value, see [Valuation](#), Part 3 of this Chapter, [Section III.A](#).

### II. Duties of the Trial Judge

#### A. Classify

1. The trial judge must classify property according to the statutory classifications in G.S. 50-20 as either:
  - a. Marital (discussed in [Section V](#), below),
  - b. Separate (discussed in [Section VI](#), below), or
  - c. Divisible property (discussed in [Section IX.B](#), below; classification as divisible property applicable only to actions filed after Oct. 1, 1997).

2. The trial judge also must identify all marital and divisible debt. [*Bodie v. Bodie*, 221 N.C. App. 29, 39, 727 S.E.2d 11, 18 (2012) (quoting *Miller v. Miller*, 97 N.C. App. 77, 79, 387 S.E.2d 181, 183 (1990)) (well-established North Carolina law requires a trial court “to classify, value and distribute, if marital, the debts of the parties to the marriage”); *Jessee v. Jessee*, 212 N.C. App. 426, 713 S.E.2d 28 (2011) (citing *Byrd v. Owens*, 86 N.C. App. 418, 358 S.E.2d 102 (1987)) (as part of equitable distribution (ED) process, debts, as well as assets, must be classified as marital or separate property).]
3. The trial court must identify marital property with sufficient detail to enable an appellate court to review the decision and test the correctness of the judgment, even when misconduct of a party makes a detailed listing difficult. [*Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260, *review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).]
4. “The fact that there is evidence in the record from which sufficient findings *could* be made does not excuse” the failure of the trial court to sufficiently identify marital property. [*Stone v. Stone*, 181 N.C. App. 688, 693, 640 S.E.2d 826, 829 (2007) (quoting *Wade v. Wade*, 72 N.C. App. 372, 376, 325 S.E.2d 260, 266, *review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985)) (emphasis in original).]
5. A distribution order that does not list all the marital property is “fatally defective. . . . [M]arital property may not be identified by implication.” [*Hill v. Hill*, 229 N.C. App. 511, 523, 748 S.E.2d 352, 361 (2013) (quoting *Stone v. Stone*, 181 N.C. App. 688, 693, 640 S.E.2d 826, 829 (2007)) (portion of order that distributed a Subchapter S corporation, vehicles, and bank accounts without classifying them was vacated and remanded).]
6. When parties fail to produce evidence sufficient to allow a court to classify and value marital property, the asset is not subject to distribution under the Equitable Distribution Act. [*Grasty v. Grasty*, 125 N.C. App. 736, 739, 482 S.E.2d 752, 754 (trial court did not err in failing to value husband’s business when only evidence offered was “wholly incredible and without reasonable basis”), *review denied*, 346 N.C. 278, 487 S.E.2d 545 (1997); *Albritton v. Albritton*, 109 N.C. App. 36, 426 S.E.2d 80 (1993) (trial court did not err when it failed to value a pension plan when party with burden of proving value presented no evidence of value); *Washburn v. Washburn*, 228 N.C. App. 570, 749 S.E.2d 111 (2013) (**unpublished**) (not paginated on Westlaw) (citing *Grasty* and *Albritton*) (error to order that a percentage of plaintiff’s future retirement payments be distributed to defendant when trial court failed to value plaintiff’s military pension; on remand, the pension was to “be removed and excluded” from ED because defendant, the party claiming an interest, had failed to provide any evidence of the pension’s value); *Ikechukwu v. Ikechukwu*, 200 N.C. App. 617, 687 S.E.2d 710 (2009) (**unpublished**) (the *Grasty* rule, that marital property passes outside of ED when the parties’ evidence is not sufficient for the court to classify and value that property, applies to marital debts as well as to marital assets, so debt not valued as of the date of separation falls outside of ED).]

## B. Findings

1. The trial court must support its conclusion that property is either marital, separate, or divisible by written findings of fact. [*Hunt v. Hunt*, 112 N.C. App. 722, 436 S.E.2d 856 (1993).] Appropriate findings include, but are not limited to,
  - a. The date the property was acquired,
  - b. Who acquired the property,
  - c. The date of the marriage,
  - d. The date of separation, and
  - e. How the property was acquired (by gift, bequest, or purchase.) [*Hunt v. Hunt*, 112 N.C. App. 722, 436 S.E.2d 856 (1993). See [Sections V, VI](#), and [IX.B](#), below, regarding the three types of property; S.L. 2011-284, § 51 eliminated bequest from the definition of separate property effective June 24, 2011.]
2. When classification is disputed, the findings of fact must address the dispute and support the classification made. [*Hunt v. Hunt*, 112 N.C. App. 722, 436 S.E.2d 856 (1993) (reversing in part an ED judgment that lacked findings as to facts a., b., and e. set out in the section immediately above); *Duruanyim v. Duruanyim*, 204 N.C. App. 210, 694 S.E.2d 522 (2010) (**unpublished**) (citing *Hunt*) (when parties provided trial court with a list of property as to which classification, valuation, or existence was disputed, trial court erred when it “merely” classified the majority of the disputed items as marital, assigned a value to each item, and distributed items to one party or the other without making findings that settled the dispute as to the items).]

## C. Valuation and Distribution

1. After the court has classified property as marital or divisible, the court must value and distribute it. [G.S. 50-20(a), (c).] See [Valuation](#), Part 3 of this Chapter.
2. Separate property is not subject to distribution. [*McLeod v. McLeod*, 74 N.C. App. 144, 327 S.E.2d 910, *cert. denied*, 314 N.C. 331, 333 S.E.2d 488 (1985), *overruled in part on other grounds by Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986); *Warren v. Warren*, 175 N.C. App. 509, 623 S.E.2d 800 (2006) (stating that a trial court has no authority to distribute separate property).]
3. When classification is accomplished by stipulation of the parties, the trial court must nonetheless value and distribute the property. [*Zurosky v. Shaffer*, 236 N.C. App. 219, 763 S.E.2d 755 (2014) (where parties stipulated that property was marital but failed to agree on value, trial court did not err by not distributing the property); *Byrd v. Owens*, 86 N.C. App. 418, 358 S.E.2d 102 (1987).] See [Equitable Distribution Overview and Procedure](#), Part 1 of this Chapter, [Section V](#) for more on stipulations. For stipulations as to value, see [Valuation](#), Part 3 of this Chapter, [Section III.A](#).
4. The trial court must classify, value, and distribute the marital estate, even when the marital property no longer exists by the time of trial and even when the estate contains nothing but debt. [*Eason v. Taylor*, 784 S.E.2d 200 (N.C. Ct. App. 2016).]

### III. The Classification Framework

#### A. Marital Property [G.S. 50-20(b)(1). See [Section V](#), below.]

Marital property is defined as:

1. All real and personal property;
2. Acquired by either or both spouses;
3. During the marriage and before the date of separation;
4. That is presently owned;
5. That is not separate or divisible property under G.S. 50-20(b)(2) and (4);
6. Including all vested and nonvested pension, retirement, and other deferred compensation rights, and vested and nonvested military pensions eligible under the federal Uniformed Services Former Spouses' Protection Act. [G.S. 50-20(b)(1).]

#### B. Separate Property [G.S. 50-20(b)(2). See [Section VI](#), below.]

Separate property is defined as:

1. All real and personal property;
2. Acquired by a spouse before marriage or acquired by devise, descent, or gift during the marriage; [S.L. 2011-284, § 51 eliminated bequest from the definition of separate property effective June 24, 2011.]
3. Acquired in exchange for separate property, regardless of title, unless a contrary intention is expressly stated in the conveyance;
4. Including increases in the value of separate property and income derived from separate property; and
5. Professional licenses and business licenses that would terminate on transfer. [G.S. 50-20(b)(2).]

#### C. "Mixed" Property

1. Mixed property is not defined in G.S. Chapter 50.
2. Mixed property is a term adopted by the court of appeals to refer to property having both marital and separate property components. [*Conway v. Conway*, 131 N.C. App. 609, 508 S.E.2d 812 (1998) (referring to property as marital, separate, or mixed), *review dismissed, review denied*, 350 N.C. 593, 537 S.E.2d 210 (1999); *Smith v. Smith*, 111 N.C. App. 460, 473, 433 S.E.2d 196, 204 (1993) (recognizing "that acquisition is an ongoing process" and that "property may have a dual nature"), *rev'd in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994); *Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260, *review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).] See [Section VIII](#), below.

#### D. Divisible Property. [G.S. 50-20(b)(4). See Section IX.B, below.]

Divisible property was added as a category of property subject to equitable distribution (ED) by S.L. 1997-302, § 1, applicable to actions filed on or after Oct. 1, 1997. Divisible property is defined as:

1. All appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and before the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property;
2. All property, property rights, or any portion thereof received after the date of separation but before the date of distribution, acquired as a result of the efforts of either spouse during the marriage and before the date of separation, including, but not limited to, commissions, bonuses, and contractual rights;
3. Passive income from marital property received after the date of separation, including, but not limited to, interest and dividends; and
4. Passive increases and passive decreases in marital debt and financing charges and interest related to marital debt. [G.S. 50-20(b)(4), amended by S.L. 2002-159, § 33.5, effective Oct. 11, 2002, to provide that divisible property includes decreases in marital debt in G.S. 50-20(b)(4)d.; further amended by S.L. 2013-103, § 1, effective Oct. 1, 2013, to add “passive” before increases and decreases in G.S. 50-20(b)(4)d.] For the classification of divisible property, see Section IX.B, below. For a discussion of the 2013 amendment, see Cheryl Daniels Howell, *Equitable Distribution Update: Tenancy by the Entirety, Postseparation Payment of Debt, and Defined Contribution Retirement Accounts*, FAM. L. BULL. No. 26 (UNC School of Government, Mar. 2014) (hereinafter 2014 Howell Bulletin), [www.sogpubs.unc.edu/electronicversions/pdfs/flb26.pdf](http://www.sogpubs.unc.edu/electronicversions/pdfs/flb26.pdf).

### IV. Burden of Proof

#### A. Burden in Classification of an Asset as Marital or Separate

1. Who has burden.
  - a. Party claiming a certain classification has the burden of showing, by a preponderance of the evidence, that the property is within the claimed classification. [*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); *Joyce v. Joyce*, 180 N.C. App. 647, 637 S.E.2d 908 (2006).]
  - b. The burden of showing property to be marital is on the party seeking to classify the asset as marital, and the burden of showing the property to be separate is on the party seeking to classify the asset as separate. [*Atkins v. Atkins*, 102 N.C. App. 199, 401 S.E.2d 784 (1991).]
2. Showing necessary to classify property as marital. The party claiming the property to be marital must show, by a preponderance of the evidence, that the property is presently owned (meaning owned on the date of separation, see Section V.D, below) and was acquired by either or both of the spouses during the course of the marriage and before the

- date of separation. [*Finney v. Finney*, 225 N.C. App. 13, 736 S.E.2d 639 (2013) (citing *Fountain v. Fountain*, 148 N.C. App. 329, 559 S.E.2d 25 (2002)); *O'Brien v. O'Brien*, 131 N.C. App. 411, 508 S.E.2d 300 (1998), *review denied*, 350 N.C. 98, 528 S.E.2d 365 (1999).]
3. Showing necessary to classify property as separate. If the party claiming property is marital meets his burden, the burden shifts to the party claiming that the property is separate, who must show, by a preponderance of the evidence, that the property falls within the statutory definition of separate property. [*Finney v. Finney*, 225 N.C. App. 13, 736 S.E.2d 639 (2013) (citing *Fountain v. Fountain*, 148 N.C. App. 329, 559 S.E.2d 25 (2002)); *Finkel v. Finkel*, 162 N.C. App. 344, 590 S.E.2d 472, *cert. denied*, 358 N.C. 234, 595 S.E.2d 150 (2004); *O'Brien v. O'Brien*, 131 N.C. App. 411, 508 S.E.2d 300 (1998), *review denied*, 350 N.C. 98, 528 S.E.2d 365 (1999).]
  4. If both parties meet their burdens, the property is **separate property**. [*Finney v. Finney*, 225 N.C. App. 13, 736 S.E.2d 639 (2013) (citing *Fountain v. Fountain*, 148 N.C. App. 329, 559 S.E.2d 25 (2002)); *O'Brien v. O'Brien*, 131 N.C. App. 411, 508 S.E.2d 300 (1998), *review denied*, 350 N.C. 98, 528 S.E.2d 365 (1999); *Atkins v. Atkins*, 102 N.C. App. 199, 401 S.E.2d 784 (1991).]
  5. If the party claiming the property is marital meets his burden and the party claiming that the property is separate does **not** meet her burden, the property **is marital property**. [*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); *Minter v. Minter*, 111 N.C. App. 321, 432 S.E.2d 720, *review denied*, 335 N.C. 176, 438 S.E.2d 201 (1993); *Atkins v. Atkins*, 102 N.C. App. 199, 401 S.E.2d 784 (1991).]
  6. When burden for marital classification not met. If the party claiming the property is marital does **not** meet his burden, the property does not immediately become, as a matter of law, separate property. [*Watkins v. Watkins*, 228 N.C. App. 548, 746 S.E.2d 394 (2013) (citing *Atkins v. Atkins*, 102 N.C. App. 199, 401 S.E.2d 784 (1991)), *review denied*, 367 N.C. 290, 753 S.E.2d 670 (2014).] The party claiming the property is separate must show that the property falls within one of the statutory categories of separate property. See Section VI, below.
  7. 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).]

## B. The Marital Property Presumption

1. The presumption. All property acquired after the date of marriage and before the date of separation is presumed to be marital except property that is separate property under G.S. 50-20(b)(2). [G.S. 50-20(b)(1).] There is no marital presumption for property acquired after the date of separation. [See *Freeman v. Freeman*, 107 N.C. App. 644, 421 S.E.2d 623 (1992), and [Section IX.A](#), below, on classification of property acquired after separation.]



2. Standard for rebuttal. The marital property presumption may be rebutted by the greater weight of the evidence. [G.S. 50-20(b)(1).] For a discussion about rebutting the marital property presumption in the context of jointly held real property after the 2013 amendment to G.S. 50-20(b)(1), see 2014 Howell Bulletin.
3. Effective date of marital property presumption. The statutory presumption in G.S. 50-20(b)(1) in favor of marital property became effective Oct. 1, 1991. [S.L. 1991-635, § 1.1, effective Oct. 1, 1991, and applicable to equitable distribution actions pending or filed on or after that date.)] Before the 1991 amendment to G.S. 50-20(b)(1), appellate courts had disagreed on whether there was a presumption in favor of marital property. [See *Loeb v. Loeb*, 72 N.C. App. 205, 324 S.E.2d 33 (language of Equitable Distribution Act creates a presumption that all property acquired during the marriage is marital), *cert. denied*, 313 N.C. 508, 329 S.E.2d 393 (1985), and *Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986) (refusing to infer a marital property presumption because it believed legislature’s decision not to so provide by statute was deliberate).]
4. Cases decided after the marital property presumption became effective still use the burden of proof rules established in cases decided before the effective date. [*Ciobanu v. Ciobanu*, 104 N.C. App. 461, 409 S.E.2d 749 (1991) (the allocation of burdens of proof set out in cases before 1991 is consistent with the statutory presumption in G.S. 50-20(b)(1)).]

### C. “Mixed” Assets

1. For burden in classification of a mixed asset, see [Section VIII.G](#), below.

### D. Divisible Property

1. The burden of proof has been clearly established for only one category of divisible property, that identified in G.S. 50-20(b)(4)a as passive appreciation and diminution in value of marital and divisible property occurring after the date of separation and before the date of distribution. [See *Wirth v. Wirth*, 193 N.C. App. 657, 661, 668 S.E.2d 603, 607 (2008) (emphasis in original) (“[u]nder the plain language of the statute [G.S. 50-20(b)(4)a], all appreciation and diminution in value of marital and divisible property is presumed to be divisible property *unless* the trial court finds that the change in value is attributable to the postseparation actions of one spouse”); *Romulus v. Romulus*, 215 N.C. App. 495, 715 S.E.2d 308 (2011), and *Cheek v. Cheek*, 211 N.C. App. 183, 712 S.E.2d 301 (2011) (both citing *Wirth*).]
2. No case to date has set out the burden of proof when classifying other categories of divisible property. [*But see Walter v. Walter*, 149 N.C. App. 723, 728 n.2, 561 S.E.2d 571, 575 n.2 (2002) (where court stated in footnote 2 that the party claiming property to be divisible has the burden of proving “that it is so”), and *Simon v. Simon*, 231 N.C. App. 76, 753 S.E.2d 475 (2013) (holding husband had burden of proving extent to which postseparation distributions from a marital corporation were his separate property).]
3. Applying the burden of proof adopted for classification of marital and separate property, the party claiming the property to be divisible must show, by a preponderance of the evidence, that the property falls in one of the categories of divisible property set out in G.S. 50-20(b)(4)b. to d. If this burden is met, the burden would shift to the other party to show that the property is not divisible property.

## V. Elements of Marital Property

### A. All Real and Personal Property

1. Appellate courts have not defined “property” for purposes of equitable distribution (ED). However, the court of appeals has considered whether a particular interest constitutes “property” without defining the term.
  - a. U.S. Department of Veterans Affairs loan eligibility is not property. [*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).]
  - b. A master’s degree in business and economics is not property. [*Haywood v. Haywood*, 333 N.C. 342, 425 S.E.2d 696 (1993), *rev’g in part per curiam for reasons stated in dissenting opinion in* 106 N.C. App. 91, 415 S.E.2d 565 (1992) (Wynn, J., dissenting).]
  - c. A leased vehicle could not be classified and valued as a marital asset because neither spouse had any ownership or equity interest in it. [*Dalgewicz (Hearten) v. Dalgewicz*, 167 N.C. App. 412, 606 S.E.2d 164 (2004) (citing *Fox v. Fox*, 103 N.C. App. 13, 404 S.E.2d 354 (1991)).]
  - d. A check from insurance company to cover the cost of repairing a roof was not a separate asset but instead was reflected in the value of the house. [*Cheek v. Cheek*, 211 N.C. App. 183, 712 S.E.2d 301 (2011).]
2. Property includes both legal and equitable interests. [*See Upchurch v. Upchurch*, 122 N.C. App. 172, 468 S.E.2d 61 (trial judge may impose a constructive trust on property in which a spouse acquired an equitable interest during the marriage), *review denied*, 343 N.C. 517, 472 S.E.2d 26 (1996).]
  - a. A third party who holds legal title to property that is claimed to be marital property is a necessary party to the ED action, with participation limited to the issue of ownership of that property. [*Upchurch v. Upchurch*, 122 N.C. App. 172, 468 S.E.2d 61, *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).]
  - b. See [Section X](#), below, on classification of equitable interests.

### B. Acquired by Either or Both Spouses

1. Under the partnership theory of marriage, both spouses are presumed to have contributed to the acquisition of property during the marriage regardless of whose earnings paid for an asset or in whose name the asset is titled. [*McLean v. McLean*, 323 N.C. 543, 374 S.E.2d 376 (1988); *Smith v. Smith*, 314 N.C. 80, 331 S.E.2d 682 (1985).]
2. Stipulation by wife that she did not make any direct financial contribution to the acquisition of property or the payment of debt during the marriage did not mean that there was no marital contribution to the acquisition of property or the payment of debt during the marriage. [*Clark v. Dyer*, 236 N.C. App. 9, 762 S.E.2d 838 (2014), *cert. denied*, 778 S.E.2d 279 (N.C. 2015).]

3. In 1983, the legislature added “or both spouses” to G.S. 50-20(b)(1) to make it clear that jointly titled property is to be included in ED. [S.L. 2013-640, § 1, effective Aug. 1, 1983.]
4. Acquisition of property does not necessarily occur on the date title to property is acquired. Because North Carolina follows the “source of funds” approach to classification, acquisition may be an ongoing process. See discussion in [Section VIII.C](#), below.

### C. After Marriage and Before the Date of Separation

1. Property acquired before marriage is separate even when the property was purchased in anticipation of marriage. [*McIver v. McIver*, 92 N.C. App. 116, 374 S.E.2d 144 (1988); *Clark v. Dyer*, 236 N.C. App. 9, 762 S.E.2d 838 (2014) (citing *McIver*) (two lots gifted to both parties before marriage from parents of a spouse-to-be were jointly owned separate property of both spouses), *cert. denied*, 778 S.E.2d 279 (N.C. 2015); *Tiryakian v. Tiryakian*, 91 N.C. App. 128, 370 S.E.2d 852 (1988).]
2. For classification purposes, the marital estate is frozen as of the date of separation. [*Becker v. Becker*, 88 N.C. App. 606, 364 S.E.2d 175 (1988). See also *Davis v. Davis*, 360 N.C. 518, 631 S.E.2d 114 (2006) (citing *Sharp v. Sharp*, 84 N.C. App. 128, 351 S.E.2d 799 (1987)) (recognizing that G.S. 50-20(a) effectively provides for the “freezing” of the marital estate as of the date of the parties’ separation and finding that trial court erred in classifying real property as wife’s separate property when properties were held as tenants by the entirety on the date of separation and only deeded to wife after the parties separated).] For actions filed after Oct. 1, 1997, property acquired after separation may meet the definition of divisible property. See [Section IX.B](#), below.
3. “The date of separation” means the last separation before the action for equitable distribution (ED) is filed. [*Broome v. Broome*, 112 N.C. App. 823, 436 S.E.2d 918 (1993) (court rejected husband’s argument that a vehicle purchased during an earlier separation was his separate property; since the vehicle was purchased before the final separation of the parties, it was marital property).]
4. The date of separation is determined in an ED proceeding in the same manner as in divorce actions. [*Hall v. Hall*, 88 N.C. App. 297, 363 S.E.2d 189 (1987) (test used is whether parties held themselves out as husband and wife).] In an ED proceeding, there is no right to a jury trial on the issue of the date of separation. [*McCall v. McCall*, 138 N.C. App. 706, 531 S.E.2d 894 (2000).]
5. A finding of the specific date of separation in a judgment of absolute divorce is not binding on the trial court in equitable distribution, at least when neither party to the absolute divorce argued that the parties had not been separated one full year before the filing of the divorce complaint. [See *Stafford v. Stafford*, 351 N.C. 94, 520 S.E.2d 785 (1999). For more information, see Cheryl Daniels Howell, *Equitable Distribution: Can We Use the Date of Separation from the Divorce Judgment?* UNC SCH. OF GOV’T: ON THE CIVIL SIDE BLOG (Aug. 5, 2016), <http://civil.sog.unc.edu/equitable-distribution-can-we-use-the-date-of-separation-from-the-divorce-judgment>.

### D. That Is Presently Owned

1. “Presently owned” means property owned on the date of separation (DOS), not the date of trial. [*Wornom v. Wornom*, 126 N.C. App. 461, 485 S.E.2d 856 (1997) (trial court did not

err in classifying assets and liabilities that existed at the time of separation but no longer existed at the time of trial); *Eason v. Taylor*, 784 S.E.2d 200 (N.C. Ct. App. 2016) (trial court erred in refusing to classify and distribute marital home that had been foreclosed upon by the time of trial); *Lilly v. Lilly*, 107 N.C. App. 484, 420 S.E.2d 492 (1992) (husband established that property was presently owned with evidence that funds were in parties' joint account on the date of separation). *Cf. Hill v. Sanderson*, 781 S.E.2d 29 (N.C. Ct. App. 2015) (trial court erred in classifying and distributing all proceeds from the postseparation sale of a parcel of real property where the parties owned only one-half interest in the property on the date of separation; even though the parties became full owners after the date of separation, only the interest owned on the date of separation was marital property subject to distribution).]

2. "Presently owned" has been interpreted to include the situation when the right to receive property was acquired during the marriage even though the property was not received until after the date of separation (DOS). [*Allen v. Allen*, 168 N.C. App. 368, 607 S.E.2d 331 (2005) (court of appeals rejected argument that a tax refund from a joint return filed before the DOS was not marital property because it was not owned by either party on the DOS; tax refund was properly classified as marital property when the right to receive the refund was acquired during the marriage and before the DOS, even though the refund was not received until after the DOS).]
3. An asset is not presently owned if it was given to another before separation. [*Weaver v. Weaver*, 72 N.C. App. 409, 324 S.E.2d 915 (1985) (court found that a piano purchased with marital funds had been given as a gift to the parties' children so that it was not presently owned), *disapproved of on other grounds by Armstrong v. Armstrong*, 322 N.C. 396, 368 S.E.2d 595 (1988).]
4. Assets owned by third parties may be distributed by the court only if the court finds the parties to the ED action to be the equitable owners of the property. [*Nicks v. Nicks*, 774 S.E.2d 365 (N.C. Ct. App. 2015) (trial court had no authority to distribute a limited liability company (LLC) that had been given to a trust before the DOS, unless the trust was joined into the ED proceeding and the trial court imposed a constructive trust on the LLC). See [Section X](#), below.]
5. An expectation of an inheritance is not property presently owned. [*Petty v. Petty*, 199 N.C. App. 192, 680 S.E.2d 894 (2009) (husband's future inheritance under his father's will was not property presently owned and also was too speculative to be considered as a distributional factor), *appeal dismissed, review denied*, 363 N.C. 806, 691 S.E.2d 16, *cert. denied*, 561 U.S. 1030, 130 S. Ct. 3512 (2010).]

## VI. Elements of Separate Property

### A. All Real and Personal Property Acquired by a Spouse Before Marriage [G.S. 50-20(b)(2).]

1. Property acquired before marriage remains separate even when the property was purchased in anticipation of marriage. [*McIver v. McIver*, 92 N.C. App. 116, 374 S.E.2d 144 (1988); *Clark v. Dyer*, 236 N.C. App. 9, 762 S.E.2d 838 (2014) (citing *McIver*) (two lots gifted to both parties before marriage from parents of a spouse-to-be were jointly owned

- separate property of both spouses), *cert. denied*, 778 S.E.2d 279 (N.C. 2015); *Tiryakian v. Tiryakian*, 91 N.C. App. 128, 370 S.E.2d 852 (1988).]
2. Property acquired before the parties were married but while they lived together is not marital property. [*McIver v. McIver*, 92 N.C. App. 116, 374 S.E.2d 144 (1988); *Glaspy v. Glaspy*, 143 N.C. App. 435, 545 S.E.2d 782 (2001) (citing *McIver*) (holding that the interests in land acquired by plaintiff and defendant before marriage were the parties' respective separate property).]
  3. Property acquired by the parties as tenants in common before marriage was the separate property of both parties. [*Barton v. Barton*, 215 N.C. App. 235, 715 S.E.2d 529 (husband paid purchase price but gifted one-half of the ownership of the property to wife when he placed title in both their names as tenants in common), *appeal dismissed*, 365 N.C. 364, 719 S.E.2d 20 (2011).]
  4. Real property acquired before marriage may be marital if title is transferred to both spouses as tenants by the entirety after marriage. See [Section VII.A](#), below, on the marital gift presumption. Additionally, after Oct. 1, 2013, real property owned as tenants by the entirety on the date of separation is presumed to be marital property. [G.S. 50-20(b)(1), *amended by* S.L. 2013-103, § 1, effective Oct. 1, 2013].] See [Section IV.B](#), above, on the marital property presumption.
  5. See also rules about gifts between spouses ([Section VI.C](#), below) and rules about property acquired in exchange for separate property ([Section VI.D](#), below).

**B. All Real and Personal Property Acquired by a Spouse During the Marriage by Devise or Descent [G.S. 50-20(b)(2), *amended by* S.L. 2011-284, § 51, eliminating bequest from the definition of separate property effective June 24, 2011.]**

1. When a spouse receives property by bequest, devise, or descent during the marriage, it is the separate property of the recipient. [*O'Brien v. O'Brien*, 131 N.C. App. 411, 508 S.E.2d 300 (1998) (wife's inheritance during the marriage was her separate property), *review denied*, 350 N.C. 98, 528 S.E.2d 365 (1999).]
2. Monies inherited by wife in 1993 that she always maintained in accounts in her sole name and never comingled were wife's separate property on the date of separation in 2009, even though wife could not precisely trace the monies back to 1993 because the parties had moved multiple times. Wife's testimony that the accounts in dispute contained only inherited funds, that she inherited the funds upon her grandfather's death from a documented jointly held account, and that husband's name was never added to any account in which the funds were held was competent evidence supporting classification of the funds as wife's separate property. [*Congdon v. Congdon*, 226 N.C. App. 583, 741 S.E.2d 514 (2013) (**unpublished**).]

**C. All Real and Personal Property Acquired by a Spouse During the Marriage by Gift [G.S. 50-20(b)(2).]**

1. A gift is a voluntary transfer of property by one to another without any consideration therefore.
  - a. If consideration is promised and given, the transfer is not a gift. [*Caudill v. Caudill*, 131 N.C. App. 854, 509 S.E.2d 246 (1998).]

- b. Lack of consideration may be demonstrated by testimony of donor and donee. [*Rogers v. Rogers*, 90 N.C. App. 408, 368 S.E.2d 412, *review denied*, 323 N.C. 366, 373 S.E.2d 548 (1988).]
  - c. A transfer document that indicates receipt of consideration is prima facie evidence that consideration was received for the property, although such evidence does not compel that finding if contradictory evidence exists. [*Joyce v. Joyce*, 180 N.C. App. 647, 637 S.E.2d 908 (2006).]
2. To constitute a valid gift, two elements must be present:
    - a. Donative intent and
    - b. Actual or constructive delivery. [*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).]
  3. Gifts from third parties.
    - a. General rule when one spouse receives a gift from a third party (i.e., gift is not from a spouse, which is discussed in [Section VI.C.4](#), below). A gift received by a spouse during the marriage from a third party is the separate property of the receiving spouse. [G.S. 50-20(b)(2); *Friend-Novorska v. Novorska*, 131 N.C. App. 508, 507 S.E.2d 900 (1998). *See Atkins v. Atkins*, 102 N.C. App. 199, 206, 401 S.E.2d 784, 788 (1991) (referring to statutory language in first sentence of G.S. 50-20(b)(2) as the “third-party gift provision”); *Langston v. Richardson*, 206 N.C. App. 216, 696 S.E.2d 867 (2010) (citing *Atkins*), *appeal dismissed, cert. denied*, 365 N.C. 191, 707 S.E.2d 231 (2011).]
    - b. It follows that a gift to both spouses jointly during the marriage is marital property. [*Burnett v. Burnett*, 122 N.C. App. 712, 714 n. 1, 471 S.E.2d 649, 651 n.1 (1996).]
    - c. Presumption when gift is from a parent. When property is acquired during the marriage by a spouse from her parent(s), a rebuttable presumption arises that the transfer is a gift to that spouse only. [*Joyce v. Joyce*, 180 N.C. App. 647, 637 S.E.2d 908 (2006); *Caudill v. Caudill*, 131 N.C. App. 854, 509 S.E.2d 246 (1998); *Gould v. Gould*, 225 N.C. App. 264, 736 S.E.2d 649 (2013) (**unpublished**) (piano acquired from wife’s parents during the marriage presumed to be wife’s separate property).]
    - d. The burden then shifts to the spouse resisting the separate property classification to show that the parent lacked donative intent. [*Joyce v. Joyce*, 180 N.C. App. 647, 637 S.E.2d 908 (2006); *Burnett v. Burnett*, 122 N.C. App. 712, 471 S.E.2d 649 (1996); *Gould v. Gould*, 225 N.C. App. 264, 736 S.E.2d 649 (2013) (**unpublished**) (citing *Burnett*).]
      - i. It is reversible error for the trial court to place the burden of proof on the receiving spouse. [*Caudill v. Caudill*, 131 N.C. App. 854, 509 S.E.2d 246 (1998) (trial court erred in placing burden on receiving spouse to show that he acquired property from his mother by gift).]
      - ii. It is reversible error for the trial court to classify as marital any property received by one spouse during the marriage from his parent without first determining that the other spouse rebutted the presumption set out in [Section VI.C.3.c](#), above. [*Gould v. Gould*, 225 N.C. App. 264, 736 S.E.2d 649 (2013) (**unpublished**) (equitable distribution order did not address the rebuttable

- presumption and did not provide any rationale for trial court's decision that a grand piano, received by wife as a gift from her parents during the marriage, was marital property; matter remanded to determine whether husband met his burden to rebut the presumption that the piano was wife's separate property).]
- iii. Presumption of a gift to husband was rebutted when father's transfer to husband of an interest in a mobile home park was supported by adequate consideration. Wife established adequate consideration by evidence that both parties performed a considerable amount of work for husband's father during the course of the marriage, specifically, in connection with the mobile home park; by a statement in the deed that transfer was "for a valuable consideration paid by the Grantee, the receipt of which is hereby acknowledged . . .," which court considered prima facie evidence of consideration; and by the fact that there was no credible documentation of father's donative intent that contradicted wife's evidence that compensation was given. [*Joyce v. Joyce*, 180 N.C. App. 647, 651, 637 S.E.2d 908, 911 (2006).]
  - e. Burden of proof when gift is from a nonparent. A party claiming that property acquired during the marriage is separate on the basis that it was a gift has the burden of showing that the "alleged donor intended to transfer ownership of the property without receiving any consideration in return." [*Burnett v. Burnett*, 122 N.C. App. 712, 714, 471 S.E.2d 649, 651 (1996); *Watkins v. Watkins*, 228 N.C. App. 548, 746 S.E.2d 394 (2013) (gift of a Rolex watch to wife from her employer during the marriage was her separate property based on wife's evidence that the employer often gave gifts to employees and was "generous" and on the absence of evidence by husband showing that the watch was intended as compensation), *review denied*, 367 N.C. 290, 753 S.E.2d 670 (2014).]
  - f. To determine donor's intent.
    - i. The most relevant evidence in determining donative intent is the donor's own testimony. Also relevant is the testimony of the alleged donee, documents surrounding the transaction, whether a gift tax return was filed, and whether excise tax was paid. [*Burnett v. Burnett*, 122 N.C. App. 712, 471 S.E.2d 649 (1996) (wife failed to rebut presumption of a gift to husband from his mother, so property was classified as husband's separate property). *See also Hunt v. Hunt*, 85 N.C. App. 484, 355 S.E.2d 519 (1987) (separate checks given by wife's grandmother to husband and wife were intended by grandmother to be gifts to wife).]
    - ii. In determining donative intent, or the lack thereof, the credibility of the donor's testimony is within the discretion of the trial judge. [*Joyce v. Joyce*, 180 N.C. App. 647, 651, 637 S.E.2d 908, 911 (2006) (trial judge within his rights to be suspicious of a "post-transfer document" used to support husband's position that the deed from his father to him was an early inheritance).]
  - g. When funds gifted by father to husband during the marriage were commingled with marital funds in a joint account, husband failed to prove that a portion of the joint account was his separate property where he could not prove funds gifted to him by his father actually still were in the account on the date of separation. [*Power v. Power*, 236 N.C. App. 581, 763 S.E.2d 565 (2014).]

4. Gifts between spouses.
  - a. General rule when one spouse receives a gift from the other spouse. Property acquired during the marriage as a gift from the other spouse is separate property only if such an intention is stated in the conveyance. [G.S. 50-20(b)(2); *Friend-Novorska v. Novorska*, 131 N.C. App. 508, 507 S.E.2d 900 (1998).]
  - b. General rule applicable after separation.
    - i. The general rule is applicable “to an even greater extent” to transfers between spouses after separation. [*Cobb v. Cobb*, 107 N.C. App. 382, 385, 420 S.E.2d 212, 213–14 (1992) (checks given by husband to wife after separation for living expenses from the parties’ joint checking account were advances on wife’s share of the marital estate and were not gifts from the husband).]
    - ii. Transfer of husband’s interest in properties held as tenancy by the entirety after separation were not gifts to wife where language in deeds did not indicate that wife initially received the properties as a gift, did not expressly convey a gift, and there was no evidence in the record that the properties were a gift from husband to wife. [*Davis v. Davis*, 360 N.C. 518, 631 S.E.2d 114 (2006) (citing G.S. 50-20(b)(2)).]
  - c. Marital gift presumption. G.S. 50-20(b)(2), also called the interspousal gift provision, creates a presumption that gifts between spouses are marital property. [*McLeod v. McLeod*, 74 N.C. App. 144, 327 S.E.2d 910, *cert. denied*, 314 N.C. 331, 333 S.E.2d 488 (1985), *overruled in part on other grounds by Johnson v. Johnson*, 317 N.C. 437, 454 346 S.E.2d 430 (1986), and *Atkins v. Atkins*, 102 N.C. App. 199, 401 S.E.2d 784 (1991) (both *McLeod* and *Atkins* referring to statutory language in second sentence of G.S. 50B-20(b)(2) as the interspousal gift provision); *Langston v. Richardson*, 206 N.C. App. 216, 696 S.E.2d 867 (2010) (citing *Atkins*), *appeal dismissed, cert. denied*, 365 N.C. 191, 707 S.E.2d 231 (2011).]
  - d. Statement of contrary intent. Under the interspousal gift provision of G.S. 50-20(b)(2), if the donor wishes her separate property to remain her separate property, the donor must state that intention in the conveyance. Similarly, if the donor wishes her separate property to become the separate property of the donee, the donor also must state that intention in the conveyance. [*McLean v. McLean*, 323 N.C. 543, 374 S.E.2d 376 (1988).]
  - e. Gift of a leased car. In *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), the court considered the classification of a car given to wife as a birthday present and financed by husband through a lease-purchase agreement. At the end of the lease, wife moved to “finalize the gift” by requiring husband to purchase the car for her. Wife’s motion was denied on the ground that husband had leased, not purchased, the car; husband could only give as a gift the interest he had at the time the gift was made.
  - f. Tenancy by the entirety. When real property is titled as tenants by the entirety, there is a presumption that any separate funds used to acquire the property, or any separate real property exchanged for the entirety property, was a gift to the marriage. See [Section VII](#), below, on tenancy by the entirety and the marital gift presumption. Additionally, after Oct. 1, 2013, real property owned as tenants by the entirety on the



date of separation is presumed to be marital property. [G.S. 50-20(b)(1), *amended* by S.L. 2013-103, § 1, effective Oct. 1, 2013.] See [Section IV.B](#), above, on the marital property presumption.

#### D. Property Acquired During the Marriage in Exchange for Separate Property [G.S. 50-20(b)(2).]

1. General rule. When a spouse acquires property during the marriage in exchange for his or her separate property, the acquired property remains the separate property of that spouse regardless of whether title is in the name of the husband or wife or both, unless a contrary intention is expressly stated in the conveyance. [G.S. 50-20(b)(2); *Friend-Novorska v. Novorska*, 131 N.C. App. 508, 507 S.E.2d 900 (1998).] This language has been referred to as the exchange provision. [See *Atkins v. Atkins*, 102 N.C. App. 199, 401 S.E.2d 784 (1991); *Langston v. Richardson*, 206 N.C. App. 216, 696 S.E.2d 867 (2010) (citing *Atkins*), *appeal dismissed, cert. denied*, 365 N.C. 191, 707 S.E.2d 231 (2011).]
2. Burden of proof.
  - a. The party claiming that exchanged property is separate under the exchange provision must establish that the source of the contested asset was her separate property. [*Fountain v. Fountain*, 148 N.C. App. 329, 559 S.E.2d 25 (2002) (husband able to show that a plane owned by him before marriage was exchanged for another plane during the marriage and then for a note upon the plane's sale by presenting "detailed" records of every deposit and payment from a joint account); *Friend-Novorska v. Novorska*, 131 N.C. App. 508, 507 S.E.2d 900 (1998) (undisputed that source of contested investment account was husband's inheritance). Cf. *Broome v. Broome*, 112 N.C. App. 823, 436 S.E.2d 918 (1993) (husband had no documents or cancelled checks to show that his separate funds from an inheritance were used to acquire the real property at issue; property was classified as marital pursuant to the marital property presumption).]
  - b. After the party seeking separate classification of exchanged property proves that the source of the asset was his separate property, the party seeking classification of the exchanged property as marital must show by a preponderance of the evidence that the exchange was accompanied by an express intention that the property be marital property. [*Friend-Novorska v. Novorska*, 131 N.C. App. 508, 507 S.E.2d 900 (1998) (in case involving exchange of inherited funds, statement made one year prior to exchange was not made "in the conveyance").]
3. Real property.
  - a. If the property acquired in exchange for separate property is real property held by the entirety, the marital gift presumption in G.S. 50-20(b)(2) is applicable and the entirety property will be classified as marital property unless the presumption of gift is rebutted. [*Romulus v. Romulus*, 215 N.C. App. 495, 715 S.E.2d 308 (2011); *Haywood v. Haywood*, 333 N.C. 342, 425 S.E.2d 696 (1993), *rev'g in part per curiam for reasons stated in dissenting opinion* in 106 N.C. App. 91, 415 S.E.2d 565 (1992) (Wynn, J., dissenting); *Manes v. Harrison-Manes*, 79 N.C. App. 170, 338 S.E.2d 815 (1986) (in *Romulus*, *Haywood*, and *Manes*, a spouse exchanged his or her separate property for real property held by the entirety; marital gift presumption applicable).]

The presumption probably can be rebutted by the greater weight of the evidence. [G.S. 50-20(b)(1), *amended by* S.L. 2013-103, § 1, effective Oct. 1, 2013].]

- b. When a house that was the husband's separate property was moved to a lot held by the husband and wife as tenants by the entirety, the lot was properly classified as marital but the house remained the husband's separate property, making the proceeds from the sale of the house and lot dual in nature. [*Goldston v. Goldston*, 159 N.C. App. 180, 582 S.E.2d 685 (2003) (act of physically transferring the house to a lot held by the parties as entirety property was not sufficient to rebut statutory mandate that separate property remains separate unless a contrary intention is expressly stated in the conveyance).]
  - c. See [Section VII](#), below, on tenancy by the entirety and the marital gift presumption.
4. Personal property.
- a. Intent that personal property be marital will not be presumed. In cases involving personal property, courts have rejected the argument that an exchange or transfer of separate personal property into joint ownership constitutes the required express statement of intent. "The deposit of [separate] funds into a joint account, standing alone, is not sufficient evidence to show a gift or an intent to convert the funds from separate property to marital property." [*Friend-Novorska v. Novorska*, 131 N.C. App. 508, 511, 507 S.E.2d 900, 903 (1998) (quoting *Manes v. Harrison-Manes*, 79 N.C. App. 170, 172, 338 S.E.2d 815, 817 (1986)) (husband's exchange of his separate funds from an inheritance for a joint investment fund did not convert the funds into marital property, as the transfer was not accompanied by the required express statement); *Lilly v. Lilly*, 107 N.C. App. 484, 420 S.E.2d 492 (1992) (fact that wife deposited her separate personal injury settlement award into a joint account does not constitute the expressly stated intention required by the exchange provision).]

## E. Increase in Value of Separate Property During the Marriage [G.S. 50-20(b)(2).] and the Active/Passive Analysis

1. General rule. The increase in value of separate property during the marriage is separate property. [G.S. 50-20(b)(2).]
2. Interpretation of the general rule. In *Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260, *review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985), the court held that classification of appreciation of separate property during the marriage depends upon whether the appreciation is active or passive.
  - a. Only passive appreciation of separate property is classified as separate property. [*Ciobanu v. Ciobanu*, 104 N.C. App. 461, 409 S.E.2d 749 (1991); *Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260, *review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).]
  - b. Active appreciation of separate property is classified as marital property. [*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).]
  - c. Increases in value of separate property that result from both active and passive appreciation are classified as both marital and separate property, with each estate entitled to an interest in the increase consistent with its contribution. [*Ciobanu*

- v. Ciobanu*, 104 N.C. App. 461, 409 S.E.2d 749 (1991); *Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260, *review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).]
3. Active appreciation is an increase in the value of separate property resulting from contributions of one or both spouses during the marriage and before the date of separation. These contributions may be financial, managerial, or involve some other type of “marital” effort. [*Ciobanu v. Ciobanu*, 104 N.C. App. 461, 409 S.E.2d 749 (1991); *Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260, *review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).] Active appreciation is appreciation resulting from effort by one or both spouses “which otherwise would have augmented the marital estate.” [*McLeod v. McLeod*, 74 N.C. App. 144, 148, 327 S.E.2d 910, 913, *cert. denied*, 314 N.C. 331, 333 S.E.2d 488 (1985), *overruled in part on other grounds by Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986). *See also Brackney v. Brackney*, 199 N.C. App. 375, 386, 682 S.E.2d 401, 408 (2009) (discussing active appreciation in the context of divisible property and stating that it refers to “financial or managerial contributions” of one of the spouses), *review withdrawn*, 363 N.C. 853, 694 S.E.2d 200 (2010).]
  4. Passive appreciation is an increase in the value of separate property resulting solely from inflation, changing economic conditions, or other circumstances beyond the control of either spouse. [*O’Brien v. O’Brien*, 131 N.C. App. 411, 508 S.E.2d 300 (1998), *review denied*, 350 N.C. 98, 528 S.E.2d 365 (1999).] Passive appreciation does not deplete the marital estate. [*McLeod v. McLeod*, 74 N.C. App. 144, 327 S.E.2d 910 (inflation or governmental action given as examples of passive appreciation), *cert. denied*, 314 N.C. 331, 333 S.E.2d 488 (1985), *overruled in part on other grounds by Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986). *See also Brackney v. Brackney*, 199 N.C. App. 375, 385–86, 682 S.E.2d 401, 408 (2009) (discussing passive appreciation in the context of divisible property and stating that it “refers to enhancement of the value of property due solely to inflation, changing economic conditions, or market forces, or other such circumstances beyond the control of either spouse”), *review withdrawn*, 363 N.C. 853, 694 S.E.2d 200 (2010).]
  5. Principles underlying the active/passive analysis.
    - a. The sophisticated spouse who expends money and effort during the marriage to improve her separate property should not be insulated from equitable distribution when the marriage breaks down. [*McLeod v. McLeod*, 74 N.C. App. 144, 327 S.E.2d 910, *cert. denied*, 314 N.C. 331, 333 S.E.2d 488 (1985), *overruled in part on other grounds by Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986).]
    - b. The passive versus active analysis used to classify increases in the value of separate property occurring during the marriage “is designed to ensure that marital contributions to the appreciation of separate property are credited to the marital estate.” [*Smith v. Smith*, 111 N.C. App. 460, 474, 433 S.E.2d 196, 205 (1993), *rev’d in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994).]
  6. Presumption and the burden of proof.
    - a. Increases in value of separate property occurring during the marriage are presumed to be marital property. [*Conway v. Conway*, 131 N.C. App. 609, 508 S.E.2d 812 (1998), *review dismissed, review denied*, 350 N.C. 593, 537 S.E.2d 210 (1999).]
    - b. The party seeking to have the increase in value classified as separate property has the burden of proving that the increase was passive. [*See O’Brien v. O’Brien*, 131 N.C.

App. 411, 508 S.E.2d 300 (1998) (wife established that appreciation of her separate investment account was purely passive), *review denied*, 350 N.C. 98, 528 S.E.2d 365 (1999); *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); *see also Barton v. Barton*, 215 N.C. App. 235, 715 S.E.2d 529 (arbitrator did not err in concluding that husband failed to rebut presumption that increase in value of investment account during the marriage was active, where evidence showed that husband met with his broker every month or two, that he authorized every trade, and that there was frequent trading and other activity in the account throughout the marriage), *appeal dismissed*, 365 N.C. 364, 719 S.E.2d 20 (2011).]

7. Cases classifying appreciation as active include the following:
  - a. *Lawrence v. Lawrence*, 75 N.C. App. 592, 331 S.E.2d 186 (contributions by husband in the form of repairs, alterations, and additions made during the marriage to a house that wife owned before marriage), *review denied*, 314 N.C. 541, 335 S.E.2d 18 (1985).
  - b. *Beightol v. Beightol*, 90 N.C. App. 58, 367 S.E.2d 347 (contributions by wife in the form of property management, redecorating, and paying bills related to a rental condominium that husband owned before marriage), *review denied*, 323 N.C. 171, 373 S.E.2d 104 (1988).
  - c. *McLeod v. McLeod*, 74 N.C. App. 144, 327 S.E.2d 910 (contribution by husband in the form of a business decision by which he, as president of a closely held corporation, redeemed during the marriage outstanding shares, making him sole owner; resulting increase in the value of the stock was active appreciation of his separate property), *cert. denied*, 314 N.C. 331, 333 S.E.2d 488 (1985), *overruled in part on other grounds by Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986).
8. Cases classifying appreciation as passive include the following:
  - a. *Fountain v. Fountain*, 148 N.C. App. 329, 336, 559 S.E.2d 25, 31 (2002) (increase in the value of husband's 75 percent interest in a Piggly-Wiggly store was not due to any effort of husband, as he "had no involvement in the operations of the business").
  - b. *O'Brien v. O'Brien*, 131 N.C. App. 411, 508 S.E.2d 300 (1998) (adopting a multi-factorial approach to classification of the appreciation of an investment account, the court found that appreciation of wife's separate investment account was passive when neither spouse rendered "substantial services" in managing the account), *review denied*, 350 N.C. 98, 528 S.E.2d 365 (1999).
  - c. *Godley v. Godley*, 110 N.C. App. 99, 429 S.E.2d 382 (1993) (appreciation of husband's stock in a family business during the marriage was passive because husband did not manage, control, or direct any operations of the business).
  - d. *Rogers v. Rogers*, 90 N.C. App. 408, 368 S.E.2d 412 (wife's attempt to show active appreciation of husband's separate interest in a business failed), *review denied*, 323 N.C. 366, 373 S.E.2d 548 (1988). *But compare Smith v. Smith*, 111 N.C. App. 460, 433 S.E.2d 196 (1993) (where court held that defendant was not entitled to any return on his investment of separate property because he failed to show that the increase in value of his investment was due to passive appreciation), *rev'd in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994).

- e. *Lawing v. Lawing*, 81 N.C. App. 159, 175, 344 S.E.2d 100, 111 (1986) (appreciation of separate property caused by efforts of a third party is passive; court of appeals saw “no difference between ‘passive’ increases in separate property (interest, inflation) and ‘active’ increases brought about by the labor of third parties for whom neither spouse has responsibility”).

## F. Income Derived from Separate Property During the Marriage [G.S. 50-20(b)(2).]

1. Income derived from separate property during the marriage is separate property [G.S. 50-20(b)(2).] as long as the income is not acquired as the result of marital effort. [*Fountain v. Fountain*, 148 N.C. App. 329, 559 S.E.2d 25 (2002).]
2. Two cases to date have considered whether income earned during the marriage from separate property was marital or separate property.
  - a. *Watkins v. Watkins*, 228 N.C. App. 548, 746 S.E.2d 394 (2013), *review denied*, 367 N.C. 290, 753 S.E.2d 670 (2014).
    - i. Wife owned a rental home before marriage that she maintained at all times after marriage as her separate property. Wife never transferred the property to husband or to herself and husband as tenants by the entirety.
    - ii. Rental income received by wife during the marriage was wife’s separate property. Mortgage payments made during the marriage did not give rise to a marital interest when evidence showed that wife made the mortgage payments using rental income generated by the property.
  - b. *Fountain v. Fountain*, 148 N.C. App. 329, 559 S.E.2d 25 (2002).
    - i. The trial court used the traditional burden of proof analysis to classify income during the marriage from a lease of husband’s separate property, an airplane, as his separate property. See [Section IV.A](#), above, on burden of proof.
    - ii. The trial court also classified funds in a bank account as income from husband’s separate property after determining that the funds were acquired as the result of payments on a note, which the court had classified as husband’s separate property.
  - c. The lack of cases classifying income derived from separate property during the marriage may be due to the fact that the court does not always distinguish between “income” and “appreciation.” [See *O’Brien v. O’Brien*, 131 N.C. App. 411, 508 S.E.2d 300 (1998) (where court analyzed the increase in value of an investment account as “appreciation” rather than income), *review denied*, 350 N.C. 98, 528 S.E.2d 365 (1999); *Gum v. Gum*, 107 N.C. App. 734, 421 S.E.2d 788 (1992) (where court classified interest on a bank account containing proceeds from the sale of the marital home as appreciation rather than income).]
  - d. For cases in which the court has applied the active/passive analysis to postseparation income for purpose of distribution rather than classification, see *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), and *Godley v. Godley*, 110 N.C. App. 99, 429 S.E.2d 382 (1993).

## G. Professional Licenses and Business Licenses That Would Terminate on Transfer [G.S. 50-20(b)(2).]

1. Professional licenses that terminate on transfer are separate property. [G.S. 50-20(b)(2); *Conway v. Conway*, 131 N.C. App. 609, 508 S.E.2d 812 (1998) (license to practice medicine classified as separate property pursuant to G.S. 50-20(b)), *review dismissed, review denied*, 350 N.C. 593, 537 S.E.2d 210 (1999).]
  - a. A trial court must classify a professional license as separate property. [*Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985) (trial court's conclusion that neither spouse owned separate property was error when one spouse was a licensed dentist); *Poore v. Poore*, 75 N.C. App. 414, 331 S.E.2d 266 (trial judge's failure to classify a dental license as separate property was error), *review denied*, 314 N.C. 543, 335 S.E.2d 316 (1985).]
  - b. However, there is no requirement that the trial court place a value on a professional license. [*Conway v. Conway*, 131 N.C. App. 609, 615, 508 S.E.2d 812, 817 (1998) (sufficient to find that defendant's medical license had "very significant value"), *review dismissed, denied*, 350 N.C. 593, 537 S.E.2d 210 (1999).] See [Valuation](#), Part 3 of this Chapter.
  - c. A professional license is a distributional factor under G.S. 50-20(c)(1). [*Dorton v. Dorton*, 77 N.C. App. 677, 336 S.E.2d 415 (1985) (husband's dental license was his separate property, which the trial court had to consider as a factor in distribution).]
  - d. Active increase in value of license during the marriage as marital property. Judge Greene in a concurring opinion has suggested recognizing as marital property the increase in value, if any, of the medical license due to marital contributions when the licensed spouse is a salaried employee of a practice and has no ownership interest. [*Sonek v. Sonek*, 105 N.C. App. 247, 412 S.E.2d 917, *review allowed*, 331 N.C. 287, 417 S.E.2d 255 (1992). See also *Conway v. Conway*, 131 N.C. App. 609, 508 S.E.2d 812 (1998) (considering wife's argument that marital efforts increased the value of husband's medical license but finding no increase in value during four-month period between date license was acquired and date of separation), *review dismissed, denied*, 350 N.C. 593, 537 S.E.2d 210 (1999).]
  - e. A professional practice may be marital property. While a professional license is separate property, a spouse's interest in a professional practice or association may be marital property that should be valued and distributed if it meets the definition of marital property. [*Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985) (trial court erred in not classifying husband's dental practice as marital property); *Pellom v. Pellom*, 194 N.C. App. 57, 669 S.E.2d 323 (2008) (husband's interest in an anesthesiology practice was marital property), *review denied*, 363 N.C. 375, 678 S.E.2d 667 (2009).]
2. Business licenses that terminate on transfer are separate property. [G.S. 50-20(b)(2).] There are no cases to date on this issue. Examples of professions requiring a license are accountants, [G.S. 93-12.] attorneys, [N.C. State Bar, Bar Rules and Regulations, codified as title 27, subchapter C of the N.C. Administrative Code (hereinafter N.C.A.C.), §§ .0102, .0103.] and engineers. [G.S. 89C-14.]

3. Advanced or professional degree.
  - a. An educational degree is not property, either marital or separate, under the equitable distribution statute. [*Haywood v. Haywood*, 333 N.C. 342, 425 S.E.2d 696 (1993), *rev'g in part per curiam for reasons stated in dissenting opinion in* 106 N.C. App. 91, 415 S.E.2d 565 (1992) (Wynn, J., dissenting).]
  - b. Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse is a distributional factor under G.S. 50-20(c)(7). [See *Geer v. Geer*, 84 N.C. App. 471, 353 S.E.2d 427 (1987) (considering as a distributional factor under G.S. 50-20(c)(7) that husband contributed to wife's medical degree when he interrupted his career, relocated twice, and assumed a greater role than his wife in child care and homemaking duties); see *Distribution*, Part 4 of this Chapter, Section V.G.]

## VII. Tenancy by the Entirety and the Marital Gift Presumption

### A. The Marital Gift Presumption

1. When property is titled as tenants by the entirety, there is a presumption that any separate property or separate funds used to acquire the property was a gift to the marriage and the entirety property is marital. [*Walter v. Walter*, 149 N.C. App. 723, 561 S.E.2d 571 (2002) (titling of marital residence acquired during the marriage as tenants by the entirety raised a presumption of donative intent); *Davis v. Sineath (Davis)*, 129 N.C. App. 353, 498 S.E.2d 629 (1998).] The property is presumed marital even if one spouse subsequently dissolves the tenancy by the entirety before the date of separation by quitclaiming her interest in the property to the other spouse. [*Beroth v. Beroth*, 87 N.C. App. 93, 359 S.E.2d 512, *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. A presumption of a gift of separate property to the marital estate arises when “a spouse uses separate funds to furnish consideration for property conveyed to the marital estate, as demonstrated by titling property as a tenancy by the entirety.” [*Stone v. Stone*, 181 N.C. App. 688, 692, 640 S.E.2d 826, 829 (2007) (quoting *McLean v. McLean*, 323 N.C. 543, 546, 374 S.E.2d 376, 378 (1988)).]
3. If property is held as tenants by the entirety on the date of separation, the property is presumed marital even if one party quitclaimed his interest to the other party after the date of separation. [*Davis v. Davis*, 360 N.C. 518, 631 S.E.2d 114 (2006).]
4. Additionally, after Oct. 1, 2013, the equitable distribution statute specifies that real property owned as tenants by the entirety on the date of separation is presumed to be marital property. [G.S. 50-20(b)(1), *amended by* S.L. 2013-103, § 1, effective Oct. 1, 2013).] See Section IV.B, above, on the marital property presumption. For an article considering the rebuttal of both presumptions, see 2014 Howell Bulletin and Cheryl Daniels Howell, *Tenancy by the Entirety in Equitable Distribution: Did the Statutory Amendment Change Anything?* UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (May 15, 2015), <http://civil.sog.unc.edu/tenancy-by-the-entirety-in-equitable-distribution-did-the-statutory-amendment-change-anything>.

## B. Initial Application of the Marital Gift Presumption

1. The first application of the marital gift presumption was in *McLeod v. McLeod*, 74 N.C. App. 144, 327 S.E.2d 910, cert. denied, 314 N.C. 331, 333 S.E.2d 488 (1985), overruled in part on other grounds by *Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986).
  - a. Both husband and wife contributed separate property toward the purchase of a house titled as entirety property.
  - b. Rather than having each party retain as separate property the amount he or she contributed plus any passive appreciation, the court adopted the marital gift presumption set out in [Section VII.A](#), above, and classified the entirety property as marital property.
  - c. The rationale for the presumption is that the titling of the property as tenants by the entirety supplies the specific intent necessary to find a gift to the marital estate. [*McLeod v. McLeod*, 74 N.C. App. 144, 156, 327 S.E.2d 910, 918.]

## C. Marital Gift Presumption Upheld by North Carolina Supreme Court

1. The North Carolina Supreme Court upheld the use of the marital gift presumption for entirety property in *McLean v. McLean*, 323 N.C. 543, 374 S.E.2d 376 (1988).

## D. Standard for Rebuttal

1. Effective Oct. 1, 2013, the marital gift presumption probably is rebutted “by the greater weight of the evidence.” [G.S. 50-20(b)(1), amended by S.L. 2013-103, § 1, effective Oct. 1, 2013.] For a discussion of the 2013 amendment, see 2014 Howell Bulletin and Cheryl Daniels Howell, *Tenancy by the Entirety in Equitable Distribution: Did the Statutory Amendment Change Anything?* UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (May 15, 2015), <http://civil.sog.unc.edu/tenancy-by-the-entirety-in-equitable-distribution-did-the-statutory-amendment-change-anything>.
2. Before Oct. 1, 2013, the presumption was rebutted by clear, cogent, and convincing evidence that a gift was not intended. [*McLean v. McLean*, 323 N.C. 543, 374 S.E.2d 376 (1988); *Warren v. Warren*, 175 N.C. App. 509, 623 S.E.2d 800 (2006); *Loving v. Loving*, 118 N.C. App. 501, 455 S.E.2d 885 (1995); *Stone v. Stone*, 181 N.C. App. 688, 640 S.E.2d 826 (2007) (contributing spouse may rebut the presumption by presenting clear, cogent, and convincing evidence that the investment of separate funds was intended to remain separate property).]
3. Whether a party succeeds in rebutting the marital gift presumption is a matter left to the trial court’s discretion. [*Romulus v. Romulus*, 215 N.C. App. 495, 715 S.E.2d 308 (2011); *McLean v. McLean*, 323 N.C. 543, 374 S.E.2d 376 (1988).] The trial court’s finding that a party successfully rebutted the presumption must be supported by competent evidence in the record or the classification of the property as separate will be overturned. [*Walter v. Walter*, 149 N.C. App. 723, 561 S.E.2d 571 (2002) (when party did not provide supporting evidence in his brief and appellate court could find none in the record, residence was classified as marital property).]
4. Where the trial court failed to find that the presumption was rebutted, the case was remanded for a new distribution order. [*Stone v. Stone*, 181 N.C. App. 688, 640 S.E.2d 826



- (2007) (where trial court failed to classify as either separate or marital property wife's contribution of her separate property to purchase the marital residence and funds provided by her mother for improvements thereto, and failed to find or conclude whether wife had rebutted the marital gift presumption as to either of those contributions, case was remanded for new distribution order).]
5. An appellate court will review the exercise of discretion under an abuse of discretion standard. [*Thompson v. Thompson*, 93 N.C. App. 229, 377 S.E.2d 767 (1989).] The marital gift presumption has never been rebutted in a North Carolina appellate case.
  6. It is the donor's, not the donee's, intent that is relevant in determining whether the marital gift presumption has been rebutted. [*Warren v. Warren*, 175 N.C. App. 509, 623 S.E.2d 800 (2006) (donee wife's testimony, that she did not believe that her husband had given her an interest in the property at issue, was irrelevant).]
  7. There is no rule that the marital gift presumption cannot, as a matter of law, be rebutted by testimony of the donor spouse alone. [*Romulus v. Romulus*, 215 N.C. App. 495, 715 S.E.2d 308 (2011) (weight to give donor testimony is matter for trial court to determine).] However, appellate courts have repeatedly upheld trial court determinations that testimony offered by the grantor spouse alone that no gift was intended was not sufficient to rebut the presumption of a gift in individual cases. [*Warren v. Warren*, 175 N.C. App. 509, 623 S.E.2d 800 (2006); *Haywood v. Haywood*, 333 N.C. 342, 425 S.E.2d 696 (1993), *rev'g in part per curiam for reasons stated in dissenting opinion in* 106 N.C. App. 91, 415 S.E.2d 565 (1992) (Wynn, J., dissenting); *Thompson v. Thompson*, 93 N.C. App. 229, 377 S.E.2d 767 (1989); *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).]
  8. In determining whether the marital gift presumption has been rebutted, the trial court should **not** consider any of the following relevant to the classification of the property at issue:
    - a. That separate funds were used to acquire the entirety property (but this may be considered as a distributional factor, see discussion in [Section VII.F](#), below);
    - b. That the property was "ancestral" property of the donor spouse;
    - c. That the donee spouse did not know the location of the property; or
    - d. That the donee spouse did not testify that the donor spouse intended to make a gift to the marital estate. [*Lawrence v. Lawrence*, 100 N.C. App. 1, 394 S.E.2d 267 (1990).]

## E. Marital Gift Presumption Applicable to Various Types of Acquisitions

1. Courts have applied the marital gift presumption to the acquisition of entirety property in a variety of contexts, including the following:
  - a. When only one spouse contributes his separate property or funds to the acquisition of entirety property and the other spouse makes no contribution; [*Haywood v. Haywood*, 333 N.C. 342, 425 S.E.2d 696 (1993), *rev'g in part per curiam for reasons stated in dissenting opinion in* 106 N.C. App. 91, 415 S.E.2d 565 (1992) (Wynn, J., dissenting); *Davis v. Sineath (Davis)*, 129 N.C. App. 353, 498 S.E.2d 629 (1998); *Manes v. Harrison-Manes*, 79 N.C. App. 170, 338 S.E.2d 815 (1986).]

- b. When both spouses contribute separate property or funds to acquire entirety property; [*Hunt v. Hunt*, 85 N.C. App. 484, 355 S.E.2d 519 (1987); *McLeod v. McLeod*, 74 N.C. App. 144, 327 S.E.2d 910, *cert. denied*, 314 N.C. 331, 333 S.E.2d 488 (1985), *overruled in part on other grounds by Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986).]
- c. When one spouse contributes separate property or funds, which is combined with marital property to purchase entirety property; [*McLean v. McLean*, 323 N.C. 543, 374 S.E.2d 376, 382 (1988).]
- d. When the real property acquired was a gift during the marriage to one spouse, which that spouse directed be placed in the entirety; [*Loving v. Loving*, 118 N.C. App. 501, 455 S.E.2d 885 (1995) (parents' gift of house and land to husband, which he directed be titled as entirety property, was marital property).]
- e. When the interest in the real property was initially given to each spouse by separate gift during the marriage, which the spouses thereafter combined and titled by the entirety; [*Daetwyler v. Daetwyler*, 130 N.C. App. 246, 502 S.E.2d 662 (1998) (husband's mother gifted both husband and wife a 9 percent interest in a tree farm, which they thereafter combined as entirety property; the combined interest was marital property), *aff'd per curiam*, 350 N.C. 375, 514 S.E.2d 89 (1999).]
- f. Through the purchase and sale of a succession of homes; [*Thompson v. Thompson*, 93 N.C. App. 229, 377 S.E.2d 767 (1989) (first marital residence was separate property of husband; this was sold to purchase a home titled by the entirety, which was sold to purchase another home titled by the entirety; third house was marital property).]
- g. When a spouse's separate property was used to pay down a mortgage encumbering property held as tenants by the entirety. [*Draughon v. Draughon*, 82 N.C. App. 738, 347 S.E.2d 871 (1986) (wife's use of her inheritance to pay down the mortgage on entirety property was a gift to the marital estate), *review denied*, 319 N.C. 103, 353 S.E.2d 107 (1987).]

## F. Consideration of Separate Contributions

1. Use of the marital gift presumption does not preclude consideration of separate contributions as a distributional factor.
2. A trial court may consider as a distributional factor that one spouse contributed separate property to the acquisition of real property classified as marital pursuant to the marital gift presumption. [*Collins v. Collins*, 125 N.C. App. 113, 479 S.E.2d 240 (rejecting wife's argument that if marital gift presumption applied, court could not consider husband's contribution of separate property as a distributional factor), *review denied*, 346 N.C. 277, 487 S.E.2d 542 (1997). *See also Davis v. Sineath (Davis)*, 129 N.C. App. 353, 498 S.E.2d 629 (1998) (even though residence was marital property per marital gift presumption, trial court could consider husband's use of his separate funds as a distributional factor and could award house to husband since entire purchase price and funding for extensive renovations came from husband's separate funds).] But the court should not consider distributional factors until it has classified the property. [*Cable v. Cable*, 76 N.C. App. 134, 331 S.E.2d 765, *review denied*, 315 N.C. 182, 337 S.E.2d 856 (1985).]

3. While a trial court may consider as a distributional factor one spouse's contribution of separate property to the marital estate, the trial court may not consider the **source** of that separate property as a distributional factor. [*Daetwyler v. Daetwyler*, 130 N.C. App. 246, 502 S.E.2d 662 (1998) (while trial court may consider as a distributional factor that both husband and wife contributed their separate interests in a tree farm to the marital estate, it cannot consider that husband's mother was the original source of the parties' interests), *aff'd per curiam*, 350 N.C. 375, 514 S.E.2d 89 (1999).]
4. For more on distributional factors, see *Distribution*, Part 4 of this Chapter.

#### G. Relationship with the Source of Funds Analysis (discussed more fully in Section VIII.C, below.)

1. When the marital gift presumption has been rebutted, the court should use the source of funds analysis to classify the property. [*McLeod v. McLeod*, 74 N.C. App. 144, 327 S.E.2d 910, *cert. denied*, 314 N.C. 331, 333 S.E.2d 488 (1985), *overruled in part on other grounds by Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986).]
2. When the marital gift presumption is not applicable, the court should use the source of funds analysis to classify the property. [*Riggs v. Riggs*, 124 N.C. App. 647, 478 S.E.2d 211 (1996) (marital gift presumption not applicable because marital residence was never held as entirety property), *review denied*, 345 N.C. 755, 485 S.E.2d 297 (1997).]

#### H. Personal Property

1. A presumption similar to the marital gift presumption applicable to entirety property has not been applied to personal property.
2. The deposit of funds into a joint account, standing alone, is not sufficient evidence to show a gift or intent to convert funds from separate property to marital property. [*Manes v. Harrison-Manes*, 79 N.C. App. 170, 338 S.E.2d 815 (1986) (annuity and bank account funded with husband's separate funds from an inheritance remained his separate property, even though he titled both jointly).]
3. Fact that wife deposited her separate personal injury settlement award into a joint account does not constitute an expressly stated intention that the property be considered marital. [*Lilly v. Lilly*, 107 N.C. App. 484, 420 S.E.2d 492 (1992).]
4. However, when separate funds are deposited into a joint account during the marriage, the party seeking to classify the funds as separate property must prove how much of the total value of the joint account on the date of separation (DOS) is separate property. [*Comstock v. Comstock*, 240 N.C. App. 304, 771 S.E.2d 602 (2015) (defendant failed to meet his burden of proof despite the fact that both parties agreed that separate funds had been deposited into the account during the marriage); and *Power v. Power*, 236 N.C. App. 581, 763 S.E.2d 565 (2014) (husband deposited inherited funds into marital account during the marriage but failed to trace those funds to the balance of the account on the DOS).]

## VIII. Classification of “Mixed” Property

### A. Definitions

1. Property may have both marital and separate property components. [*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); *Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260, *review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).]
2. Property having both marital and separate property components is sometimes referred to as “mixed” property or property having a dual classification or a dual nature. [*Goldston v. Goldston*, 159 N.C. App. 180, 582 S.E.2d 685 (2003) (recognizing that property can have a dual nature); *Ciobanu v. Ciobanu*, 104 N.C. App. 461, 409 S.E.2d 749 (1991) (property may have a dual character).]
3. For cases filed after Oct. 1, 1997, property may also be, at least in part, divisible property.

### B. How Assets Become “Mixed”

1. Mixed assets result from:
  - a. Appreciation. The value of separate property increases during the marriage due to marital effort. See [Section VI.E](#), above, addressing increase in value of separate property.
  - b. Acquisition. Property is acquired by a contribution from both separate and marital estates.
2. The characterization of an asset is important because:
  - a. When the value of separate property increases during the marriage, **the active/passive analysis is used**. See discussion of the active/passive analysis in [Section VI.E](#), above.
  - b. When property is acquired by a contribution from both separate and marital estates, **the source of funds analysis is used**. [*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).] See [Section VIII.C](#), below, for more on the source of funds analysis.
3. Despite the importance of differentiating between the active/passive and the source of funds approaches, appellate courts often confuse the two, speak of them interchangeably, or combine the two approaches. [See *McLeod v. McLeod*, 74 N.C. App. 144, 327 S.E.2d 910 (stating that under the source of funds analysis, an increase in the value of husband’s separate property was active appreciation and thus was marital property), *cert. denied*, 314 N.C. 331, 333 S.E.2d 488 (1985), *overruled in part on other grounds by Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986).]

### C. Source of Funds

1. The source of funds approach is used to identify the marital and separate property components of a mixed asset.
2. Under the source of funds approach, the value of an asset on the date of separation (DOS) is classified according to the monetary or other contributions used to “acquire” the asset.

[See *McLeod v. McLeod*, 74 N.C. App. 144, 327 S.E.2d 910, *cert. denied*, 314 N.C. 331, 333 S.E.2d 488 (1985), *overruled in part on other grounds by Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986).]

- a. Acquisition may be an ongoing process. [*Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260, *review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).]
  - b. Loan to husband alone of balance of purchase price of home was not an acquisition of a separate property interest in the house. Husband would acquire a separate interest only upon payment of the loan or reduction of the principal amount of the loan from his separate property between the date of loan closing and trial, which husband did not show. [*Brackney v. Brackney*, 199 N.C. App. 375, 682 S.E.2d 401 (2009) (in this case loan to husband was made after the date of separation, but the court of appeals noted that holdings in earlier cases regarding premarital secured debt applied equally to postseparation secured debt), *review withdrawn*, 363 N.C. 853, 694 S.E.2d 200 (2010).]
3. Under the source of funds approach, when both the marital and separate estates contribute to the **acquisition** of property, “each estate is entitled to an interest in the property in the ratio its contribution bears to the total investment in the property.” Thus, the separate estate and the marital estate each receive a proportionate and fair return on its investment. [*Brackney v. Brackney*, 199 N.C. App. 375, 384, 682 S.E.2d 401, 407 (2009) (citing *Wade v. Wade*, 72 N.C. App. 372, 382, 325 S.E.2d 260, 269, *review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985)), *review withdrawn*, 363 N.C. 853, 694 S.E.2d 200 (2010); *Glaspy v. Glaspy*, 143 N.C. App. 435, 443, 545 S.E.2d 782, 787 (2001) (citing *Davis v. Sineath (Davis)*, 129 N.C. App. 353, 498 S.E.2d 629 (1998)) (under the source of funds rule, “property is acquired through both marital and separate estates and each estate is entitled to an interest in the property in proportion to its contribution”); *Smith v. Smith*, 111 N.C. App. 460, 433 S.E.2d 196 (1993) (citing *Wade*), *rev’d in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994).]
4. To determine the ratio referenced in [Section VIII.C.3](#), immediately above, the monetary or other contributions by the marital and separate estates toward the acquisition of property must be identified and accounted for. [*McIver v. McIver*, 92 N.C. App. 116, 374 S.E.2d 144 (1988).]
5. The separate estate is entitled to:
- a. Retain as separate property the amount of separate property that the party contributed toward acquisition of the asset (i.e., the original investment, which under *Mishler v. Mishler*, 90 N.C. App. 72, 367 S.E.2d 385, *review denied*, 323 N.C. 174, 373 S.E.2d 111 (1988), includes any appreciation of separate property that occurred before the date of marriage) plus
  - b. A reasonable return on the original investment. [*Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260, *review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).]
    - i. In *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), the court held that the party seeking to prove a separate component of an asset must prove the reasonable rate of return by showing the passive appreciation of the separate component during the marriage.

6. Without proof of any return on the investment of separate property attributable to passive appreciation, the court may return only the base amount of the separate contribution. [*Carpenter v. Carpenter*, 781 S.E.2d 828 (N.C. Ct. App. 2016); *Smith v. Smith*, 111 N.C. App. 460, 480, 433 S.E.2d 196, 208 (1993), *rev'd in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994).] The marital estate is entitled to:
  - a. Any marital contribution to the acquisition of the property subsequent to marriage (the investment of marital funds) [*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); *McIver v. McIver*, 92 N.C. App. 116, 374 S.E.2d 144 (1988).] plus
  - b. Any appreciation on the marital contributions, whether active or passive. [*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).]
7. Under the source of funds approach, when both the marital and separate estates contribute assets to **improve** the property, “each estate is entitled to an interest in the property in the ratio its contribution bears to the total investment in the property. Thus, both the separate and marital estates receive a proportionate and fair return on [their] investment.” [*Rice v. Rice*, 159 N.C. App. 487, 497, 584 S.E.2d 317, 324 (2003) (quoting *Wade v. Wade*, 72 N.C. App. 372, 382, 325 S.E.2d 260, 269, *review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985)).]
  - a. When calculating the marital and separate interests in the passive appreciation of the marital residence during the marriage, the marital estate’s share could be based on improvements made to the home with marital property. [*Rice v. Rice*, 159 N.C. App. 487, 584 S.E.2d 317 (2003) (marital estate entitled to a return on the investment for improvements just as it was entitled to a return on investment for mortgage payments made).]

## D. Case Examples

1. Cases where property was acquired by a contribution from both separate and marital estates include the following:
  - a. *Goldston v. Goldston*, 159 N.C. App. 180, 582 S.E.2d 685 (2003) (relocation of house that was husband’s separate property to lot owned by husband and wife as tenants by entirety).
  - b. *Mishler v. Mishler*, 90 N.C. App. 72, 367 S.E.2d 385 (lots purchased by husband before marriage, with balance of mortgage being paid during the marriage), *review denied*, 323 N.C. 174, 373 S.E.2d 111 (1988).
  - c. *Willis v. Willis*, 86 N.C. App. 546, 358 S.E.2d 571 (1987) (real property purchased by wife before marriage; approximately \$10,000 paid on mortgage during the marriage).
  - d. *Lawrence v. Lawrence*, 100 N.C. App. 1, 394 S.E.2d 267 (1990) (investment trust inherited by husband, to which parties contributed \$10/month during the course of the marriage, was dual nature property).
  - e. *McIver v. McIver*, 92 N.C. App. 116, 374 S.E.2d 144 (1988) (lakefront home and pontoon boat acquired with husband’s separate funds before marriage; marital funds used to make loan payments during the marriage). [*But see King v. King*, 112

N.C. App. 92, 434 S.E.2d 669 (1993) (husband's payments during the marriage from his separate funds on marital debt associated with acquisition of closely held stock did not make stock a mixed asset; decision based on conclusion that stock was not acquired over time but was paid for in full at outset by family loan).]

- f. *Ross v. Ross*, 193 N.C. App. 247, 666 S.E.2d 889 (2008) (**unpublished**) (lot purchased by husband before marriage with house constructed on the lot during the marriage and equity acquired during the marriage), *review dismissed*, 363 N.C. 656, 685 S.E.2d 105 (2009). For a later appeal between the same parties further discussing trial court's treatment of the house and lot, see *Ross v. Ross*, 230 N.C. App. 28, 749 S.E.2d 84 (2013), and discussion in [Section VIII.G.1](#), below.

## E. Formulas

1. While cautioning against reliance on any one formula, the court of appeals has upheld the use of a formula to calculate the value of the separate and marital interests in a mixed asset.
2. In *Mishler v. Mishler*, 90 N.C. App. 72, 367 S.E.2d 385, *review denied*, 323 N.C. 174, 373 S.E.2d 111 (1988), the court calculated the separate and marital interests in two beach lots as follows:
  - a. The court made findings as follows:
    - i. The total amount of down payment and other contributions (including appreciation occurring before the date of marriage) made by husband before marriage,
    - ii. The total amount of principal paid during the marriage, and
    - iii. The fair market value of the lots on the date of marriage and on the date of separation (DOS). (There appears to have been no encumbrances on the DOS. Therefore, fair market value is the same as net value in this case.)
  - b. The court then used those figures in a formula:
    - i. The court multiplied the value on the date of separation by a fraction consisting of a numerator of the amount of principal paid during the marriage and a denominator of the total contribution to the acquisition of the property (actual marital and separate payments as well as premarital appreciation) to arrive at a dollar amount of marital interest. The difference between this figure and the value on the DOS was the value of the separate interest.
    - ii. The formula can be expressed as follows:
 
$$\text{Net value on DOS} \quad \times \quad \frac{\text{Total marital contribution}}{\text{Total contribution}} \quad = \quad \text{Value of marital interest}$$

$$\text{Net value on DOS} \quad \times \quad \text{Value of marital interest} \quad = \quad \text{Value of separate interest}$$
3. While the formula in *Mishler v. Mishler*, 90 N.C. App. 72, 367 S.E.2d 385, *review denied*, 323 N.C. 174, 373 S.E.2d 111 (1988), is not the only formula that may be used, [*Lawrence v. Lawrence*, 100 N.C. App. 1, 394 S.E.2d 267 (1990).] when valuing the marital and separate components of a mixed asset, the court must make findings similar to those in *Mishler*, set out above. [See *McIver v. McIver*, 92 N.C. App. 116, 374 S.E.2d 144 (1988)]

(on remand, trial court should make findings as to the respective contributions of the marital and separate estates of both husband and wife towards acquisition of the mixed assets; suggested findings include the amount of husband's equity in the property at the time of the marriage, the contributions to that equity during the marriage, and the value of improvements made to the property during the marriage).]

## F. Entirety Property

1. If entirety property is classified as marital pursuant to the marital gift presumption, the source of funds analysis is not used. The entire value of the property on the date of separation (DOS) is marital. See [Section VII](#), above. After Oct. 1, 2013, the equitable distribution statute specifies that real property owned as tenants by the entirety on the DOS is presumed to be marital property. [G.S. 50-20(b)(1), *amended by* S.L. 2013-103, § 1, effective Oct. 1, 2013).] See [Section IV.B](#), above, on the marital property presumption.
2. If the marital gift presumption is not applicable, the source of funds analysis is used when the property has been acquired by both separate and marital contributions. [*Riggs v. Riggs*, 124 N.C. App. 647, 478 S.E.2d 211 (1996) (marital gift presumption not applicable because marital residence was never held as entirety property; source of funds analysis used), *review denied*, 345 N.C. 755, 485 S.E.2d 297 (1997); *Lawrence v. Lawrence*, 100 N.C. App. 1, 394 S.E.2d 267 (1990); *McLeod v. McLeod*, 74 N.C. App. 144, 327 S.E.2d 910, *cert. denied*, 314 N.C. 331, 333 S.E.2d 488 (1985), *overruled in part on other grounds by Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986) (both *Lawrence* and *McLeod* stating that the source of funds analysis is used when presumption of a gift is rebutted).]

## G. Burden in Classification of a “Mixed” Asset

1. Once the party claiming that property is marital shows that the asset was acquired during the marriage and was owned on the date of separation (DOS), the burden shifts to the other party to establish the separate component of the asset.
  - a. If the party with the burden to establish the separate component of a mixed asset fails to meet that burden, the property will be classified as marital. In *Ross v. Ross*, 230 N.C. App. 28, 749 S.E.2d 84 (2013), husband purchased a beach lot in 1987 with a down payment and proceeds of a \$65,000 loan; after 1990 marriage, parties constructed a house on the lot; \$65,000 note was paid in full in 1999, before 2002 separation. Court held that 1999 loan payoff, standing alone, shifted burden to husband to show what, if any, portion of the loan was reduced before marriage from his separate property. When husband did not present any evidence of premarital payments (and had been sanctioned for his refusal to provide this information in discovery), burden not met and the entire \$65,000 loan reduction, or the increase in equity resulting from the loan satisfaction, was marital property.
2. Spouse claiming that portion of commingled account was partially separate had burden to show how much of the source of the contested property was his separate property. [*Comstock v. Comstock*, 240 N.C. App. 304, 771 S.E.2d 602 (2015); *Clark v. Dyer*, 236 N.C. App. 9, 762 S.E.2d 838 (2014), *cert. denied*, 778 S.E.2d 279 (N.C. 2015); *Power v. Power*, 236 N.C. App. 581, 763 S.E.2d 565 (2014); *Minter v. Minter*, 111 N.C. App. 321, 432 S.E.2d 720, *review denied*, 335 N.C. 176, 438 S.E.2d 201 (1993).]



3. Wife failed to show that the source of the contested property was her separate property, as she was unable to trace her inheritances to assets owned by the parties on the DOS. [*Holterman v. Holterman*, 127 N.C. App. 109, 448 S.E.2d 265, review denied, 347 N.C. 267, 493 S.E.2d 455 (1997).]

## IX. Classification of Property Acquired After Separation

### A. Marital Property

1. The general rule is that property acquired after separation is not marital property. [*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); *Becker v. Becker*, 88 N.C. App. 606, 364 S.E.2d 175 (1988) (for classification purposes, the marital estate is frozen as of the date of separation (DOS)).]
2. Exceptions to the general rule.
  - a. Exchange or conversion of marital property.
    - i. Property that comes into the possession of one spouse after the DOS as the result of an exchange or conversion of marital funds or assets is marital property. [*Freeman v. Freeman*, 107 N.C. App. 644, 421 S.E.2d 623 (1992); *Mauser v. Mauser*, 75 N.C. App. 115, 330 S.E.2d 63 (1985).]
    - ii. Property acquired after separation in exchange for marital funds is considered marital property to the extent of the contribution of marital funds. [*Brackney v. Brackney*, 199 N.C. App. 375, 682 S.E.2d 401 (2009) (because \$89,000 of marital funds were exchanged for equity in a house, that house was acquired in exchange for marital property and was marital property unless husband could demonstrate that some portion of the property was acquired by the use of his separate funds), review withdrawn, 363 N.C. 853, 694 S.E.2d 200 (2010).]
  - b. Vested right acquired before separation.
    - i. Before the creation of divisible property in 1997, the court of appeals held that:
      - (a) Property that comes into the possession of one spouse after the DOS may be marital property when the right to receive that property was “vested” on the DOS. [*Smith v. Smith*, 111 N.C. App. 460, 433 S.E.2d 196 (1993) (citing *Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986)), rev'd in part on other grounds, 336 N.C. 575, 444 S.E.2d 420 (1994); *Freeman v. Freeman*, 107 N.C. App. 644, 421 S.E.2d 623 (1992).] For a post-1997 case applying a similar analysis, see *Allen v. Allen*, 168 N.C. App. 368, 607 S.E.2d 331 (2005) (tax refund from a joint return filed before the DOS was properly classified as marital property when the right to receive the refund was acquired during the marriage and before the DOS, even though refund was not received until after the DOS).]
      - (b) If the right to receive property was not certain as of the DOS, the asset should not be classified as marital. [*Godley v. Godley*, 110 N.C. App. 99,

429 S.E.2d 382 (1993) (commissions, not vested or certain as of the DOS, received by husband after separation were not marital property); *Edwards v. Edwards*, 110 N.C. App. 1, 428 S.E.2d 834 (husband's right to receive bonus was uncertain on the DOS, so bonus received after separation was not marital property), *cert. denied*, 335 N.C. 172, 436 S.E.2d 374 (1993).]

- ii. After 1997, G.S. 50-20(b)(4)b. provides that all property received after the DOS but before the date of distribution that was acquired as the result of efforts of either spouse during the marriage is divisible property. [*But see Simon v. Simon*, 231 N.C. App. 76, 753 S.E.2d 475 (2013) (court indicated that retained earnings of Subchapter S corporation distributed to husband after the DOS should be classified as marital property unless husband could show that the distribution was compensation for postseparation labor, rather than preseparation labor).]
3. Property or value acquired after separation may be classified as divisible property in cases filed after Oct. 1, 1997. See [Section IX.B](#), below.
4. Treatment of property or income acquired after separation. If property acquired after separation does not fit either exception listed in [Section IX.A.2.a](#) or [IX.A.2.b](#), above, and is not divisible property, then it may be considered as a distributional factor. For more on distribution factors, see *Distribution*, Part 4 of this Chapter. [*See, e.g., Chandler v. Chandler*, 108 N.C. App. 66, 422 S.E.2d 587 (1992), *Gum v. Gum*, 107 N.C. App. 734, 421 S.E.2d 788 (1992), and *Truesdale v. Truesdale*, 89 N.C. App. 445, 366 S.E.2d 512 (1988) (before statute was amended to create divisible property, income and property received after the DOS was treated as a distribution factor).]

## B. Divisible Property (Cases Filed After Oct. 1, 1997)

1. Divisible property is a category of postseparation property that the trial court must classify, value, and distribute. [G.S. 50-20(a).] Divisible property is not marital property. When evidence shows the existence of divisible property, the trial court must classify, value, and distribute the divisible property. [*Hill v. Sanderson*, 781 S.E.2d 29 (N.C. Ct. App. 2015) (trial court erred in failing to classify and distribute passive postseparation increase in value of marital real property); *Nicks v. Nicks*, 774 S.E.2d 365 (N.C. Ct. App. 2015) (trial court erred in failing to classify and distribute postseparation increase in value of marital IRA); *Cheek v. Cheek*, 211 N.C. App. 183, 712 S.E.2d 301 (2011) (case remanded where judgment did not account for the significant postseparation decrease in value of marital retirement accounts).]
2. Categories of divisible property.
  - a. Postseparation appreciation or depreciation of marital and divisible property occurring after the date of separation (DOS) and prior to the date of distribution, except to the extent the appreciation or depreciation was the result of postseparation actions or activities of a spouse. [G.S. 50-20(b)(4)a.]
    - i. Presumption in favor of this category of divisible property.
      - (a) “Under the plain language of the statute [G.S. 50-20(b)(4)a.], all appreciation and diminution in value of marital and divisible property is presumed to be divisible property *unless* the trial court finds that the change in value is attributable to the postseparation actions of one spouse.” [*Wirth v. Wirth*,

- 193 N.C. App. 657, 661, 668 S.E.2d 603, 607 (2008) (emphasis in original); *Romulus v. Romulus*, 215 N.C. App. 495, 715 S.E.2d 308 (2011) (citing *Wirth*); *Cheek v. Cheek*, 211 N.C. App. 183, 712 S.E.2d 301 (2011) (citing *Wirth*); *Gould v. Gould*, 225 N.C. App. 264, 736 S.E.2d 649 (2013) (**unpublished**) (citing *Cheek*).]
- (b) Evidence of increased value of marital IRA on the date of trial was sufficient to support classification of the increase as divisible property even though the actual date of distribution, meaning the date the equitable distribution judgment was entered, was four months after the date of trial. [*Nicks v. Nicks*, 774 S.E.2d 365 (N.C. Ct. App. 2015).]
- (c) However, it is error to distribute postseparation gains and losses on a marital account when there was no evidence of the value of the account on the date of distribution. [*Burger v. Burger*, 790 S.E.2d 683 (N.C. Ct. App. 2016) (gains and losses can be classified as divisible property only if evidence shows an increase or decrease in the value of the account after separation and before the date of distribution).]
- (d) Presumption that postseparation increase in value of a dental practice was divisible property was not rebutted by showing that husband continued to work at the practice after the DOS. [*Romulus v. Romulus*, 215 N.C. App. 495, 715 S.E.2d 308 (2011) (simply showing that husband continued to do everything he did before separation did not establish that his actions caused the increase in value).]
- (e) Wife met her burden of proving the existence of divisible property simply by testifying that, in her opinion, the value of the marital home increased by \$35,000 during separation. Any increase in value of marital property after the DOS is presumed to be passive, so if the court were to find wife's opinion to be credible, increase should be classified as divisible unless husband can establish that the increase was active. [*Lund v. Lund*, 779 S.E.2d 175 (N.C. Ct. App. 2015).]
- ii. Critical issue under G.S. 50-20(b)(4)a. "is whether the increase or decrease in the value of the subject property 'is the result of' post-separation actions or activities of a spouse." [*Brackney v. Brackney*, 199 N.C. App. 375, 386, 682 S.E.2d 401, 408 (2009) (emphasis in original), *review withdrawn*, 363 N.C. 853, 694 S.E.2d 200 (2010).] Findings are required on this point. [*Gould v. Gould*, 225 N.C. App. 264, 736 S.E.2d 649 (2013) (**unpublished**) (on remand, trial court was directed to find whether the decrease in value was due to husband's actions or to passive market forces).]
- iii. "Passive appreciation" refers to enhancement of the value of property due solely to inflation, changing economic conditions, or market forces or other such circumstances beyond the control of either spouse. "Active appreciation" refers to "financial or managerial contributions" of one of the spouses. [*Brackney v. Brackney*, 199 N.C. App. 375, 385-86, 682 S.E.2d 401, 408 (2009) (citing *O'Brien v. O'Brien*, 131 N.C. App. 411, 508 S.E.2d 300 (1998), *review denied*, 350 N.C. 98, 528 S.E.2d 365 (1999)), *review withdrawn*, 363 N.C. 853, 694 S.E.2d 200 (2010).]

- iv. Appreciations and diminutions in value classified as divisible property under G.S. 50-20(b)(4)a. may be divided among the parties in the discretion of the court, even if the asset is distributed to one spouse and the passive loss is distributed to the other spouse. [*Zurosky v. Shaffer*, 236 N.C. App. 219, 763 S.E.2d 755 (2014) (citing *Wirth v. Wirth*, 204 N.C. App. 372, 696 S.E.2d 202 (2010) (**unpublished**)) (upholding distribution of the marital interest in a vacation home to husband and distribution of the passive loss in the value of that home to wife).] See [Distribution](#), Part 4 of this Chapter.
- v. When the trial court finds that the DOS value and the date of distribution value of divisible property are the same, there is no active or passive change for the trial court to consider. [*Zurosky v. Shaffer*, 236 N.C. App. 219, 763 S.E.2d 755 (2014) (after rejecting expert testimony as to date of distribution value as unreliable, trial court adopted the DOS value as the date of distribution value; with no diminution in value, trial court did not err by not determining active or passive components for a net change of \$0).]
- vi. Consideration of property appreciation as divisible property precluded by language in a consent order.
  - (a) Where a consent order making an interim distribution of property provided that the distribution of a condominium to wife was “final” for purposes of equitable distribution (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).]
- vii. Stipulation that appreciation was the result of market forces alone resulted in classification of appreciation as divisible property.
  - (a) Where parties had stipulated 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, trial court properly classified the appreciation as divisible property. [*Brackney v. Brackney*, 199 N.C. App. 375, 682 S.E.2d 401 (2009) (rejecting husband’s argument that his actions in acquiring and closing a loan in his name only, so that the parties would not forfeit their down payment, preserved marital property, making the subsequent appreciation the result of his actions and thus active; rather, court found husband’s preservation efforts provided the opportunity for market forces to increase the house’s value), *review withdrawn*, 363 N.C. 853, 694 S.E.2d 200 (2010).] For more on stipulations, see [Equitable Distribution Overview and Procedure](#), Part 1 of this Chapter, Section V, and [Valuation](#), Part 3 of this Chapter, [Section III.A](#).
- viii. Postseparation appreciation or depreciation caused by the actions or activities of **one** spouse is not divisible property. [G.S. 50-20(b)(4)a.]
  - (a) The evidence must be sufficient to establish whether the appreciation or depreciation was the result of the actions of a party or whether the matter is subject to remand for further evidence and findings. [See *Allen v. Allen*,

- 168 N.C. App. 368, 607 S.E.2d 331 (2005) (remand was necessary when evidence was insufficient to determine whether husband's actions contributed to the diminution in stock value).]
- (b) When it is impossible for a court to determine whether appreciation or diminution in value is due to the actions of one spouse or due to forces beyond the spouse's control, the presumption in favor of divisible property is not rebutted and the court must find that the increase or decrease in value is divisible property. [*Wirth v. Wirth*, 193 N.C. App. 657, 668 S.E.2d 603 (2008) (when court was unable to separate losses incurred due to husband's active control from losses that were beyond husband's control, trial court erred when it failed to classify a postseparation decrease in the value of a corporation, which was marital property and owned solely by husband, as divisible property; error to consider decrease as a distributional factor).]
  - (c) Postseparation depreciation in value of car was properly classified as divisible property where there was no evidence linking the decrease in value to the actions of one spouse. [*Barton v. Barton*, 215 N.C. App. 235, 715 S.E.2d 529, *appeal dismissed*, 365 N.C. 364, 719 S.E.2d 20 (2011).] Depreciation caused by **both** parties is divisible property. [*Robertson v. Robertson*, 167 N.C. App. 567, 605 S.E.2d 667 (2004) (both parties' neglect of the residence contributed to its decrease in value, which the parties should share).]
  - (d) Postseparation loss in value of wife's investment accounts properly classified as divisible property based on wife's testimony that value of accounts declined over two-year period before trial due to market forces. [*Watkins v. Watkins*, 228 N.C. App. 548, 746 S.E.2d 394 (2013), *review denied*, 367 N.C. 290, 753 S.E.2d 670 (2014).]
  - (e) Where husband actively managed marital limited liability company (LLC) after separation and was not paid a salary, trial court conclusion that his work caused the increase in value of the LLC after the DOS was supported by the evidence. [*Montague v. Montague*, 238 N.C. App. 61, 767 S.E.2d 71 (2014).]
- ix. Cases classifying appreciation of separate property as active or passive should be helpful in determining whether postseparation appreciation of marital property is the result of the effort of a spouse. See cases in [Section VI.E](#), above.
  - x. Classification of postseparation passive appreciation of a mixed real property asset.
    - (a) To determine the interest of each spouse in the passive postseparation appreciation of a mixed real property asset, the trial court may apply the marital and separate property percentages *as of the date of separation* (DOS) to the passive postseparation appreciation of the asset.
    - (b) In *Ross v. Ross*, 230 N.C. App. 28, 749 S.E.2d 84 (2013), 13.5 percent of the DOS value of the mixed asset, a beach house constructed during the marriage on a lot purchased by husband prior to marriage, was separate property, while 86.5 percent of the DOS value of the beach house was marital property.

- (c) In *Ross v. Ross*, 230 N.C. App. 28, 749 S.E.2d 84 (2013), the passive postseparation appreciation of the beach property should have been classified by applying the percentages identified above so that 13.5 percent of the appreciation of the beach property was separate property, while 86.5 percent of the appreciation was marital property.
  - (d) In *Ross v. Ross*, 230 N.C. App. 28, 749 S.E.2d 84 (2013), the trial court erred in its classification of the passive postseparation appreciation of the beach property by using a calculation that included the separate, marital, and divisible contributions of the parties (in the form of postseparation payments of each party) *up to the date of distribution*. The inclusion of the postseparation payments of each party changed the ownership interest of the parties in the beach property after the DOS, which was error.
  - (e) See [Section VIII](#), above, for more on classification of “mixed” property.
- b. Property or property rights received postseparation and before the date of distribution that was/were acquired as a result of the efforts of either spouse during the marriage and before the date of separation (DOS). [G.S. 50-20(b)(4)b. See *Ubertaccio v. Ubertaccio*, 359 N.C. 175, 604 S.E.2d 912 (2004) (where proceeds from the sale of stock grants acquired as the result of the efforts of wife during the marriage and before the DOS, and received by wife before the date of distribution, were properly classified as divisible property), *aff’g per curiam for reasons stated in concurring opinion in* 161 N.C. App. 352, 588 S.E.2d 905 (2003) (Levinson, J., concurring in result only).]
- i. This category includes commissions, bonuses, and contractual rights. [G.S. 50-20(b)(4)b.]
    - (a) Stock grants received by wife contemporaneous with her employment and before the DOS, which gave her the right to receive “units” of value if she remained employed for a specific duration, and the proceeds from the sale of the grants after the DOS but before the date of distribution, were divisible property. [*Ubertaccio v. Ubertaccio*, 359 N.C. 175, 604 S.E.2d 912 (2004), *aff’g per curiam for reasons stated in concurring opinion in* 161 N.C. App. 352, 588 S.E.2d 905 (2003) (Levinson, J., concurring in result only).]
    - (b) The focus is on the “source” from which the property was generated and not on whether a spouse’s rights in the property have vested. [*Ubertaccio v. Ubertaccio*, 359 N.C. 175, 604 S.E.2d 912 (2004) (determination that wife’s employment benefit was not a stock option not dependent on whether benefit was vested or nonvested), *aff’g per curiam for reasons stated in concurring opinion in* 161 N.C. App. 352, 588 S.E.2d 905 (2003) (Levinson, J., concurring in result only).]
  - ii. Results in the following cases may change as a result of divisible property being added as a category of property subject to ED:
    - (a) *Edwards v. Edwards*, 110 N.C. App. 1, 428 S.E.2d 834 (bonus received after separation based on work performed during the marriage held not to be subject to distribution because the right to receive the bonus was not ‘vested’ on the date of separation; bonus may be divisible under divisible

- property statute if found to have been earned as the result of the efforts of a spouse during the marriage), *cert. denied*, 335 N.C. 172, 436 S.E.2d 374 (1993).
- (b) *Godley v. Godley*, 110 N.C. App. 99, 429 S.E.2d 382 (1993) (commissions received after separation based on work performed during the marriage held not to be subject to distribution because the right to receive the commissions was not “vested” on the date of separation; commission may be divisible under divisible property statute if found to have been earned as the result of the efforts of a spouse during the marriage).
- c. Passive income from marital property received after the date of separation, including, but not limited to, interest and dividends. [G.S. 50-20(b)(4)c.]
- i. Interest earned during separation on a party’s separate property is not divisible property. [See *Wirth v. Wirth*, 193 N.C. App. 657, 664, 668 S.E.2d 603, 608 (2008) (2005 consent order provided for the sale of the marital residence, with the net proceeds thereof to be distributed to wife; proceeds from 2006 sale earned interest that husband contended was divisible property; proceeds upon distribution to wife pursuant to the 2005 consent order became wife’s separate property; interest earned on the proceeds was wife’s separate property and could not be considered divisible property; trial court correctly found that the 2005 consent order “preclude[d] any additional value being associated with (the former marital residence) in the form of divisible property”).]
- ii. Rental income generated from marital property after the DOS represents passive income and, therefore, is properly classified as divisible property. [*Lund v. Lund*, 779 S.E.2d 175 (N.C. Ct. App. 2015).]
- iii. Trial court erred by not classifying as divisible property the retained earnings, or profit, of a Subchapter S corporation distributed postseparation to defendant. Defendant’s right to receive the profit distribution arose from ownership of shares of stock in the Subchapter S corporation and may have been acquired in part due to his pre-separation labor. Matter was remanded with instructions to classify and distribute the profit distribution as divisible property, except to the extent that defendant could prove an active post-DOS component. [*Simon v. Simon*, 231 N.C. App. 76, 753 S.E.2d 475 (2013) (DOS was Sept. 16, 2006; profit distribution was for calendar year 2006; any active post-DOS component would not be divisible property). Cf. *Hill v. Hill*, 229 N.C. App. 511, 748 S.E.2d 352 (2013) (if parties’ Subchapter S corporation was marital property, retained earnings of the corporation distributed postseparation would be marital property; court on remand could consider how income was generated as a distributional factor; Subchapter S corporation in this case was owned equally by husband and wife and was incorporated during the marriage).]
- iv. Postseparation cash withdrawals by defendant from a marital limited liability corporation with a shopping center as its only asset, were part divisible property and part defendant’s separate property. Withdrawal of \$304,014 was compensation for defendant’s active postseparation management of the shopping center and was his separate property, while a withdrawal of \$1,879,748 was found to

be a distribution of passive income earned by a marital asset, and thus divisible property. [*Binder v. Binder*, 231 N.C. App. 514, 753 S.E.2d 743 (2013) (**unpublished**) (defendant’s postseparation management efforts included managing shopping center tenants, cleaning toilets, and other daily management services; testimony supported finding that 5 percent of the center’s rental income, which came to \$304,014, was a customary management fee and supported award of that amount to defendant as compensation for postseparation management of the center).]

- v. When parties listed postseparation funds received by defendant from marital limited liability company (LLC) on tax returns as passive distributions from the LLC to shareholders, trial court erred in determining that payments were compensation to husband for his postseparation work with the LLC. [*Montague v. Montague*, 238 N.C. App. 61, 767 S.E.2d 71 (2014).]
- vi. Shareholder distributions from a marital limited liability company generally are passive income that should be classified as divisible property. [*Montague v. Montague*, 238 N.C. App. 61, 65–66, 767 S.E.2d 71, 74–75.]
- vii. However, retained earnings of a limited liability company (LLC) shown on wife’s income tax returns as nonpassive income were property belonging to the LLC and were not funds paid to wife. [*Hill v. Sanderson*, 781 S.E.2d 29 (N.C. Ct. App. 2015) (trial court did not err by not classifying the monies as divisible property because the LLC had not made distributions to shareholders; the income remained property of the LLC even though it was shown on wife’s tax return).]
- viii. For more discussion about income from marital LLCs, see Cheryl Daniels Howell, *Equitable Distribution: LLCs and Divisible Property*, UNC SCH. OF GOV’T: ON THE CIVIL SIDE BLOG (Nov. 13, 2015), <http://civil.sog.unc.edu/equitable-distribution-llcs-and-divisible-property>.
- ix. Active postseparation income from marital property remains a distributional factor.
- x. Results in the following pre-1997 cases may change as a result of divisible property being added as a category of property subject to ED:
  - (a) *Leighow v. Leighow*, 120 N.C. App. 619, 463 S.E.2d 290 (1995) (court held postseparation interest income from marital property could not be divided) (under divisible property statute, postseparation interest income from marital property may be divisible property if the income was not earned as the result of the postseparation efforts of a spouse).
  - (b) *Chandler v. Chandler*, 108 N.C. App. 66, 422 S.E.2d 587 (1992) (court held postseparation rental income could not be divided) (under divisible property statute, postseparation rental income may be divisible property if the income was not earned as the result of the postseparation efforts of a spouse).
- d. Passive increases and passive decreases in marital debt and finance charges and interest related to marital debt. [G.S. 50-20(b)(4)d., *amended by* S.L. 2013-103, § 1, effective Oct. 1, 2013, to add “passive” before increases and decreases; amended by S.L. 2002-159, § 33.5, effective Oct. 11, 2002, to provide that divisible property



includes decreases in marital debt.] For a discussion of the 2013 amendment, see 2014 Howell Bulletin.]

- i. Increases and decreases must relate to marital debt.
  - (a) Wife's postseparation draw on the parties' equity line of credit, and the finance charges and interest arising from that draw, were her separate debt and were not marital debt or divisible property. [*Warren v. Warren*, 175 N.C. App. 509, 623 S.E.2d 800 (2006) (trial court on remand should take into account husband's payment of finance charges associated with wife's separate debt).]
- ii. Between Oct. 11, 2002, and Oct. 1, 2013, G.S. 50-20(b)(4)d. provided that **all** increases and decreases in marital debt after the DOS were divisible debt.
  - (a) That version of the statute required a trial judge deciding an ED case to make findings classifying and distributing increases and decreases in marital debt. [*See Bodie v. Bodie*, 221 N.C. App. 29, 727 S.E.2d 11 (2012).] See [Distribution](#), Part 4 of this Chapter, [Section VIII.C](#) for treatment of a post-separation payment as either a credit or a distributional factor.
- iii. Because divisible debt now is defined to include only passive changes in the value of marital debt, postseparation decreases in marital debt caused by post-separation payments on that debt no longer will be divisible debt. [*See Hay v. Hay*, 148 N.C. App. 649, 559 S.E.2d 268 (2002) (holding that change in value of property caused by one party making payments on the mortgage was an "active" change, rather than a "passive" one).]
- iv. The 2013 change to G.S. 50-20(b)(4)d. applies to payments on a marital debt made on or after Oct. 1, 2013. [*Lund v. Lund*, 779 S.E.2d 175 (N.C. Ct. App. 2015) (citing *Cooke v. Cooke*, 185 N.C. App. 101, 647 S.E.2d 662 (2007), review denied, 362 N.C. 175, 657 S.E.2d 888 (2008), and *Warren v. Warren*, 175 N.C. App. 509, 623 S.E.2d 800 (2006)).]
- v. For discussion of postseparation payment of marital debt, see [Section XIII](#), below.

## X. Classification of Equitable Interests

### A. Trusts

1. Both legal and equitable interests in real and personal property are subject to distribution under G.S. 50-20. [*Upchurch v. Upchurch*, 122 N.C. App. 172, 468 S.E.2d 61, review denied, 343 N.C. 517, 472 S.E.2d 26 (1996) (*Upchurch I*).]
2. "[I]n the course of an equitable distribution proceeding, equitable interests may be recognized and wrested from the hands of a legal title holder by imposition of a constructive trust." [*Upchurch v. Upchurch*, 128 N.C. App. 461, 463, 495 S.E.2d 738, 739, review denied, 348 N.C. 291, 501 S.E.2d 925 (1998) (*Upchurch II*).]

3. For more information, see Cheryl Daniels Howell, *Equitable Distribution: When Marital Property Is Not Owned by a Party*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Feb. 17, 2016), <http://civil.sog.unc.edu/equitable-distribution-when-marital-property-is-not-owned-by-a-party>.

## B. Third Party Is a Necessary Party

1. When a trial court is being asked to impose a trust, the third-party legal owner of the property at issue is a necessary party to the equitable distribution (ED) proceeding, with his participation limited to the issue of ownership of that property. [*Upchurch v. Upchurch*, 122 N.C. App. 172, 468 S.E.2d 61, review denied, 343 N.C. 517, 472 S.E.2d 26 (1996) (*Upchurch I*); *Dechkovskaia v. Dechkovskaia*, 232 N.C. App. 350, 754 S.E.2d 831 (citing *Upchurch I*) (minor child was a necessary party when he held legal title to real property that was part of ED action between parents), review denied, 367 N.C. 506, 758 S.E.2d 870 (2014). See also *Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985) (third party must be joined in the lawsuit and afforded due process before a court can deprive the third party of rights).]
2. See also *Nicks v. Nicks*, 774 S.E.2d 365 (N.C. Ct. App. 2015) (trust that owned limited liability company (LLC) on the date of separation must be joined as a party to the ED proceeding before the court can impose a constructive trust on the LLC to bring it within the marital estate); and *Tanner v. Tanner*, 789 S.E.2d 888 (N.C. Ct. App. 2016) (husband's mother must be joined as a necessary party before trial court can impose a constructive trust on property transferred to her by husband shortly before the parties separated).
3. Right of the third party to a jury trial. The third-party owner has no 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 (1999), 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).]
4. Appointment of a guardian ad litem (GAL) for minor. When a minor child becomes a party to an action, the trial court must appoint a G.S. 1A-1, Rule 17 GAL for the child. [G.S. 1A-1, Rule 17(b). See *Dechkovskaia v. Dechkovskaia*, 232 N.C. App. 350, 354 n.4, 754 S.E.2d 831, 835 n.4 (citing *Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985)) (when mother claimed child held real property in a constructive trust for the marital estate, child required to be made a party to the action and represented by a GAL before the child could be divested of an ownership interest in the property; in this case, GAL appointed to investigate custodial issues and not to represent the child's property interests was not sufficient), review denied, 367 N.C. 506, 758 S.E.2d 870 (2014).]

## C. Title to the Property Should Be Resolved First

1. If one of the trust situations set out in [Section X.D](#), immediately below, is established, the property can be ordered conveyed to the husband and wife and treated as other marital property. [See *Gragg v. Gragg*, 94 N.C. App. 134, 379 S.E.2d 684 (1989).]

## D. Types of Trusts

1. Order to convey property based on finding that one of the three types of trusts listed below has been established. The court can order that title be conveyed to the husband and wife, or to one of them, by finding one of the following:
  - a. An express trust, which is one created by contract, express or implied;
  - b. A resulting trust, which arises from the presumed intent of the parties at the time title is taken by one party under facts and circumstances showing that the beneficial interest in the real or personal property is in another; [See *Tuwamo v. Tuwamo*, 790 S.E.2d 331 (N.C. Ct. App. 2016) (discussing how resulting trusts arise).]
  - c. A constructive trust, which is a duty imposed by a court of equity to prevent the unjust enrichment of the title holder when he acquired title through fraud, breach of duty, or some other circumstance making it inequitable to retain it. [*Upchurch v. Upchurch*, 122 N.C. App. 172, 468 S.E.2d 61, review denied, 343 N.C. 517, 472 S.E.2d 26 (1996) (*Upchurch I*); *Tuwamo v. Tuwamo*, 790 S.E.2d 331 (N.C. Ct. App. 2016). See also *Glaspy v. Glaspy*, 143 N.C. App. 435, 545 S.E.2d 782 (2001) (further defining a constructive trust and requiring that facts supporting a constructive trust on real property be supported by clear and convincing evidence); *Dechkovskaia v. Dechkovskaia*, 232 N.C. App. 350, 754 S.E.2d 831 (citing *Glaspy*) (trial court must support determination that houses were held in a constructive trust created during the marriage by findings based on clear and convincing evidence), review denied, 367 N.C. 506, 758 S.E.2d 870 (2014).]

## E. Burden of Proof

1. The party wishing to establish a trust has the burden to show its existence by clear, strong, and convincing evidence. [*Upchurch v. Upchurch*, 122 N.C. App. 172, 468 S.E.2d 61, review denied, 343 N.C. 517, 472 S.E.2d 26 (1996) (*Upchurch I*).]

## F. Failure to Pray for Trust Is No Bar

1. A trial court is entitled to create a constructive trust even though a party did not expressly request such relief in the complaint. [*Weatherford v. Keenan*, 128 N.C. App. 178, 493 S.E.2d 812 (1997), review denied, 348 N.C. 78, 505 S.E.2d 887 (1998).]

## G. Cases Imposing a Constructive Trust

1. *Upchurch v. Upchurch*, 128 N.C. App. 461, 463, 495 S.E.2d 738, 738 (court imposed a constructive trust in favor of wife on certain bonds, title to which was transferred shortly before separation from husband to the parties' son, and on certain notes titled in whole or in part to the son), review denied, 348 N.C. 291, 501 S.E.2d 925 (1998) (*Upchurch II*).
2. *Weatherford v. Keenan*, 128 N.C. App. 178, 493 S.E.2d 812 (1997) (court imposed a constructive trust in favor of wife on one-half the net value of improvements made to the parties' home, which was originally titled in husband's parents but which husband had inherited after separation), review denied, 348 N.C. 78, 505 S.E.2d 887 (1998).

## H. Case Imposing a Resulting Trust

1. *Gragg v. Gragg*, 94 N.C. App. 134, 379 S.E.2d 684 (1989) (jury verdict in favor of wife finding a resulting trust upheld; husband's father held legal title to parties' marital home, for which he had made down payment and obtained purchase money financing; parties had made monthly payments for ten years at time of separation.)

## XI. Classification of Specific Assets

### A. Pension and Retirement Benefits and Other Deferred Compensation

1. All vested and nonvested pension, retirement, and other deferred compensation rights are marital property. Vested and nonvested military pensions eligible under the Uniformed Services Former Spouses' Protection Act (USFSPA) are marital property. [G.S. 50-20(b)(1).]
2. Stock options. Like retirement benefits, stock options are a salary substitute or a deferred compensation benefit. [*Fountain v. Fountain*, 148 N.C. App. 329, 559 S.E.2d 25 (2002). *But see Ubertaccio v. Ubertaccio*, 359 N.C. 175, 604 S.E.2d 912 (2004) (disagreeing with the implication in *Fountain* that all forms of salary substitutes or compensation, the receipt of which is deferred, such as stock options, must be classified and distributed pursuant to G.S. 50-20.1), *aff'g per curiam for reasons stated in concurring opinion in* 161 N.C. App. 352, 588 S.E.2d 905 (2003) (Levinson, J., concurring in result only).]
  - a. A stock option is "the right, or option, to buy a certain number of shares of corporate stock within a specified period at a fixed price." [CLARENCE E. HORTON, JR., *Principles of Valuation in North Carolina Equitable Distribution Actions*, Special Series No. 10, at 35 (UNC Institute of Government, Apr. 1993).]
  - b. Often the fixed price matches the stock price at the time the option is granted, but it may be higher or lower than the stock price. [*See Ubertaccio v. Ubertaccio*, 359 N.C. 175, 604 S.E.2d 912 (2004) (citing *Equitable Distribution of Stock Options*, 17 EQUITABLE DISTRIBUTION J. 85 (Aug. 2000)) (discussing characteristics of stock options when determining that an employee benefit was a stock grant and not an option), *aff'g per curiam for reasons stated in concurring opinion in* 161 N.C. App. 352, 588 S.E.2d 905 (2003) (Levinson, J., concurring in result only).]
  - c. Marital property includes vested and nonvested stock options. [G.S. 50-20(b)(1).] An earlier version of G.S. 50-20(b)(1) allowed only vested pensions to be treated as marital property. [*See Hall v. Hall*, 88 N.C. App. 297, 363 S.E.2d 189 (1987) (finding that options that are not exercisable as of the date of separation (DOS) and that may be lost are not vested and are the separate property of the employee spouse).]
  - d. For actions filed after Oct. 1, 1997, options that are compensation for marital effort may be divisible property if received after separation and before distribution. See definition of divisible property in [Section III.D](#), above.
3. For more on the classification, valuation, and distribution of pension and retirement benefits, including stock options, see [Pension and Retirement Benefits](#), Part 5 of this Chapter.

## B. Personal Injury Proceeds

1. General rule. Classification of personal injury proceeds as marital or separate depends on what the award was intended to replace. [*Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986) (adopting what is referred to as the “analytical approach”).]
  - a. That part of the award compensating the injured spouse for pain and suffering, disability, disfigurement, or lost limbs (“noneconomic loss”), as well as postseparation lost earning capacity, postseparation lost wages, and postseparation hospital and medical expenses, is classified as the **separate** property of the injured spouse;
  - b. That part of the award compensating for lost wages and lost earning capacity during the marriage and before separation, and for medical and hospital expenses paid out of marital funds, is classified as **marital** property; and
  - c. That part of the award compensating the noninjured spouse for the loss of services or loss of consortium is classified as the **separate** property of the noninjured spouse. [*Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986); *Lilly v. Lilly*, 107 N.C. App. 484, 420 S.E.2d 492 (1992), and *Dunlap v. Dunlap*, 85 N.C. App. 324, 354 S.E.2d 734 (1987) (both citing *Johnson*).]
2. Burden of proof.
  - a. Award received **after** separation for injuries sustained during the marriage.
    - i. In *Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986), on remand, the burden was placed on the injured spouse, the husband, to show by a preponderance of the evidence what amount of award received after the date of separation (DOS) represents compensation for loss of, or injury to, his separate property; the noninjured spouse, the wife, will have burden to show by a preponderance of the evidence what portion of the award compensates for her separate property; any portion not shown to be compensation for separate property of either the husband or wife must necessarily be marital. Essentially, *Johnson* required each spouse to prove what portion of the award compensates that spouse for a loss to his or her separate property, with any portion not accounted for “falling into” the category of marital property.
    - ii. In *Freeman v. Freeman*, 107 N.C. App. 644, 421 S.E.2d 623 (1992), discussed in [Section XI.C](#), below, a workers’ compensation award was received before separation, but the case sets out the burden of proof when an award is received after separation (as well as the burden when the award is received during the marriage). While acknowledging that the marital property presumption would not apply to an award received after the DOS, *Freeman* requires a party claiming that an award is marital to prove by a preponderance of the evidence that all or some portion of the award is compensation for economic loss that occurred during the marriage and before separation.
  - b. Award received **before** separation for injuries sustained during marriage.
    - i. Noninjured spouse, as party claiming that award is marital, has burden to prove by a preponderance of the evidence that the property was acquired by either or both spouses during the marriage, before the date of separation (DOS), and was owned by the parties on the DOS. If this burden is met, burden shifts to injured

spouse to show by a preponderance of the evidence the portion of the award that is separate, in other words, the portion that represents compensation for noneconomic loss as set out in [Section XI.B.1.a](#), above. [*Lilly v. Lilly*, 107 N.C. App. 484, 420 S.E.2d 492 (1992) (by showing that award was received during the marriage, before the DOS, and was presently owned on the DOS, husband met his burden to show that award was marital; wife, the injured spouse, then met her burden to show that award was separate by showing that award was compensation only for her pain and suffering and that she suffered no economic loss from either lost wages from the accident or unreimbursed medical bills); *Curtis v. Curtis*, 220 N.C. App. 415, 725 S.E.2d 472 (2012) (**unpublished**) (citing *Finkel v. Finkel*, 162 N.C. App. 344, 590 S.E.2d 472 (2004)) (trial court found that defendant, the injured spouse, did not submit any documentation or testify that any portion of a personal injury settlement received was her separate property, and court applied the marital presumption to find that settlement received during the marriage was marital; however, record showed that defendant had testified that a portion of the settlement was for her pain and suffering; matter was remanded for findings regarding the portion, if any, of the settlement that was defendant's separate property representing compensation for her pain and suffering and/or other noneconomic losses).]

- ii. Effect of commingling. When one party has established the personal injury award as her separate property, the fact that she deposited and kept the settlement proceeds in the parties' joint bank account does not constitute an expressly stated intention that the property be marital, as provided in the exchange provision in G.S. 50-20(b)(2). [*Lilly v. Lilly*, 107 N.C. App. 484, 420 S.E.2d 492 (1992) (injury occurred, and settlement proceeds were received, during the marriage and before the date of separation).]
3. Effect of stipulations. When parties stipulate that a personal injury award received during the marriage does not include any compensation for lost wages and medical expenses, the award is marital property only to the extent that a spouse can prove that a portion of the award compensates for lost earning capacity during the marriage. [*Dunlap v. Dunlap*, 85 N.C. App. 324, 354 S.E.2d 734 (1987).]

### C. Workers' Compensation Benefits

1. The general rule for allocating workers' compensation benefits was established by *Freeman v. Freeman*, 107 N.C. App. 644, 421 S.E.2d 623 (1992) (setting out for the first time the proper procedure for the allocation in an equitable distribution (ED) action of a workers' compensation award and applying the "analytic" approach used to classify personal injury awards; in *Freeman*, the work-related injury occurred, and the award was received, before separation).]
  - a. Classification of workers' compensation benefits as marital or separate depends on what the award was intended to replace.
    - i. That part of the award compensating for medical expenses, lost wages, or loss of earning capacity sustained during the marriage and before the date of separation (DOS) is classified as **marital** property.

- ii. That part of the award compensating for medical expenses, lost wages, or loss of earning capacity sustained after the DOS is classified as the **separate** property of the injured spouse.
        - b. A workers' compensation award is presumed not to compensate for pain and suffering ("noneconomic loss"). [*Freeman v. Freeman*, 107 N.C. App. 644, 421 S.E.2d 623 (1992) (noting established precedent in North Carolina that workers' compensation is intended solely to replace medical expenses, lost wages, or the diminished capacity to earn wages ("economic loss") and is not compensation for pain and suffering or other noneconomic loss). *See also Bell v. Bell*, 236 N.C. App. 247, 765 S.E.2d 122 (2014) (**unpublished**) (pursuant to an Agreement for Final Compromise Settlement and Release, defendant received postseparation \$37,500 in final settlement of his workers' compensation claim; evidence showed that the award was received for defendant's temporary disability, from which he no longer suffered; noting that uncontradicted evidence established that the \$37,500 award was compensation for economic loss occurring during the marriage and before separation, trial court's classification of the award as marital property was upheld).]
2. Burden of proof.
  - a. If a workers' compensation award is received during the marriage, the marital property presumption is applicable and the burden of proof is as follows:
    - i. The party claiming that the award is marital must show by a preponderance of the evidence that the award was acquired by the injured spouse during the marriage and before separation.
    - ii. If this burden is met, the entire award will be marital property unless the party claiming it to be separate property proves by a preponderance of the evidence that the award, or some portion of it, was intended to compensate him for economic loss occurring after the date of separation. [*Freeman v. Freeman*, 107 N.C. App. 644, 421 S.E.2d 623 (1992).]
  - b. If a spouse is injured during the marriage but does not receive the award until after the date of separation, the marital property presumption does not apply and the burden of proof is as follows:
    - i. The party claiming that the award is marital must prove by a preponderance of the evidence that all or some portion of the award is compensation for economic loss that occurred during the marriage and before separation. [*Freeman v. Freeman*, 107 N.C. App. 644, 421 S.E.2d 623 (1992).]

## D. Disability Benefits

1. Generally.
  - a. The analytic approach adopted to classify a personal injury award is to be applied to the classification of disability benefits. [*See Wright v. Wright*, 222 N.C. App. 309, 730 S.E.2d 218 (2012) (remand was required when court did not apply the analytic approach to a disability benefit).] This approach requires the court to focus on the nature of the wages being replaced. [*Wright v. Wright*, 222 N.C. App. 309, 730 S.E.2d 218 (2012) (citing *Finkel v. Finkel*, 162 N.C. App. 344, 590 S.E.2d 472 (2004)) (trial court's focus should not have been on nature of spouse's career, in this case, a player

- in the NFL, but on nature of wages being replaced by spouse’s line-of-duty disability benefits).]
- b. The trial court must determine whether the benefits are true disability benefits, retirement benefits, or a combination of the two. [*Johnson v. Johnson*, 117 N.C. App. 410, 450 S.E.2d 923 (1994) (court employed the analytic method to decide whether benefits that plaintiff received were truly disability benefits or were retirement benefits and, as an issue of first impression, whether disability retirement benefits fall within the definition of marital property; monthly payments were held to have components of both disability and retirement benefits); *Wright v. Wright*, 222 N.C. App. 309, 730 S.E.2d 218 (2012) (citing *Johnson*) (applying the analytic approach to disability payments requires a trial court to determine whether the benefits received were truly disability benefits, based on an actual disability, or were retirement benefits).]
  - c. The court of appeals has encouraged trial courts to expressly state whether disability benefits in a given case were due to the party’s own disability “and were to replace [the party’s] loss of earning capacity.” [*Johnson v. Johnson*, 117 N.C. App. 410, 413, 450 S.E.2d 923, 926 (1994) (court stated that language quoted above is preferred over a statement that the “disability retirement benefits were to replace [plaintiff’s] loss of future income” due to his disability); *Finkel v. Finkel*, 162 N.C. App. 344, 590 S.E.2d 472 (citing *Johnson*) (agreeing that the better practice is for the trial court to expressly state that the disability benefits were due to plaintiff’s own disability and were for the purpose of replacing his loss of earning capacity), *cert. denied*, 358 N.C. 234, 595 S.E.2d 150 (2004).]
  - d. In *Bishop v. Bishop*, 113 N.C. App. 725, 733, 440 S.E.2d 591, 597 (1994), the court considered a military disability benefit but made some general observations about disability benefits. It rejected the nondisabled spouse’s argument that “military retirement pay based on service-related disability . . . should be treated as any other military retirement pay.” The court observed that generally disability benefits may be classified using the same analytic approach used to classify personal injury and workers’ compensation awards. Classification would depend on what the benefit was intended to replace.
    - i. The portion of the benefit compensating for lost wages and earning capacity during the marriage would be **marital** property.
    - ii. The portion of the benefit compensating for personal suffering and lost wages after the date of separation would be **separate** property of the disabled spouse. [*Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994).]
2. Cases finding a benefit, or a portion thereof, to be a true disability benefit and, therefore, separate property of the disabled spouse.
    - a. Disability benefits of a professional athlete.
      - i. In *Wright v. Wright*, 222 N.C. App. 309, 730 S.E.2d 218 (2012), the court considered the nonconventional disability program of a professional football player. One of the benefits was a “total permanent” disability benefit paid for an injury that renders the player unable to sustain any type of employment, even nonfootball-related employment. The trial court found that this benefit was a long-term disability benefit and was partially marital because the benefits were purchased



- in part with marital income or employment, and it distributed approximately one-half of the marital portion of the benefit to wife. The appellate court reversed the award to wife, holding that the total permanent disability benefit was intended to compensate husband for an actual physical disability and was his separate property, noting that there was no evidence that marital labor contributed to the acquisition of the benefits or that husband contributed money to acquire the benefits.
- b. Social Security disability benefit.
    - i. Applying the reasoning in *Johnson v. Johnson*, 117 N.C. App. 410, 450 S.E.2d 923 (1994) (firefighter disability case), the court of appeals held that Social Security disability payments, awarded postseparation but retroactive to date before separation, were the separate property of the disabled spouse. [*Cooper v. Cooper*, 143 N.C. App. 322, 326, 545 S.E.2d 775, 778 (2001) (benefits were intended to replace the disabled spouse’s loss of earning capacity and were not the result of any marital labor; record was clear that the benefits were not “pension, retirement, and other deferred compensation rights under [former] G.S. § 50-20(b) (1)”)].
    - c. Disability benefits with no retirement component.
      - i. True disability benefits received after separation were properly classified as separate property. [*Finkel v. Finkel*, 162 N.C. App. 344, 590 S.E.2d 472 (under the analytic approach, language of two disability policies clearly showed that benefits were intended to compensate the policyholder, in this case a dentist, for loss of health and earning capacity due to disability and did not contain a retirement component; benefits did not lose classification as separate property because the source of the premiums was husband’s dental practice, which was a marital asset prior to dissolution), *cert. denied*, 358 N.C. 234, 595 S.E.2d 150 (2004)].
  3. Cases finding benefit to be a combination of true disability benefits and retirement benefits.
    - a. Disability retirement benefit. In *Johnson v. Johnson*, 117 N.C. App. 410, 450 S.E.2d 923 (1994), the court considered a firefighter’s “disability retirement benefit.” The employee had contributed a certain amount each month, before and after marriage, to a retirement fund as a participant in the Local Governmental Employees’ Retirement System but had made no contribution to a disability fund. The court held that “true” disability benefits are the separate property of the disabled spouse but apportioned the retirement portion of the benefit to the marital estate.
      - i. The portion of the benefit representing the employee’s contribution to the state retirement fund made during the marriage was classified as **marital** property.
      - ii. The portion of the benefit representing the employee’s contribution to the state retirement fund made before the marriage was classified as **separate** property.
      - iii. The portion of the benefit received due to medical disability and intended to replace the employee’s postseparation lost earning capacity was classified as **separate** property. [*Johnson v. Johnson*, 117 N.C. App. 410, 450 S.E.2d 923 (1994)].

4. Military disability benefits. Military disability benefits are the separate property of the disabled spouse and are not subject to distribution. [*Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023 (1989); *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994).]
  - a. Before Jan. 1, 2004, a disabled servicemember was required to waive a portion of his retirement pay in order to receive military disability benefits. The waived retirement benefits were excluded from the military retirement pay that was subject to distribution under the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. §§ 1408(a)(4)(B), (c)(1). [*Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023 (1989); *Hillard v. Hillard*, 223 N.C. App. 20, 733 S.E.2d 176 (2012) (citing *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994)), *review denied*, 366 N.C. 432, 736 S.E.2d 490 (2013); *Bishop*.] For changes in the law after Jan. 1, 2004, see [Pension and Retirement Benefits](#), Part 5 of this Chapter.
  - b. Other military retirement benefits are subject to classification and distribution. See [Pension and Retirement Benefits](#), Part 5 of this Chapter.

## E. Trust Advances

1. Advances from wife's trust during the marriage to purchase a home were properly classified as 50 percent gift and 50 percent debt of the marital estate requiring repayment, where husband had induced trustee to advance the funds by promising to repay half. [*Munn v. Munn*, 112 N.C. App. 151, 435 S.E.2d 74 (1993).]

## F. Life Insurance

1. Cash value of a policy purchased with marital funds. The date of separation cash value of a life insurance policy purchased during the marriage is marital property. [*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); *Foster v. Foster*, 90 N.C. App. 265, 368 S.E.2d 26 (1988), *review dismissed*, 324 N.C. 245, 376 S.E.2d 739 (1989).]
2. Proceeds of a policy purchased with marital funds and continued in effect after separation.
  - a. When one spouse pays postseparation premiums from her separate property, proceeds payable for a death occurring after separation are the separate property of that spouse. [*Foster v. Foster*, 90 N.C. App. 265, 368 S.E.2d 26 (1988) (husband was paying premiums after separation and before distribution when the insured, a child, died; because husband was paying premiums when the death benefit vested, proceeds were his separate property), *review dismissed*, 324 N.C. 245, 376 S.E.2d 739 (1989); *Edwards v. Edwards*, 110 N.C. App. 1, 428 S.E.2d 834 (citing *Foster*) (when wife paid postseparation premiums on policies insuring wife and the parties' children, policy belonged to wife), *cert. denied*, 335 N.C. 172, 436 S.E.2d 374 (1993).]
3. Life insurance accident benefit. Proceeds paid to a spouse during the marriage for medical expenses and lost wages are marital property. [*Little v. Little*, 74 N.C. App. 12, 327 S.E.2d 283 (1985); *Johnson v. Johnson*, 317 N.C. App. 437, 450, 346 S.E.2d 430, 437 (1986) (deeming "correct" the classification of the insurance proceeds in *Little* as marital property "at least to the extent that the recovery compensated for lost earning capacity during the marriage").]

## G. Timber Rights

1. The future value of timber, planted during the marriage on marital property but which will not mature until some years in the future, is too speculative to be considered a vested property right for purposes of equitable distribution (ED). [*Cobb v. Cobb*, 107 N.C. App. 382, 420 S.E.2d 212 (1992).]
2. Court was not required to consider as a distributional factor the projected appreciation of timber upon its maturity some fifteen years into the future. The postseparation appreciation that may be considered as a distributional factor accumulates only until the date of the ED order. [*Cobb v. Cobb*, 107 N.C. App. 382, 386–87, 420 S.E.2d 212, 214 (1992).]

## H. Retained Earnings

1. The trial court erred when it classified as marital property the retained earnings, or profit, of a Subchapter S corporation when the funds had not been paid to the spouse as a shareholder distribution. [*Allen v. Allen*, 168 N.C. App. 368, 607 S.E.2d 331 (2005) (noting that other jurisdictions have held generally that retained earnings of a corporation belong to the corporation and are not marital property until distributed to the shareholders). *See also Hill v. Sanderson*, 781 S.E.2d 29 (N.C. Ct. App. 2015) (trial court did not err by failing to classify retained earnings of marital limited liability company (LLC) as divisible property; retained earnings of an LLC are shown on the personal income tax returns of shareholders as nonpassive income but remain property of the LLC until distributed to shareholders).]
2. However, retained earnings of a Subchapter S corporation actually distributed to a shareholder spouse after separation may be considered marital property when the right to receive those funds was acquired during the marriage and before separation. [*Simon v. Simon*, 231 N.C. App. 76, 753 S.E.2d 475 (2013) (citing *Allen v. Allen*, 168 N.C. App. 368, 607 S.E.2d 331 (2005)); *Hill v. Hill*, 229 N.C. App. 511, 748 S.E.2d 352 (2013) (citing *Allen*).]

## I. Uniform Transfers to Minors Act Account (UTMA)

1. Uniform Transfers to Minors Act accounts (UTMA accounts) are owned by the children and therefore are not marital property because they are not owned by either or both spouses on the date of separation. [*See Carpenter v. Carpenter*, 781 S.E.2d 828 (N.C. Ct. App. 2016) (while not addressing the classification of the account on appeal, the court of appeals held that the trial court erred in distributing the account without making the child owner a party to the equitable distribution proceeding).]
2. *See also Guerrier v. Guerrier*, 155 N.C. App. 154, 156 n.2, 574 S.E.2d 69, 70 n.2 (2002) (while the issue was not raised on appeal, the court of appeals noted in a footnote that UTMA accounts are owned by the children and thus would not be classified as marital property in an equitable distribution action).

## J. Insurance Payments

1. Check received from homeowner's insurance policy to cover repairs made to roof on marital residence was not a separate asset. The value of the check was reflected in the value of the house. [*Cheek v. Cheek*, 211 N.C. App. 183, 712 S.E.2d 301 (2011).]

## K. Corporations

1. An ownership interest in a corporation is marital property if it is acquired during the marriage by either or both spouses and is owned on the date of separation (DOS). [See, e.g., *Poore v. Poore*, 75 N.C. App. 414, 331 S.E.2d 266, *review denied*, 314 N.C. 543, 335 S.E.2d 316 (1985); *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).]
2. The “property” to be classified, valued, and distributed in equitable distribution are the corporate shares owned by the parties on the DOS. [*Burgess v. Burgess*, 205 N.C. App. 325, 698 S.E.2d 666 (2010).]
3. Property actually owned by the corporation is not marital property because it is not property owned by either or both spouses. See definition of marital property in [Section V](#), above.
4. Trial court did not err by not classifying husband’s business as a business entity where he did not maintain a business structure during the marriage and commingled marital and business assets throughout the marriage. [*Clark v. Dyer*, 236 N.C. App. 9, 762 S.E.2d 838 (2014) (trial court properly classified assets and accounts related to the business as property owned by husband rather than as property owned by the business), *cert. denied*, 778 S.E.2d 279 (N.C. 2015).]
5. A court hearing an equitable distribution (ED) claim has no jurisdiction to order a marital limited liability company (LLC) to act or to affect the LLC’s corporate structure unless the LLC is made a party to the ED proceeding. [*Campbell v. Campbell*, 773 S.E.2d 93 (N.C. Ct. App. 2015) (trial court erred in removing wife as manager of the LLC and by appointing an interim manager of the LLC before making the LLC a party to the proceeding).] For additional information, 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. For a discussion of the classification of income received from a marital business after the date of separation, see [Section IX.B.2.c](#), above.

## XII. Classification of Debts

### A. Statutory References to Debt

1. Divisible property includes passive increases and passive decreases in marital *debt* and financing charges and interest related to marital *debt*. [G.S. 50-20(b)(4)d., *added by* S.L. 1997-302, § 1, effective Oct. 1, 1997; *amended by* S.L. 2002-159, § 33.5 to include decreases in debt effective Oct. 11, 2002; *amended by* S.L. 2013-103, § 1 to add “passive” before increases and decreases effective Oct. 1, 2013.]
2. In an interim distribution, the court may enter orders dividing part of the marital property, marital *debt*, divisible property, or divisible *debt* between the parties. The partial distribution may provide for a distribution of marital property, marital *debt*, divisible property, or divisible *debt*. [G.S. 50-20(i1), *amended by* S.L. 1997-302, § 1, effective Oct. 1, 1997.]

3. One of the distributional factors that a court considers when dividing marital and divisible property in an equitable manner is the income, property, and *liabilities* of each party at the time the division of property is to become effective. [G.S. 50-20(c)(1).]
4. For more information, see Cheryl Daniels Howell, *Equitable Distribution: Classification of Marital Debt*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (June 19, 2015), <http://civil.sog.unc.edu/equitable-distribution-classification-of-marital-debt>.

## B. Duties of the Trial Judge

1. The trial court is required to classify, value, and distribute marital debt and, after the creation of divisible property in 1997, divisible debt, [*Mrozek v. Mrozek*, 129 N.C. App. 43, 496 S.E.2d 836 (1998).] even if
  - a. The debt was fully liquidated during separation. [*Loving v. Loving*, 118 N.C. App. 501, 455 S.E.2d 855 (1995).]
  - b. The marital estate has no assets. [*Rawls v. Rawls*, 94 N.C. App. 670, 381 S.E.2d 179 (1989).]
2. The trial court is to consider all debts of the parties, whether a debt is one for which the parties are jointly liable or one for which only one party is individually liable. [*Wornom v. Wornom*, 126 N.C. App. 461, 485 S.E.2d 856 (1997); *Ikechukwu v. Ikechukwu*, 200 N.C. App. 617, 687 S.E.2d 710 (2009) (**unpublished**) (not paginated on Westlaw) (citing *Atkins v. Atkins*, 102 N.C. App. 199, 401 S.E.2d 784 (1991)) (trial court is authorized to assign responsibility for specific (marital and divisible) debts among the parties, “regardless of which spouse actually incurred the obligation and regardless of which spouse is liable to a third party creditor for that indebtedness”).]
3. The trial court did not err when it first valued and distributed the marital property, and then valued and distributed the marital debts in a second step, rather than valuing and distributing the “net marital estate.” [*Hay v. Hay*, 148 N.C. App. 649, 559 S.E.2d 268 (2002).]
4. The trial court must make written findings of fact.
  - a. The court must make findings to show it considered all debts of the parties and to identify those that comprise marital (and divisible) debts. [*Geer v. Geer*, 84 N.C. App. 471, 353 S.E.2d 427 (1987).]
  - b. When the court’s incomplete findings make it impossible to determine whether a debt was marital, the case must be remanded for further factual findings and an appropriate order based on such findings. [*Rawls v. Rawls*, 94 N.C. App. 670, 381 S.E.2d 179 (1989).]
5. The trial court must allow parties sufficient opportunity to present and refute evidence on their debt situations. [*See Mishler v. Mishler*, 90 N.C. App. 72, 367 S.E.2d 385 (trial court that cut short husband’s testimony about his present debt situation and limited wife’s cross-examination did not give proper consideration to issue of debts; case remanded), *review denied*, 323 N.C. 174, 373 S.E.2d 111 (1988).]

### C. Definition of Marital Debt

1. Marital debt is debt incurred during the marriage and before the date of separation (DOS), by either or both spouses, for the joint benefit of the parties, [*Jessee v. Jessee*, 212 N.C. App. 426, 713 S.E.2d 28 (2011) (citing *Geer v. Geer*, 84 N.C. App. 471, 353 S.E.2d 427 (1987)); *Riggs v. Riggs*, 124 N.C. App. 647, 478 S.E.2d 211 (1996), *review denied*, 345 N.C. 755, 485 S.E.2d 297 (1997); *Geer*.] regardless of who is legally obligated for the debt. [*Wornom v. Wornom*, 126 N.C. App. 461, 485 S.E.2d 856 (1997).] See [Section XII.F.3](#), below, for cases addressing “joint benefit.”
2. A debt incurred by one or both spouses after the DOS to pay off a marital debt existing on the DOS is properly classified as a marital debt. [*Huguelet v. Huguelet*, 113 N.C. App. 533, 439 S.E.2d 208, *review denied*, 336 N.C. 605, 447 S.E.2d 392 (1994).] Some debts incurred after separation will be divisible debts pursuant to G.S. 50-20(b)(4)d. See [Section XII.D](#), immediately below.

### D. Definition of Divisible Debt

1. Passive increases and passive decreases in marital debt, and financing charges and interest related to marital debt, are divisible property. [G.S. 50-20(b)(4)d., *amended by* S.L. 2002-159, § 33.5 to include decreases in debt effective Oct. 11, 2002; *amended by* S.L. 2013-103, § 1 to add “passive” before increases and decreases effective Oct. 1, 2013.] After the 2013 amendment of G.S. 50-20(b)(4)d., a trial court no longer will be required to specifically classify active reductions in marital debt. [See 2014 Howell Bulletin and Cheryl Daniels Howell, *Equitable Distribution: Post-Separation Changes in Debt*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Apr. 17, 2015), <http://civil.sog.unc.edu/equitable-distribution-post-separation-changes-in-debt>.]
2. G.S. 50-20(b)(4)d. is not clear but must refer to postseparation increases and decreases in marital debt. [See *Warren v. Warren*, 175 N.C. App. 509, 623 S.E.2d 800 (2006) (postseparation payments that decreased financing charges and interest related to marital debt constituted divisible property).]
3. In most cases, the postseparation increases in debt covered by the statute will be finance charges, interest, and tax penalties that accrue or increase after separation.
4. Increase in an equity line caused by additional amounts withdrawn following separation is not divisible debt. [*Warren v. Warren*, 175 N.C. App. 509, 623 S.E.2d 800 (2006) (new debt incurred during separation is separate debt of spouse that incurs the debt).]
5. Between Oct. 11, 2002, and Oct. 1, 2013, G.S. 50-20(d)(4)d. provided that **all** increases and decreases in marital debt were divisible property. See [Section XIII.D](#), below.

### E. Burden of Proof

1. Who has burden. Party who claims that any debt is marital bears the burden of proof on that issue. [*Becker v. Becker*, 127 N.C. App. 409, 489 S.E.2d 909 (1997); *Riggs v. Riggs*, 124 N.C. App. 647, 478 S.E.2d 211 (1996), *review denied*, 345 N.C. 755, 485 S.E.2d 297 (1997).]
2. Showing necessary to classify debt as marital.
  - a. Party claiming that a debt is marital must show that the debt was incurred during the marriage and before the date of separation for the joint benefit of the husband and wife. [*Riggs v. Riggs*, 124 N.C. App. 647, 478 S.E.2d 211 (1996), *review denied*, 345

- N.C. 755, 485 S.E.2d 297 (1997); *Tucker v. Miller*, 113 N.C. App. 785, 440 S.E.2d 315 (1994).]
- b. Joint benefit is not presumed from the fact that debt was incurred during the marriage. [*Becker v. Becker*, 127 N.C. App. 409, 489 S.E.2d 909 (1997) (where debt for dental work performed on husband was not proven to be debt for joint benefit of the parties, trial court properly classified the debt as separate).]
  - c. A judgment entered against both spouses during the marriage is not by itself sufficient to require that the debt be classified as marital. [*Miller v. Miller*, 97 N.C. App. 77, 387 S.E.2d 181 (1990) (citing *Geer v. Geer*, 84 N.C. App. 471, 353 S.E.2d 427 (1987)) (when party who claimed judgment was a marital debt presented no evidence as to the circumstances giving rise to the debt, trial court was unable to determine whether debt was incurred for the joint benefit of the spouses; trial court's failure to classify, value, and distribute the debt was not error).]
  - d. See also Cheryl Daniels Howell, *Equitable Distribution: Classification of Marital Debt*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (June 19, 2015), <http://civil.sog.unc.edu/equitable-distribution-classification-of-marital-debt>.
3. Effect of parties' stipulations on burden of proof.
    - a. 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 not required to hear evidence either to prove or disprove issue. [*Young v. Young*, 133 N.C. App. 332, 515 S.E.2d 478 (1999).]
  4. When burden not met.
    - a. When party fails in his burden of proof, trial court not obligated to classify, value, and distribute the debt. [*Fox v. Fox*, 114 N.C. App. 125, 441 S.E.2d 613 (1994) (trial court did not err in failing to classify and value debt allegedly arising from husband's guaranty because husband failed to meet his evidentiary burden); *Miller v. Miller*, 97 N.C. App. 77, 387 S.E.2d 181 (1990) (when husband, who claimed debt was marital, failed in his burden of proof, trial court did not err when it failed to classify, value, and distribute the debt).]
    - b. Party who fails in her burden of proof may not claim on appeal error in the trial court's classification. [*Tucker v. Miller*, 113 N.C. App. 785, 440 S.E.2d 315 (1994).]

## F. Classification Procedure for Marital Debt

1. Is there an actual debt?
  - a. Loans from close family members.
    - i. In *Geer v. Geer*, 84 N.C. App. 471, 353 S.E.2d 427 (1987), the court stated that loans from close family members must be closely scrutinized for legitimacy.
    - ii. In *Mrozek v. Mrozek*, 129 N.C. App. 43, 496 S.E.2d 836 (1998), the court considered the enforceability of a promissory note from husband to his parents, the proceeds of which had been used as a down payment on a house. The note was not under seal and was subject to a three-year statute of limitations that had expired. HELD: Debt was marital debt; debt was enforceable based on husband's

testimony that he owed the money to his mother and that she expected repayment; there was no evidence that husband planned to assert a statute of limitations defense against his mother (noting statement from *Geer v. Geer*, 84 N.C. App. 471, 353 S.E.2d 427 (1987), that loans from close family members must be closely scrutinized but declaring that any concerns about the fact that the marital debt was owed to husband's parent were more properly treated as a distributional factor under G.S. 50-20(c)(12)).

- iii. In *Wornom v. Wornom*, 126 N.C. App. 461, 485 S.E.2d 856 (1997), the court considered whether cash infusions from husband's brother to husband and wife's corporation were loans for the benefit of the parties (hence a marital debt) or an investment or other entrepreneurial activity of the brother (not a marital debt). HELD: All of brother's activities were done to assist his family members in a time of financial crisis, were loans, and thus were marital debt for which parties were responsible.
- b. Loans obtained by a family member.
  - i. In *Huguelet v. Huguelet*, 113 N.C. App. 533, 439 S.E.2d 208, *review denied*, 336 N.C. 605, 447 S.E.2d 392 (1994), the court considered whether a loan obtained by husband's sister to pay a debt of a corporation jointly owned by sister and husband resulted in a marital debt. HELD: Even assuming that the loan proceeds were used to pay a marital debt, there was no evidence that the loan became a debt of either spouse, so the loan was not a marital debt. There were no findings or evidence that husband owed his sister for the money she had borrowed.
- c. Payments during the marriage and before date of separation. Reduction during the marriage of husband's separate debts, arising from the expenditure of marital funds, in the absence of an agreement to repay the marital estate, is neither an asset nor a debt of the marital estate. Trial court erred in classifying the value of the reduction of husband's separate debt as marital property. [*Adams v. Adams*, 115 N.C. App. 168, 443 S.E.2d 780 (1994) (reduction was properly considered as a distributional factor under G.S. 50-20(c)(12)).]
- d. Debt arising from a personal guaranty.
  - i. In *Byrd v. Owens*, 86 N.C. App. 418, 358 S.E.2d 102 (1987), the trial court did not consider husband's personal guaranty of corporate debt both before and after the date of separation. HELD: Trial court should have classified and valued the contingent liability pursuant to the guaranties, even though difficult, if husband presented sufficient evidence as to value.
  - ii. In *Fox v. Fox*, 114 N.C. App. 125, 441 S.E.2d 613 (1994), husband complained that his personal guaranty of certain business debt before separation should have been classified as marital debt. HELD: A trial court must classify and value a personal guaranty if the parties present sufficient evidence as to the debt's existence and value. No error in this case because husband failed to meet his evidentiary burden.



2. Was the debt incurred during the marriage and before the date of separation?
  - a. The general rule is that for a debt to be classified as marital, it must be incurred before the date of separation (DOS). [*Huguelet v. Huguelet*, 113 N.C. App. 533, 439 S.E.2d 208 (recognizing the implication in prior cases that for a debt to be marital, it must be incurred before the DOS), *review denied*, 336 N.C. 605, 447 S.E.2d 392 (1994); *Harrington v. Harrington*, 110 N.C. App. 782, 431 S.E.2d 240 (1993) (debt incurred after separation of the parties was not subject to equitable distribution).]
  - b. A debt incurred by one or both spouses on or after the DOS qualifies as a marital debt if it was incurred to pay off a marital debt. [*Huguelet v. Huguelet*, 113 N.C. App. 533, 439 S.E.2d 208, *review denied*, 336 N.C. 605, 447 S.E.2d 392 (1994).]
  - c. Trial court erred in classifying DOS balance owed on a line of credit as partially separate after concluding that the line originally had been opened to finance a car purchased by husband before marriage. Evidence showed all amounts borrowed before marriage had been repaid before the DOS. [*Hill v. Sanderson*, 781 S.E.2d 29 (N.C. Ct. App. 2015).]
  - d. Husband's obligation to pay wife's attorney fees arising out of her child support, post-separation support, and alimony claims filed after separation was not marital debt. [*Clark v. Dyer*, 236 N.C. App. 9, 762 S.E.2d 838 (2014), *cert. denied*, 778 S.E.2d 279 (N.C. 2015).]
  - e. Passive increases and passive decreases in marital debts occurring after separation will be divisible debts pursuant to G.S. 50-20(b)(4)d., *amended by* S.L. 2002-159, § 33.5 to include decreases in debt effective Oct. 11, 2002; *amended by* S.L. 2013-103, § 1 to add "passive" before increases and decreases effective Oct. 1, 2013. See [Sections XII.D](#), above, and [XIII.D](#), below.
3. Were the funds used for the joint benefit of the parties?
  - a. The party seeking the marital classification of the debt has the burden to prove that the debt was incurred for the joint benefit of the parties. [*Warren v. Warren*, 773 S.E.2d 135 (N.C. Ct. App. 2015).]
  - b. Joint benefit is not presumed from the fact that the debt is in both names. [*Miller v. Miller*, 97 N.C. App. 77, 387 S.E.2d 181 (1990) (citing *Geer v. Geer*, 84 N.C. App. 471, 353 S.E.2d 427 (1987)) (judgment entered against both spouses during the marriage was not by itself sufficient to require that the debt be classified as marital).]
  - c. Joint benefit is not presumed from the fact that debt was incurred during the marriage. [*Becker v. Becker*, 127 N.C. App. 409, 489 S.E.2d 909 (1997) (where debt for dental work performed on husband was not proven to be debt for joint benefit of the parties, trial court properly classified the debt as separate).]
  - d. Federal income tax debt owed by the parties for the tax year preceding separation was marital debt. [*Lund v. Lund*, 779 S.E.2d 175 (N.C. Ct. App. 2015).]
  - e. Funds withdrawn from the husband's capital account creating a \$500,000 deficit were used directly or indirectly for the benefit of the marriage unit; capital account deficit properly classified as marital debt. [*Godley v. Godley*, 110 N.C. App. 99, 429 S.E.2d 382 (1993).]

- f. Business profits were for the joint benefit of the husband and wife during the marriage, so a tax lien on the business was properly classified as a marital debt. [*Glaspy v. Glaspy*, 143 N.C. App. 435, 545 S.E.2d 782 (2001). See also *Lund v. Lund*, 779 S.E.2d 175 (N.C. Ct. App. 2015) (debt incurred for marital construction business was marital debt).]
- g. Trial court erred in classifying \$3,000 debt on wife’s credit card as marital when no competent evidence in the record showed that the debt was incurred for the joint benefit of the parties. [*Riggs v. Riggs*, 124 N.C. App. 647, 478 S.E.2d 211 (1996), review denied, 345 N.C. 755, 485 S.E.2d 297 (1997). Cf. *Lund v. Lund*, 779 S.E.2d 175 (N.C. Ct. App. 2015) (credit card debt was marital debt where evidence showed that the debt was incurred to purchase a refrigerator that was marital property and to pay debts associated with the marital business).]
- h. Student loans incurred by wife during the marriage were properly classified as marital debt where trial court concluded that the loan proceeds were used to pay household expenses, the loans were incurred with the intent that the college degree would benefit the marriage, and the parties actually enjoyed wife’s increased earning capacity that resulted from her degree for a period of time before the parties separated. [*Warren v. Warren*, 773 S.E.2d 135 (N.C. Ct. App. 2015).] However, the trial court erred in classifying a student loan obtained by plaintiff during the marriage for a graduate degree program as marital debt when there was no evidence that the loan benefitted defendant in any manner or benefitted the parties jointly. [*Baldwin v. Baldwin*, 232 N.C. App. 521, 757 S.E.2d 527 (2014) (**unpublished**) (citing *Riggs v. Riggs*, 124 N.C. App. 647, 478 S.E.2d 211 (1996)) (loan to be classified on remand as plaintiff’s separate debt).]
- i. Trial court did not err in concluding that husband failed to meet his burden to prove joint benefit even though he testified that debt incurred when he borrowed funds through a home equity line of credit was used to pay household expenses during the marriage. Wife testified that she had no knowledge of the line of credit during the marriage. [*Comstock v. Comstock*, 240 N.C. App. 304, 771 S.E.2d 602 (2015).]
- j. Trial court finding that credit card debt was incurred for “women,” alcohol, cigars, and gambling was sufficient to support the conclusion that the debt was not marital. [*Comstock v. Comstock*, 240 N.C. App. 304, 771 S.E.2d 602, 613 (2015).]

### XIII. Payment of Debt After the Date of Separation (DOS)

#### A. Generally

1. There are two categories of postseparation debt payments:
  - a. Postseparation payment of debts that meet the definition of marital debt set out in [Section XII.C](#), above, and
  - b. Postseparation payment of obligations that do not meet the definition of marital debt because they were not owed on the DOS but were made to maintain or protect the

marital estate during separation. Most frequently, these payments relate to the maintenance of the marital property.

2. Legislative history regarding classification of postseparation payment of marital debt.
  - a. Between Oct. 11, 2002, and Oct. 1, 2013, G.S. 50-20(b)(4)d. provided that **all** increases and decreases in marital debt after the DOS were divisible debt. See [Section XIII.D](#), below, discussing the 2002 amendment.
    - i. That version of the statute required a trial judge deciding an equitable distribution case to make findings classifying and distributing increases and decreases in marital debt. [See *Bodie v. Bodie*, 221 N.C. App. 29, 727 S.E.2d 11 (2012).] See [Distribution](#), Part 4 of this Chapter, [Section VIII.C](#) for treatment of a postseparation payment as either a credit or a distributional factor.
  - b. Effective Oct. 1, 2013, divisible debt now is defined to include only passive changes in the value of marital debt. [G.S. 50-20(b)(4), *amended by* S.L. 2013-103, § 1.] This means that postseparation decreases in marital debt caused by postseparation payments on that debt no longer will be divisible debt. [See *Hay v. Hay*, 148 N.C. App. 649, 559 S.E.2d 268 (2002) (holding that change in value of property caused by one party making payments on the mortgage was an “active” change rather than a “passive” one).]
  - c. The 2013 change to G.S. 50-20(b)(4)d. applies to payments on a marital debt made on or after Oct. 1, 2013. [*Lund v. Lund*, 779 S.E.2d 175 (N.C. Ct. App. 2015) (citing *Cooke v. Cooke*, 185 N.C. App. 101, 647 S.E.2d 662 (2007), *review denied*, 362 N.C. 175, 657 S.E.2d 888 (2008), and *Warren v. Warren*, 175 N.C. App. 509, 623 S.E.2d 800 (2006)).]

## B. Postseparation Debt Payments Before Oct. 11, 2002

1. Before Oct. 11, 2002, a trial court had discretion to determine how to address payments made after the date of separation (DOS) toward marital debts or obligations flowing from marital property, including mortgage payments and payment of property taxes, in the final distribution. [*Smith v. Smith*, 111 N.C. App. 460, 433 S.E.2d 196 (1993) (postseparation payment of property taxes on the marital residence, payment in full of a second mortgage on the same property, and principal payments made toward the first mortgage), *rev'd in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994); *Bowman v. Bowman*, 96 N.C. App. 253, 385 S.E.2d 155 (1989) (taxes on real property jointly owned by husband and wife, even those coming due and paid after DOS); *Walter v. Walter*, 149 N.C. App. 723, 561 S.E.2d 571 (2002) (postseparation payments of homeowners' insurance on two marital residences, as well as maintenance and other expenses associated with one of the properties).]
2. Options available to the trial court.
  - a. In *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), the court noted that the following treatments of postseparation payments of marital debts, applied at a trial court's discretion, had been approved by the appellate courts:
    - i. Apportioning the debts between the parties,

- ii. Ordering one spouse to reimburse the other spouse for payments made towards the debts,
- iii. Consideration of postseparation payments as a distributional factor,
- iv. “Crediting” a spouse in an appropriate manner for postseparation payments, and
- v. Actual use of a credit. [*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).]

### C. 1997 Amendment to G.S. 50-20(b) to Add Category of Divisible Property

1. In 1997, the category of divisible property was created and was defined in G.S. 50-20(b)(4) as:
  - a. “All appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property.”
  - b. “All property, property rights, or any portion thereof received after the date of separation but before the date of distribution that was acquired as a result of the efforts of either spouse during the marriage and before the date of separation, including, but not limited to, commissions, bonuses, and contractual rights.”
  - c. “Passive income from marital property received after the date of separation, including but not limited to, interest and dividends.”
  - d. “Increases in marital debt and financing charges and interest related to marital debt.” [G.S. 50-20(b)(4)a.–d., *added by* S.L. 1997-302, § 1, effective Oct. 1, 1997, and applicable to actions for equitable distribution filed on or after Oct. 1, 1997.]
2. The new category of divisible property:
  - a. Required the trial court to classify, value, and distribute divisible property and divisible debt based on the date-of-distribution value of that property.
  - b. Did not change the law regarding postseparation debt payments made up to Oct. 11, 2002. [See *Cooke v. Cooke*, 185 N.C. App. 101, 647 S.E.2d 662 (2007), *review denied*, 362 N.C. 175, 657 S.E.2d 888 (2008), and [Section XIII.B](#), above.] For more on distribution of divisible property, see [Distribution](#), Part 4 of this Chapter, [Section VIII.C](#).

### D. 2002 Amendment to G.S. 50-20(b) to Include Decreases in Marital Debt in the Definition of Divisible Property

1. Effective Oct. 11, 2002, G.S. 50-20(b)(4)d., set out in [Section XIII.C.1.d](#), above, was amended to provide that divisible property includes decreases in marital debt. [S.L. 2002-159, § 33.5.]
  - a. After the 2002 amendment, trial courts were required to identify and value all payments on marital debt made by a spouse after separation, determine the extent, if any, to which those payments should be treated as divisible property, and account for those payments in the final distribution of property. [*Bodie v. Bodie*, 221 N.C. App. 29, 727 S.E.2d 11 (2012) (after finding that husband paid \$216,000 of marital debt

after the date of separation (DOS) for mortgages, insurance, upkeep, and taxes for two marital residences, trial court erred by not determining extent, if any, to which those payments should be treated as divisible property and by not making findings identifying funds used to make payments as marital or separate; it was not enough to set out in an order the amount paid by a spouse after separation and to identify payments as payment of marital debt.)]

- b. Postseparation payments as divisible property under G.S. 50-20(b)(4)d.
  - i. Trial court properly classified husband's postseparation payment in full of a mortgage on marital property as divisible property. [*McNeely v. McNeely*, 195 N.C. App. 705, 673 S.E.2d 778 (2009) (citing *Warren v. Warren*, 175 N.C. App. 509, 623 S.E.2d 800 (2006)); *Jones v. Jones*, 193 N.C. App. 610, 670 S.E.2d 644 (2008) (**unpublished**) (postseparation mortgage payments by both husband and wife decreased marital debt and increased equity in marital residence; payments were properly considered divisible property); *Martin v. Martin*, 202 N.C. App. 584, 691 S.E.2d 133 (2010) (**unpublished**) (postseparation decrease in mortgage principal, resulting from husband's postseparation payments on mortgages secured by marital residence and marital rental property, was divisible property and should have been classified as such).]
  - ii. A spouse's postseparation payments that decreased finance charges and interest related to a marital line of credit were divisible property to the extent the payments were made after the effective date of the 2002 amendment to G.S. 50-20(b)(4)d. [*Warren v. Warren*, 175 N.C. App. 509, 623 S.E.2d 800 (2006) (remanded for findings regarding payments made after Oct. 11, 2002); *Hill v. Hill*, 229 N.C. App. 511, 748 S.E.2d 352 (2013) (citing *Warren*) (equity line of credit was husband's separate debt at marriage but parties incurred additional debt for marital purposes during the marriage; on remand, trial court to determine as of the DOS what portion, if any, of the equity line of credit debt was marital and the amount of the marital portion of the debt at the date of distribution, with any increase or decrease to be distributed as divisible property; amount of husband's postseparation payments to be determined and treated as divisible property in accordance with *Warren*).]
- c. Postseparation payments related to the upkeep and repair of the marital home as divisible property under G.S. 50-20(b)(4)d.
  - i. Postseparation payments for upkeep and repair of the marital home may be classified as divisible. [*Bodie v. Bodie*, 221 N.C. App. 29, 727 S.E.2d 11 (2012) (after review of trial court finding that husband "paid \$216,000.00 towards the mortgage, insurance, upkeep and taxes for the marital residence after the date of separation," court of appeals remanded for trial court to address source of funds used by husband to make postseparation payments and determine extent, if any, to which payments should be treated as divisible property).]
- d. After the 2002 amendment to G.S. 50-20(b), postseparation payments had to be classified as divisible debt, but distribution and the decision of whether or to what extent to "credit" a paying spouse for the postseparation payments remained a matter within the sole discretion of the trial court. [*See 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); *McNeely v. McNeely*, 195 N.C. App. 705, 673 S.E.2d 778 (2009).]

## E. Postseparation Payments After Oct. 1, 2013

1. Effective Oct. 1, 2013, G.S. 50-20(b)(4)d. was amended to provide that only *passive* increases and *passive* decreases in marital debt constitute divisible property, as well as passive increases and passive decreases in financing charges and interest related to marital debt. [S.L. 2013-103, § 1.]
2. With the definition of divisible property in G.S. 50-20(b)(4)d. limited to passive decreases in marital debt, trial courts are no longer required to classify active decreases in marital debt. [See *Hay v. Hay*, 148 N.C. App. 649, 559 S.E.2d 268 (2002) (holding that change in value of property caused by one party making payments on a debt was an “active” change rather than a “passive” one).]
3. With the 2013 legislative change, the treatment of postseparation debt payments will be as it was before Oct. 11, 2002. [See [Section XIII.B](#), above. See also Cheryl Daniels Howell, *Equitable Distribution: Post-Separation Changes in Debt*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Apr. 17, 2015), <http://civil.sog.unc.edu/equitable-distribution-post-separation-changes-in-debt>.]
4. In *Hill v. Sanderson*, 781 S.E.2d 29, 42 (N.C. Ct. App. 2015), the court of appeals explained:
 

“A spouse is entitled to some consideration, in an equitable distribution proceeding, for any post-separation payments made by that spouse (from non-marital or separate funds) for the benefit of the marital estate.” *Walter v. Walter*, 149 N.C. App. 723, 731, 561 S.E.2d 571, 576–77 (2002). “To accommodate post-separation payments, the trial court may treat the payments as distributional factors under section 50-20(c)(11a), or provide direct credits for the benefit of the spouse making the payments.” *Id.* at 731, 561 S.E.2d at 577 (citation omitted). “If the property is distributed to the spouse who did not have . . . post-separation use of it or who did not make post-separation payments relating to the property’s maintenance (i.e. taxes, insurance, repairs), the use and/or payments must be considered as either a credit or distributional factor.” *Id.* at 732, 561 S.E.2d at 577. “If, on the other hand, the property is distributed to the spouse who had . . . post-separation use of it or who made post-separation payments relating to its maintenance, there is, as a general proposition, no entitlement to a credit or distributional factor.” *Id.* “Nonetheless, the trial court may, in its discretion, weigh the equities in a particular case and find that a credit or distributional factor would be appropriate under the circumstances.” *Id.*
5. See *Lund v. Lund*, 779 S.E.2d 175 (N.C. Ct. App. 2015) (while trial court erred in classifying and distributing an active reduction in debt as divisible debt following the 2013 amendment to G.S. 50-20(b)(4) making only passive changes in the value of marital debt subject to classification and distribution, there was no reversible error because the trial court still has the authority to order that the payor spouse be reimbursed or credited for those payments).
6. A spouse is not entitled to a credit for the postseparation payment of marital debt if the payment was made with marital funds. [*Comstock v. Comstock*, 240 N.C. App. 304,

771 S.E.2d 602 (2015) (the party requesting a credit has the burden of showing that payments were made with separate funds); *Cushman v. Cushman*, 781 S.E.2d 499 (N.C. Ct. App. 2016) (same).]

7. Trial court did not award wife a “double credit” for her postseparation payment of the mortgage on the marital home which also was distributed to her. [*Hill v. Sanderson*, 781 S.E.2d 29, 42 (N.C. Ct. App. 2015). *Cf. Smith v. Smith*, 111 N.C. App. 460, 433 S.E.2d 196 (1993) (when trial court gave husband full credit for his postseparation payments that discharged a second mortgage and distributed the home to him, case was remanded to trial court for explanation of why this did not result in husband receiving a double credit), *rev'd in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994).]

## F. Postseparation Payments Made Pursuant to a Support Order

1. G.S. 50-20(f) requires that a court provide for an equitable distribution (ED) without regard to alimony for either party or support of the children of both parties. Thus, postseparation mortgage payments made pursuant to a support order or made in lieu of spousal support are not divisible property and the payor spouse is not entitled to any consideration for those payments in ED.
  - a. *Hill v. Hill*, 229 N.C. App. 511, 748 S.E.2d 352 (2013) (citing *Robinson v. Robinson*, 210 N.C. App. 319, 707 S.E.2d 785 (2011)) (postseparation mortgage payments on the marital home made pursuant to a postseparation support order were in lieu of postseparation support to a spouse and, as such, were not divisible property). *Cf. Wirth v. Wirth*, 193 N.C. App. 657, 668 S.E.2d 603 (2008) (where trial court gave husband full credit against his postseparation support arrearage for postseparation payments on two interest-only mortgages secured by the marital residence, trial court’s finding that after the credit there was no divisible property related to the payments was not an abuse of discretion).
2. See *Distribution*, Part 4 of this Chapter, [Sections XI.B](#) (under G.S. 50-20(f), ED is to be without regard to alimony or child support) and [V.N.3.c](#) (custody and support of children are not proper matters to consider as a distributional factor under G.S. 50-20(c)(12)).

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