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Chapter 6: **Equitable Distribution**

Part 4. Distribution

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I. Introduction to Distribution

A. Three-Step Process

1. Distribution of property is the third 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 (DOS) 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. Distribution by Written Agreement

1. Before, during, or after marriage, the parties may by written agreement provide for distribution of marital or divisible property, or both, in a manner deemed by the parties to be equitable. [G.S. 50-20(d). *See Stewart v. Stewart*, 141 N.C. App. 236, 541 S.E.2d 209 (2000) (in premarital agreement wife waived claim for equitable distribution (ED) regarding property specifically addressed in the agreement).]
2. In an agreement, the parties may stipulate as to the distribution of property. [*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)).]
3. See *Equitable Distribution Overview and Procedure*, Part 1 of this Chapter, Section VI for more on agreements in bar of ED.
4. For more on stipulations, see *Equitable Distribution Overview and Procedure*, Part 1 of this Chapter, Section V. For stipulations as to classification, see *Classification,* Part 2 of this Chapter, Section I.B. For stipulations as to value, see *Valuation,* Part 3 of the Chapter, Section III.A. For the distribution process when the parties stipulate to an equal division, see Section IV, below.

II. Duties of the Trial Judge

A. Generally

1. The trial judge must distribute marital and divisible property and marital and divisible debt. [G.S. 50-20(a); *Mrozek v. Mrozek,* 129 N.C. App. 43, 496 S.E.2d 836 (1998).]

B. Equal Division

1. G.S. 50-20(c) requires an equal division unless the court determines that an equal division is not equitable.
2. As long as parties have not stipulated that an equal division is equitable, there appears to be no limitation on a judge's ability to make an unequal distribution, even if not requested to do so by one party.

C. Overview of the Distribution Process When a Party Desires an Unequal Distribution

1. Each step is discussed separately in Section III, below.
2. The trial court begins with the statutory provision, G.S. 50-20(c), strongly favoring an equal distribution.
3. Evidence is presented in support of one or more distributional factors listed in G.S. 50-20(c).
    a. Although the issue has not been addressed directly, there appears to be no requirement that a party request an unequal division in a pleading.
4. The trial court considers the distributional factors raised by the evidence.
5. The trial court in its discretion determines the weight to be accorded each distributional factor.
6. The trial court decides whether the value of marital and divisible property should be divided equally or unequally.
7. The trial court allocates specific property to each party based on the trial judge's discretion and good conscience.
8. The trial court makes findings of fact sufficient to address the distributional factors and to support the division ordered.

D. Standard of Review on Appeal

1. Review of the trial court's application of distributional factors. The trial court has broad discretion in evaluating and applying the statutory distributional factors and will not be reversed absent a showing that its decision is manifestly unsupported by reason. [*Jones v. Jones*, 121 N.C. App. 523, 466 S.E.2d 342, *review denied,* 343 N.C. 307, 471 S.E.2d 72 (1996); *Leighow v. Leighow*, 120 N.C. App. 619, 463 S.E.2d 290 (1995).]
2. Review of the trial court's division of property.
    a. The trial court's decision whether to divide the marital estate equally or unequally can be disturbed only if a clear abuse of discretion has occurred. [*Jones v. Jones*, 121 N.C. App. 523, 466 S.E.2d 342, *review denied,* 343 N.C. 307, 471 S.E.2d 72 (1996);

Helms v. Helms, 191 N.C. App. 19, 661 S.E.2d 906 (standard of review of percentage division of marital property in equitable distribution cases is abuse of discretion), *review denied,* 362 N.C. 681, 670 S.E.2d 233 (2008).]

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

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

a. Only when the evidence fails to show any rational basis for the distribution ordered by the court will its determination be upset on appeal. [*Brackney v. Brackney,* 199 N.C. App. 375, 682 S.E.2d 401 (2009), *review withdrawn,* 363 N.C. 853, 694 S.E.2d 200 (2010).]

b. The appellate court reviews the trial court's distribution for an abuse of discretion. [*Troutman v. Troutman*, 193 N.C. App. 395, 667 S.E.2d 506 (2008).]

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

III. Distribution Process When a Party Desires an Unequal Division

A. Presumption

1. The trial court begins with the statutory provision, G.S. 50-20(c), strongly favoring an equal distribution.

2. G.S. 50-20(c) requires an equal division of marital and divisible property, based on net value, unless the court determines that an equal division is not equitable.

3. G.S. 50-20(c) "is a legislative enactment of public policy so strongly favoring the equal division of marital [and now divisible] property that an equal division is made *mandatory* 'unless the court determines that an equal division is not equitable.'" [*White v. White*, 312 N.C. 770, 776, 324 S.E.2d 829, 832 (1985) (emphasis in original) (quoting the statute); *Brackney v. Brackney,* 199 N.C. App. 375, 682 S.E.2d 401 (2009) (citing *White*), *review withdrawn,* 363 N.C. 853, 694 S.E.2d 200 (2010). *See also Carpenter v. Carpenter*, 781 S.E.2d 828 (N.C. Ct. App. 2016) (it is the public policy of the state that an equal distribution is required unless the court determines that equal is not equitable and explains why).]

4. It is not sufficient for a trial court to conclude that that an unequal distribution is equitable. Rather, an equitable distribution (ED) judgment must state that the trial court concluded that an "equal division is not equitable" in order to show that the trial court gave adequate weight to the presumption in favor of an equal division. [*Lucas v. Lucas,* 209 N.C. App. 492, 504, 706 S.E.2d 270, 278 (2011); *Hunt v. Hunt,* 233 N.C. App. 785, 759 S.E.2d 712 (**unpublished**) (citing *Lucas*) (even though evidence supported trial court's findings and trial court clearly considered relevant factors, when finding required by

Lucas was not made, matter was remanded), *review denied*, 367 N.C. 524, 762 S.E.2d 443 (2014). *See also Carpenter v. Carpenter*, 781 S.E.2d 828 (N.C. Ct. App. 2016) (it is not sufficient for the court to state only that the presumption in favor of an equal division has been rebutted; trial court must conclude that equal is not equitable).]

B. Burden of Proof When One or Both Parties Indicate a Desire for an Unequal Distribution and Present Evidence in Support of One or More Distributional Factors Listed in G.S. 50-20(c)

1. The party desiring an unequal division of marital property has the burden of producing evidence concerning one or more of the twelve factors set out in G.S. 50-20(c) and also has the burden of proving by a preponderance of the evidence that an equal division would not be equitable. [*White v. White*, 312 N.C. 770, 324 S.E.2d 829 (1985); *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); *Khajanchi v. Khajanchi,* 140 N.C. App. 552, 537 S.E.2d 845 (2000); *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).]
2. But even when the party seeking an unequal distribution presents evidence of several distributional factors, the trial court still has the discretion to order an equal distribution. [*Lund v. Lund*, 779 S.E.2d 175 (N.C. Ct. App. 2015).]
3. The twelve distributional factors and applicable case law are discussed more fully in Section V, below.

C. Consideration of Factors

1. The trial court has broad discretion in evaluating and applying the factors in G.S. 50-20 and is empowered to assign weight to the evidence presented on the factors as it deems appropriate. [*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).]
2. The trial court must consider the distributional factors raised by the evidence. [*Power v. Power*, 236 N.C. App. 581, 763 S.E.2d 565 (2014); *Sharp v. Sharp*, 116 N.C. App. 513, 449 S.E.2d 39, *review denied*, 338 N.C. 669, 453 S.E.2d 181 (1994); *Truesdale v. Truesdale*, 89 N.C. App. 445, 366 S.E.2d 512 (1988), *superseded in part by statute as stated in Offerman v. Offerman*, 137 N.C. App. 289, 527 S.E.2d 684 (2000).]
3. When evidence is presented from which the trial court could determine that an equal distribution of the marital property would be inequitable, the trial court must consider all of the distributional factors set out in G.S. 50-20(c) and make sufficient findings as to each factor upon which evidence was offered. [*Davis v. Sineath* (*Davis*), 129 N.C. App. 353, 498 S.E.2d 629 (1998).]
4. When evidence of a particular distributional factor is introduced, the court must consider the factor and make an appropriate finding of fact with regard to it. [*Fox v. Fox,* 114 N.C. App. 125, 441 S.E.2d 613 (1994); *Warren v. Warren,* 175 N.C. App. 509, 623 S.E.2d 800 (2006) (evidence was offered relating to G.S. 50-20(c)(9), (11a), and (12) factors but court made no findings; case was remanded for findings).]

5. Trial court is to consider only those factors listed in G.S. 50-20(c).
    a. When a trial court makes both improper and proper findings of fact, the general rule is that appellate courts will remand for a new trial based solely on proper findings. [*Smith v. Smith,* 71 N.C. App. 242, 322 S.E.2d 393 (1984) (when the order contains findings that the court properly could consider and findings that it could not, it is necessary to remand for a new equitable distribution award based solely on appropriate findings), *aff'd in part and modified on other grounds*, 314 N.C. 80, 331 S.E.2d 682 (1985); *Becker v. Becker*, 127 N.C. App. 409, 489 S.E.2d 909 (1997) (consideration of a single improper distributional factor required reversal); *Fountain v. Fountain*, 148 N.C. App. 329, 559 S.E.2d 25 (2002) (where court of appeals could not determine weight assigned by trial court to distributional factors, decision that considered inappropriate factors reversed).]
    b. For cases that considered improper factors or factors not listed in G.S. 50-20(c) that were not reversed, see *Godley v. Godley*, 110 N.C. App. 99, 429 S.E.2d 382 (1993) (consideration of improper distributional factors and the failure to consider some distributional factors did not warrant reversal when the party failed to prove an abuse of the court's discretion), and *Hill v. Hill,* 229 N.C. App. 511, 524, 748 S.E.2d 352, 362 (2013) (citing *Smith v. Smith*, 314 N.C. 80, 331 S.E.2d 682 (1985)) (consideration of factors beyond those explicitly enumerated in G.S. 50-20(c) is within the trial court's discretion but is not required; findings as to "the amount of equity in the home, the high monthly payments and the reason the debt was incurred" were proper under catch-all provision of G.S. 50-20(c)(12) as relating to the economics of the marriage).]

D. Weight Assigned to Factors

1. The trial court in its discretion assigns the weight to be accorded each distributional factor. [*White v. White,* 312 N.C. 770, 324 S.E.2d 829 (1985); *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); *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); *Edwards v. Edwards,* 152 N.C. App. 185, 566 S.E.2d 847, *cert. denied*, 356 N.C. 611, 574 S.E.2d 679 (2002); *Becker v. Becker,* 127 N.C. App. 409, 489 S.E.2d 909 (1997); *Geer v. Geer*, 84 N.C. App. 471, 353 S.E.2d 427 (1987).]
2. When evidence tending to show that an equal division of marital property would not be equitable is admitted, the trial court must exercise its discretion in assigning the weight each factor should receive in any given case. [*Khajanchi v. Khajanchi,* 140 N.C. App. 552, 537 S.E.2d 845 (2000).]
3. The trial court is not required to make findings revealing the exact weight assigned to any given factor. [*Finkel v. Finkel,* 162 N.C. App. 344, 590 S.E.2d 472 (citing *Daetwyler v. Daetwyler*, 130 N.C. App. 246, 502 S.E.2d 662 (1998), *aff'd per curiam*, 350 N.C. 375, 514 S.E.2d 89 (1999)), *cert. denied,* 358 N.C. 234, 595 S.E.2d 150 (2004); *Daetwyler*.]
4. The trial court may decide to give no weight to a factor. [*Smith v. Smith*, 111 N.C. App. 460, 433 S.E.2d 196 (1993), *rev'd in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994).]

E. Equal versus Unequal

1. The trial court decides in what proportions the value of marital and divisible property should be divided (equal or unequal).
2. The court must make an equitable division of the marital property by balancing the evidence presented by the parties in light of the legislative policy that favors equal division. [*Khajanchi v. Khajanchi,* 140 N.C. App. 552, 537 S.E.2d 845 (2000).]
3. The decision whether to divide the marital estate equally or unequally is entirely within the trial court's discretion, absent some clear abuse. [*Leighow v. Leighow*, 120 N.C. App. 619, 463 S.E.2d 290 (1995); *Jones v. Jones*, 121 N.C. App. 523, 466 S.E.2d 342 (trial court's division of marital estate can be disturbed only if a clear abuse of discretion has occurred), *review denied,* 343 N.C. 307, 471 S.E.2d 72 (1996).]
4. The trial court has discretion to divide the estate equally despite the presence of distributional factors. [*Lund v. Lund*, 779 S.E.2d 175 (N.C. Ct. App. 2015); *Freeman v. Freeman,* 107 N.C. App. 644, 421 S.E.2d 623 (1992).]
5. If the trial court, after considering any statutory factor supported by the evidence, determines that an equal division of the marital assets would not be equitable, it may order an unequal division. [*Fox v. Fox,* 114 N.C. App. 125, 441 S.E.2d 613 (1994).]
6. Finding of a single distributional factor under G.S. 50-20(c) may support an unequal division. [*Edwards v. Edwards,* 152 N.C. App. 185, 566 S.E.2d 847, *cert. denied*, 356 N.C. 611, 574 S.E.2d 679 (2002); *Khajanchi v. Khajanchi,* 140 N.C. App. 552, 537 S.E.2d 845 (2000); *Rosario v. Rosario,* 139 N.C. App. 258, 533 S.E.2d 274 (2000); *Mrozek v. Mrozek*, 129 N.C. App. 43, 496 S.E.2d 836 (1998); *Jones v. Jones*, 121 N.C. App. 523, 466 S.E.2d 342, *review denied,* 343 N.C. 307, 471 S.E.2d 72 (1996); *Leighow v. Leighow*, 120 N.C. App. 619, 463 S.E.2d 290 (1995); *Godley v. Godley,* 110 N.C. App. 99, 429 S.E.2d 382 (1993) (citing *White v. White*, 312 N.C. 770, 774, 324 S.E.2d 829 (1985)) (an unequal distribution based on a single distributional factor if supported by competent evidence will not be disturbed on appeal absent an abuse of discretion).]
7. When making an unequal award, the better practice is to set out the percentage that each spouse is to receive, but a failure to do so is not reversible error if the amount distributed to each party is otherwise ascertainable from the judgment. [*Bodie v. Bodie,* 221 N.C. App. 29, 43, 727 S.E.2d 11, 21 (2012) (trial court did not err in failing to identify the specific percentage of the marital estate distributed to each spouse when that figure could "readily be calculated using information" in the order); *Peltzer v. Peltzer*, 222 N.C. App. 784, 732 S.E.2d 357 (while noting that it would have been helpful if the trial court had been more specific as to the distributional percentages, by using some basic math, the appellate court was able to determine the distributional percentages in a disorganized and difficult to understand equitable distribution order), *review denied*, 366 N.C. 417, 735 S.E.2d 186 (2012); *Barlowe v. Barlowe,* 113 N.C. App. 797, 440 S.E.2d 279 (1994), *aff'd per curiam*, 339 N.C. 732, 453 S.E.2d 865 (1995).]

F. Allocation of Property

1. The trial court must distribute all marital and divisible property and debt. [G.S. 50-20(a); *Larkin v. Larkin*, 165 N.C. App. 390, 598 S.E.2d 651 (2004) (trial court erred when it failed to distribute the date of separation (DOS) value of a bank account classified as marital

property, even though the account had a zero balance at the time of distribution), *aff'd per curiam as modified*, 359 N.C. 316, 608 S.E.2d 754 (2005); *Edwards v. Edwards*, 152 N.C. App. 185, 566 S.E.2d 847 (trial court erred when it failed to identify and divide the divisible property that resulted from the change in value of marital property between the DOS and the date of distribution), *cert. denied*, 356 N.C. 611, 574 S.E.2d 679 (2002); *Bodie v. Bodie,* 221 N.C. App. 29, 727 S.E.2d 11 (2012) (trial court on remand was directed to make findings to classify, value, and distribute the postseparation passive increase in the value of husband's 401(k) account); *Hill v. Hill,* 229 N.C. App. 511, 748 S.E.2d 352 (2013) (equitable distribution order that classified credit card debt as marital but did not distribute that debt was remanded for distribution).]

2. The trial court allocates specific property to each party based on the trial judge's discretion and good conscience.
    a. Once property has been properly designated marital property and valued, and the court has decided in what proportions its value should be divided, there appears to be no other guide than the discretion and good conscience of the trial judge in determining which party gets which specific property. [*Khajanchi v. Khajanchi,* 140 N.C. App. 552, 537 S.E.2d 845 (2000) (citing *Andrews v. Andrews*, 79 N.C. App. 228, 338 S.E.2d 809, *review denied,* 316 N.C. 730, 345 S.E.2d 385 (1986), *disapproved of on other grounds by Armstrong v. Armstrong*, 322 N.C. 396, 368 S.E.2d 595 (1988)); *Harris v. Harris*, 84 N.C. App. 353, 352 S.E.2d 869 (1987); *Andrews*.]
3. The allocation of property cannot change the distribution ordered.
    a. Where the trial court expressly found that an equal distribution of the marital estate was equitable and did not find the existence of any distributional factors pursuant to G.S. 50-20(c), an award to one spouse of additional marital property that created an unequal distribution of the marital estate was not supported by findings of fact. [*Stone v. Stone,* 181 N.C. App. 688, 640 S.E.2d 826 (2007) (remanded for new distributional order).]
4. Court may award one party property having a value in excess of the net marital estate. [*Conway v. Conway*, 131 N.C. App. 609, 508 S.E.2d 812 (1998) (trial court does not lose its ability to distribute marital assets simply because marital debts equal or exceed the value of those assets), *review dismissed, denied*, 350 N.C. 593, 537 S.E.2d 210 (1999).]
5. Trial court did not err in distributing five businesses to wife, even though wife lacked business experience, when there was evidence that the businesses would not require active operation or management by wife. [*Wirth v. Wirth,* 193 N.C. App. 657, 668 S.E.2d 603 (2008).]

G. Findings

1. The trial court must make findings of fact sufficient to address the distributional factors and to support the division ordered. [*Armstrong v. Armstrong*, 322 N.C. 396, 368 S.E.2d 595 (1988).]
2. The trial court must make findings of fact in any distribution order, even those in which the court orders an equal division.

a. In any order for the distribution of property made pursuant to G.S. 50-20, the court shall make written findings of fact that support the determination that the marital and divisible property has been equitably divided. [G.S. 50-20(j).]

b. The plain language of G.S. 50-20(j) mandates that written findings be made in **any** order for the equitable distribution of marital property made pursuant to G.S. 50-20, not merely when property is divided unequally. [*Armstrong v. Armstrong*, 322 N.C. 396, 368 S.E.2d 595 (1988), *disapproving of contrary holding in Andrews v. Andrews*, 79 N.C. App. 228, 338 S.E.2d 809 (1986); *Petty v. Petty,* 199 N.C. App.192, 680 S.E.2d 894 (2009) (the court is required to make specific findings of fact setting forth the reasons for an unequal division), *appeal dismissed, review denied,* 363 N.C. 806, 691 S.E.2d 16, *cert. denied,* 561 U.S. 1030, 130 S. Ct. 3512 (2010); *Hinkle v. Hinkle,* 227 N.C. App. 252, 742 S.E.2d 325 (2013) (citing *Friend-Novorska v. Novorska*, 143 N.C. App. 387, 545 S.E.2d 788 (2001), and *Armstrong*) (order providing for equal distribution remanded when there were no findings regarding the contentions of the parties in the pretrial order for an unequal distribution, despite evidence having been presented on those contentions and the related distributional factors).]

c. When the parties have stipulated to an equal division of assets, discussed in Section IV, below, the trial court is not required to make findings of distributional factors established by the evidence presented. [*Miller v. Miller*, 97 N.C. App. 77, 387 S.E.2d 181 (1990) (stating that where parties stipulate to an equal division, it is not only unnecessary but improper for the trial court to consider, in making that distribution, any of the distributional factors in G.S. 50-20(c)); *Cushman v. Cushman*, 781 S.E.2d 499 (N.C. Ct. App. 2016) (same).]

3. The trial court must make findings of fact on all distributional factors on which evidence is presented.

a. Generally.

i. Trial court should make specific findings of fact as to each factor upon which evidence was presented. [*Plummer v. Plummer*, 198 N.C. App. 538, 680 S.E.2d 746 (2009) (citing *Armstrong v. Armstrong*, 322 N.C. 396, 368 S.E.2d 595 (1988)); *Warren v. Warren,* 175 N.C. App. 509, 623 S.E.2d 800 (2006); *Rosario v. Rosario*, 139 N.C. App. 258, 533 S.E.2d 274 (2000); *Crutchfield v. Crutchfield*, 132 N.C. App. 193, 511 S.E.2d 31 (1999).]

ii. Trial court is not required to make findings as to a factor if no evidence is presented as to that factor. [*Troutman v. Troutman*, 193 N.C. App. 395, 667 S.E.2d 506 (2008) (findings as to the liquidity of IRA accounts, checking and savings accounts, and certain other marital assets were not required when husband failed to present evidence of their liquidity or nonliquidity); *Wall v. Wall*, 140 N.C. App. 303, 536 S.E.2d 647 (2000) (when parties offered no evidence about tax consequences, trial court did not err in failing to consider same).]

iii. Trial court is required to make findings of fact to indicate that it considered the testimony. If the trial court does not find the testimony credible or sufficient to support a finding on a specific distributional factor, it should make findings to indicate that it considered and rejected the evidence or gave it little weight. [*Wall v. Wall*, 140 N.C. App. 303, 536 S.E.2d 647 (2000).]

iv. When evidence is presented in favor of an unequal division, the trial court must consider that evidence and make a finding accordingly, even though the trial court ultimately orders an equal division. [*Freeman v. Freeman,* 107 N.C. App. 644, 421 S.E.2d 623 (1992).]

b. Failure to make required findings usually results in remand (if evidence was presented on a distributional factor).

i. Remand required when order contained no findings regarding contentions of the parties in the pretrial order for an unequal distribution, with direction to allow the parties to offer additional evidence on issues that must be addressed at time division of property is to be effective, such as income, property, and liabilities of each party in G.S. 50-20(c)(1). [*Hinkle v. Hinkle,* 227 N.C. App. 252, 742 S.E.2d 325 (2013).]

ii. It was error for trial court not to make any findings regarding the actual income and liabilities of the parties, the amount of the wife's contribution of separate funds to the marital home, or the tax consequences to the parties. [*Rosario v. Rosario*, 139 N.C. App. 258, 533 S.E.2d 274 (2000) (remand for further proceedings consistent with appellate opinion).]

iii. It was error for trial court not to make findings as to parties' health and incomes when evidence was presented as to those factors. [*Collins v. Collins*, 125 N.C. App. 113, 479 S.E.2d 240 (remand for new judgment after consideration of parties' incomes and health), *review denied*, 346 N.C. 277, 487 S.E.2d 542 (1997).]

iv. When record clearly revealed evidence of postseparation appreciation that the court should have considered under G.S. 50-20(c)(11a) or (12) but there were no findings based on either of those statutory factors, court's order was vacated. [*Truesdale v. Truesdale*, 89 N.C. App. 445, 366 S.E.2d 512 (1988) (remanded for further proceedings), *superseded in part by statute as stated in Offerman v. Offerman*, 137 N.C. App. 289, 527 S.E.2d 684 (2000). *But see Crutchfield v. Crutchfield*, 132 N.C. App. 193, 511 S.E.2d 31 (1999) (even though trial court should have made specific findings of fact as to each factor upon which evidence was presented, where defendant wife made no argument, showing, or claim that she was prejudiced by trial court's failure to do so, there was no reversible error).]

v. Where the trial court expressly found that an equal distribution of the marital estate was equitable and did not find the existence of any distributional factors pursuant to G.S. 50-20(c), an award to one spouse of additional marital property that created an unequal distribution of the marital estate was not supported by findings of fact. [*Stone v. Stone,* 181 N.C. App. 688, 640 S.E.2d 826 (2007) (remanded for a new distributional order).]

4. The trial court should not simply list the factors on which evidence was presented but should make ultimate factual findings as to the evidence presented on those factors. [*Daetwyler v. Daetwyler*, 130 N.C. App. 246, 502 S.E.2d 662 (1998), *aff'd per curiam*, 350 N.C. 375, 514 S.E.2d 89 (1999).]

a. Findings should not be verbatim recitations of the testimony of each witness, because that would not reflect a conscious choice by the trial judge between the conflicting

versions of those witnesses. [*Stone v. Stone,* 181 N.C. App. 688, 697 n.2, 640 S.E.2d 826, 832 n.2 (2007) (Stroud, J., concurring).]

b. The findings must show the trial court's due consideration of the evidence presented by the parties in support of the factors enumerated in G.S. 50-20(c). [*Daetwyler v. Daetwyler*, 130 N.C. App. 246, 502 S.E.2d 662 (1998), *aff'd per curiam*, 350 N.C. 375, 514 S.E.2d 89 (1999).]

c. A trial court does not have to make exhaustive findings regarding the evidence presented at the hearing; rather, the trial court is to include the "ultimate" facts it considered. [*Armstrong v. Armstrong*, 322 N.C. 396, 368 S.E.2d 595 (1988); *Fitzgerald v. Fitzgerald,* 161 N.C. App. 414, 588 S.E.2d 517 (2003). *See also Rosario v. Rosario*, 139 N.C. App. 258, 533 S.E.2d 274 (2000) (where Judge Greene, concurring, provided as an example that evidentiary facts may include testimony from a doctor regarding the plaintiff's medical condition and medical bills, while the related ultimate facts would be that plaintiff is in poor health and has incurred particular expenses as a result), and *Chandler v. Chandler*, 108 N.C. App. 66, 422 S.E.2d 587 (1992) (trial court is not required to recite in detail the evidence it considered; it is required only to make findings as to ultimate, rather than evidentiary, facts).]

d. The trial court must in some manner adequately set out the evidence it ultimately considered. [*Atkinson v. Chandler,* 130 N.C. App. 561, 504 S.E.2d 94 (1998) (while a particular finding did not detail the specific evidence the trial court considered regarding the parties' income, health, and liabilities, such a specific recitation was not necessary since the finding, when read in conjunction with other findings, adequately apprised the appellate court of the evidence ultimately considered by the trial court).]

e. For an example of a case in which the trial court listed distributional factors without making supporting findings as to the ultimate evidence presented, see *Rosario v. Rosario*, 139 N.C. App. 258, 260, 533 S.E.2d 274, 275 (2000) (case remanded for further findings where the trial court's order stated that it had "considered all of the statutory factors raised by both parties, including . . . [t]he . . . marriage's duration[,] . . . [t]he income and liabilities of each party[,] . . . [t]he plaintiff's contribution of separate funds to the marital home[,] . . . [and t]he tax consequences to the parties" but did not make any findings regarding the actual income and liabilities of the parties, the amount of plaintiff's contribution of separate funds to the marital home, or what the tax consequences to the parties would be.)

5. The findings must be sufficiently specific to allow appellate review. [*Rosario v. Rosario*, 139 N.C. App. 258, 533 S.E.2d 274 (2000) (recognizing that the degree of specificity required in a court order pertaining to equitable distribution (ED) cannot be established with scientific precision); *Plummer v. Plummer*, 198 N.C. App. 538, 680 S.E.2d 746 (2009).]

a. It aids appellate review when the order allows an appellate court to see how the findings and distributional factors correspond. [*See Peltzer v. Peltzer*, 222 N.C. App. 784, 789, 732 S.E.2d 357, 361 (picking out findings that addressed the distributional factors was "challenging" when the order did not address the identification, classification, and valuation of property and distributional factors in any logical or organized manner; nevertheless, by "sifting through the findings," the court was able to "match

them up with the statutory distributional factors"), *review denied*, 366 N.C. 417, 735 S.E.2d 186 (2012).]

b. A finding stating that the trial court gave "due regard" to the G.S. 50-20 factors is insufficient. [*Peltzer v. Peltzer*, 222 N.C. App. 784, 732 S.E.2d 357 (citing *Rosario v. Rosario*, 139 N.C. App. 258, 533 S.E.2d 274 (2000)), *review denied*, 366 N.C. 417, 735 S.E.2d 186 (2012); *Daetwyler v. Daetwyler*, 130 N.C. App. 246, 502 S.E.2d 662 (1998) (citing *Collins v. Collins*, 125 N.C. App. 113, 479 S.E.2d 240, *review denied*, 346 N.C. 277, 487 S.E.2d 542 (1997)) (general finding of "due regard" does not allow appellate court to determine whether trial court considered evidence presented on each of the distributional factors), *aff'd per curiam*, 350 N.C. 375, 514 S.E.2d 89 (1999); *Collins*.]

c. A finding, stating that the court considered all distributional factors under G.S. 50-20(c), listing the four that it considered "present and relevant" to the case, and including a statement that wife contributed $70,000 of her separate property when the marital home was purchased, would have been insufficient had the trial court not made separate, specific findings that addressed each of the statutory factors listed. [*Cochran v. Cochran*, 198 N.C. App. 224, 679 S.E.2d 469 (2009), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010).]

d. Trial court's statements that it "considered the factors found and noted above in the findings of fact" and that it "*also considered the other statutory distributional factors*" were insufficient. [*Embler v. Embler,* 159 N.C. App. 186, 190, 582 S.E.2d 628, 631 (2003) (emphasis in original) (appellate court unable to determine if trial court properly ordered unequal distribution).]

e. A finding that the trial court "had considered and weighed all of the evidence . . . as that evidence relates to the [distributional] factors in [G.S.] 50-20(c)" was insufficient. [*Mrozek v. Mrozek*, 129 N.C. App. 43, 50, 496 S.E.2d 836, 841 (1998) (finding too general for effective appellate review).]

f. A finding that "factors favoring division in favor of the defendant outweigh factors favoring division in favor of the plaintiff" was insufficient. [*Brown v. Brown*, 72 N.C. App. 332, 336, 324 S.E.2d 287, 289–90 (1985).]

g. For a case in which multiple findings were deemed insufficient for appellate review, see *Plummer v. Plummer*, 198 N.C. App. 538, 680 S.E.2d 746 (2009).

   i. Finding that court considered the income and earnings abilities of the parties was deficient when court failed to find as fact what the parties' incomes or earning abilities were.

   ii. Extensive findings as to the parcels of real property subject to ED were deficient when there was no finding that the trial court considered the nature of those properties in the decision to distribute the marital estate unequally.

   iii. There was no finding that the trial court considered the approximately $73,000 in outstanding loan balances owed by husband on the various parcels of real property.

iv. Evidence was presented that husband attended ministerial school for two years during the marriage but there was no indication that court considered wife's contributions to the marriage during that time.

v. Evidence was presented that parties were in poor health but court made no findings that it considered their health as an unequal distributional factor.

vi. Court referred to marital assets as nonliquid but made no finding that nonliquidity was considered in determining that distribution should be unequal.

vii. Evidence was presented that wife signed husband's name on stock dividend checks and kept proceeds thereof for her own use for six or seven years but court made no finding as to wife's conversion of marital property. [*Plummer v. Plummer*, 198 N.C. App. 538, 680 S.E.2d 746 (2009).]

IV. Distribution Process When Parties Stipulate to an Equal Division

A. Generally

1. Because distributional factors are used only to determine whether an equal division of assets would not be equitable, the trial court should not consider, or make findings as to, the distributional factors in G.S. 50-20(c) when the parties have stipulated to an equal division of all marital and divisible assets and liabilities.
2. Where the parties stipulate that an equal division of the marital property is equitable, it is not only unnecessary but improper for the trial court to consider, in making that distribution of marital property, any of the distributional factors in G.S. 50-20(c). [*Cushman v. Cushman*, 781 S.E.2d 499 (N.C. Ct. App. 2016); *Miller v. Miller*, 97 N.C. App. 77, 387 S.E.2d 181 (1990).]
3. Where the parties stipulate to an equal division of the marital property, trial court properly refused to make separate findings of fact regarding postseparation appreciation of the marital home or its postseparation occupancy by husband as distributional factors. [*Christensen v. Christensen,* 101 N.C. App. 47, 398 S.E.2d 634 (1990).] NOTE: *Christensen* was decided before divisible property was created in 1997. Under G.S. 50-20(b)(4)a., passive postseparation appreciation may be divisible property rather than a distributional factor.
4. Where parties agreed to an equal division of property, trial court properly excluded evidence concerning wife's education and ability to support herself. [*Workman v. Workman,* 106 N.C. App. 562, 418 S.E.2d 269 (1992) (G.S. 50-20 factors are to be considered only if parties disagree over division of property).]

B. Inquiry by the Court

1. If the stipulation is not in writing, the court must conduct the inquiries required by *McIntosh v. McIntosh*, 74 N.C. App. 554, 328 S.E.2d 600 (1985), before accepting the stipulation. [*Aycock v. Aycock*, 113 N.C. App. 834, 440 S.E.2d 282 (1994).] The requirements in *McIntosh* are set out in *Equitable Distribution Overview and Procedure*, Part 1 of this Chapter, Section V.B.

2. For more on stipulations, see *Equitable Distribution Overview and Procedure*, Part 1 of this Chapter, Section V. For stipulations as to value, see *Valuation,* Part 3 of this Chapter, Section III.A.

V. Specific Factors

A. Income, Property, and Liabilities of Each Party at the Time the Division of Property Is to Become Effective [G.S. 50-20(c)(1).]

1. Income.
   a. Evidence that wife earned a larger income than husband should have been considered a distributional factor under G.S. 50-20(c)(1). [*Atkins v. Atkins*, 102 N.C. App. 199, 401 S.E.2d 784 (1991); *Hill v. Hill,* 229 N.C. App. 511, 748 S.E.2d 352 (2013) (citing *Fox v. Fox,* 114 N.C. App. 125, 441 S.E.2d 613 (1994)) (consideration of relative incomes of the parties at time of distribution was appropriate and even required if evidence was presented on the issue and unequal distribution was requested).]
   b. Income at the time of distribution is relevant, not income earned during the four years the parties were separated. [*Godley v. Godley,* 110 N.C. App. 99, 429 S.E.2d 382 (1993); *Hill v. Hill,* 229 N.C. App. 511, 748 S.E.2d 352 (2013) (it was error to base finding in equitable distribution (ED) order that husband earned twice as much as wife on finding in earlier order for postseparation support and not on evidence of parties' incomes at time of distribution).]
   c. Only those commissions, for an ascertainable sum certain, realized between the date of separation (DOS) and entry of the ED order, shall be considered as a distributional factor (distributional factor not identified). [*Godley v. Godley,* 110 N.C. App. 99, 429 S.E.2d 382 (1993) (case involved contract generating commissions entered into during marriage; defendant's right to receive commissions had not vested on the DOS; commissions that defendant might receive after the date of the ED order were too speculative to be considered as a distributional factor).] In cases filed after Oct. 1, 1997, certain commissions are to be considered divisible property. See Section IX, below, on divisible property.
   d. Value of food stamps received by a party is not income under G.S. 50-20(c)(1), nor is child support or Aid to Families with Dependent Children payments. [*Bradley v. Bradley*, 78 N.C. App. 150, 336 S.E.2d 658 (1985).]
   e. Receipt of federal military disability pay is the disabled servicemember's "separate property and, as such, must be treated as a distributional factor under N.C.G.S. § 50-20(c)(1)." [*Bishop v. Bishop*, 113 N.C. App. 725, 734, 440 S.E.2d 591, 597 (1994); *Halstead v. Halstead,* 164 N.C. App. 543, 596 S.E.2d 353 (2004) (citing *Bishop*).]
   f. A second type of military disability compensation, Combat-Related Special Compensation, available to certain qualified disabled veterans, is the disabled veteran's separate property and is not divisible in ED. [*Hillard v. Hillard,* 223 N.C. App. 20, 733 S.E.2d 176 (2012), *review denied,* 366 N.C. 432, 736 S.E.2d 490 (2013).] For a

discussion of *Hillard,* see *Pension and Retirement Benefits,* Part 5 of this Chapter, Section I.C.3.

g. Income includes the earning potential of a party as well as income at the time of distribution. [*Harris v. Harris*, 84 N.C. App. 353, 352 S.E.2d 869 (1987).] A wife's lack of earning potential has been found to justify a finding that she needed to occupy and own the marital home and household effects. [*Becker v. Becker*, 127 N.C. App. 409, 489 S.E.2d 909 (1997).]

h. Trial court did not abuse its discretion when it refused under G.S. 50-20(c)(1) to impute income to wife commensurate with her earning capacity instead of considering her actual income, which husband contended had decreased because of post-separation drug use. [*Brackney v. Brackney,* 199 N.C. App. 375, 682 S.E.2d 401 (2009) (court of appeals did not decide whether a trial court would be permitted to impute income when making findings under G.S. 50-20(c)(1)), *review withdrawn,* 363 N.C. 853, 694 S.E.2d 200 (2010).]

i. Since neither party introduced evidence concerning husband's income as of the date of trial, trial's court finding that husband was earning $120,000 annually was not supported by evidence in the record and was error. [*Pott v. Pott,* 126 N.C. App. 285, 484 S.E.2d 822 (1997).]

j. Postseparation rental income generated from marital property should be treated as a distributional factor. [*Godley v. Godley,* 110 N.C. App. 99, 429 S.E.2d 382 (1993). *Accord Chandler v. Chandler,* 108 N.C. App. 66, 422 S.E.2d 587 (1992) (involving warehouses, which were marital property, continuously under lease from the DOS to the date of trial).] Even though the opinions in *Godley* and *Chandler* identified G.S. 50-20(c)(12) ("catch-all" provision) as the distributional factor, the cases are included in this section for ease of reference. In cases filed after Oct. 1, 1997, passive postseparation income is to be considered divisible property pursuant to G.S. 50-20(b)(4)a. Active postseparation income from marital property remains a distributional factor.

k. Husband's receipt of all proceeds of a note was properly considered a "significant and compelling distributional factor" where court was not able to impose a constructive trust on the funds. [*Upchurch v. Upchurch*, 128 N.C. App. 461, 468, 495 S.E.2d 738, 742, *review denied*, 348 N.C. 291, 501 S.E.2d 925 (1998).] Even though the court identified G.S. 50-20(c)(12) ("catch-all" provision) as the distributional factor, the case is included in this section for ease of reference.

l. Voluntary postseparation payments (PSS) made by husband to wife in excess of amount he was ordered to pay as PSS were properly considered as a distributional factor. [*Miller v. Miller*, 778 S.E.2d 451 (N.C. Ct. App. 2015) (trial court did not err by subtracting excess amounts paid by husband from wife's distributive award).]

2. Property.

a. The term "property" in G.S. 50-20(c)(1) refers to the parties' separate property. [*Loeb v. Loeb*, 72 N.C. App. 205, 324 S.E.2d 33, *cert. denied*, 313 N.C. 508, 329 S.E.2d 393 (1985), *overruled in part on other grounds by Johnson v. Johnson,* 317 N.C. 437, 346 S.E.2d 430 (1986), *disapproved of on other grounds by Armstrong v. Armstrong,* 322 N.C. 396, 368 S.E.2d 595 (1988).]

b. Dental license was husband's separate property and was to be considered as a factor affecting equitable distribution (ED). [*Dorton v. Dorton,* 77 N.C. App. 667, 336 S.E.2d 415 (1985). *See also Conway v. Conway,* 131 N.C. App. 609, 508 S.E.2d 812 (1998) (trial court properly rejected wife's argument that a portion of husband's medical license was marital property because marital efforts contributed to its acquisition; to accept argument would undermine statutory definition of license as separate property), *review dismissed, review denied,* 350 N.C. 593, 537 S.E.2d 210 (1999); *Poore v. Poore*, 75 N.C. App. 414, 331 S.E.2d 266 (error for the trial court not to consider under G.S. 50-20(c)(1) husband's separate property in the form of a dental license and an interest in pension and profit sharing plans), *review denied*, 314 N.C. 543, 335 S.E.2d 316 (1985).] See G.S. 50-20(b)(2), providing that all professional licenses and business licenses that would terminate on transfer are separate property.

c. It was error for the trial court to consider as a distributional factor under G.S. 50-20(c)(1) that husband had received an inheritance of "significant value" when there was no evidence to support the value of the inheritance. [*Atkins v. Atkins*, 102 N.C. App. 199, 401 S.E.2d 784 (1991). *But see Conway v. Conway*, 131 N.C. App. 609, 615, 508 S.E.2d 812, 817 (1998) (marital contributions to acquisition of husband's medical license could be considered as a distributional factor; trial court's finding that husband's medical license had "very substantial value" sufficient), *review dismissed, review denied*, 350 N.C. 593, 537 S.E.2d 210 (1999).]

d. It was error for the court to fail to identify defendant's inheritance of $1.25 million as a distributional factor. [*Smith v. Smith*, 786 S.E.2d 12 (N.C. Ct. App. 2016).]

3. Liabilities.

a. G.S. 50-20(c)(1) requires the court to consider all debts of the parties, whether a debt is one for which both parties are legally responsible or one for which only one party is responsible. [*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); *Geer v. Geer*, 84 N.C. App. 471, 353 S.E.2d 427 (1987); *Hill v. Hill,* 229 N.C. App. 511, 748 S.E.2d 352 (2013) (trial court did not err when it considered under G.S. 50-20(c)(1) that parties had liabilities in excess of $366,500 on the date of separation).] Debt also may be considered as a factor under G.S. 50-20(c)(12) ("catch-all" provision).

b. Since separate debt cannot be distributed, the trial court must value it and consider it as a factor under G.S. 50-20(c)(1). [*Fox v. Fox,* 114 N.C. App. 125, 441 S.E.2d 613 (1994).]

c. Trial court properly considered under G.S. 50-20(c)(1) amount of wife's unpaid attorney fees as part of her overall debt. [*Brackney v. Brackney,* 199 N.C. App. 375, 682 S.E.2d 401 (2009) (noting lack of authority to treat liability for attorney fees differently than other liabilities for purposes of G.S. 50-20(c)(1)), *review withdrawn,* 363 N.C. 853, 694 S.E.2d 200 (2010).]

d. Even if wife's obligation to care for an illegitimate child born during the marriage to someone other than her husband constitutes a "liability" under G.S. 50-20(c)(1), G.S. 50-20(f) prohibits the trial court from considering that obligation. [*Pott v. Pott,* 126 N.C. App. 285, 484 S.E.2d 822 (1997).]

e. When wife had completed repayment of a loan prior to the ED hearing, the trial court correctly determined that she had no liabilities at the time the property division was to be become effective. [*Talent v. Talent*, 76 N.C. App. 545, 334 S.E.2d 256 (1985), *superseded on other grounds by statute as stated in Rhew v. Rhew,* 138 N.C. App. 467, 531 S.E.2d 471 (2000).]

f. Any concerns that the trial court may have about the fact that a marital debt is owed to the parents of a spouse, or that the parents may have an affirmative defense to repayment, is properly treated as a distributional factor. [*Mrozek v. Mrozek*, 129 N.C. App. 43, 496 S.E.2d 836 (1998).] Even though the court identified G.S. 50-20(c)(12) ("catch-all" provision) as the distributional factor, *Mrozek v. Mrozek*, 129 N.C. App. 43, 496 S.E.2d 836 (1998), is included in this section for ease of reference. For more on loans from family members, see *Classification*, Part 2 of this Chapter Section XII.F.

B. Obligation for Support Arising Out of a Prior Marriage [G.S. 50-20(c)(2).]

1. No published cases to date.
2. In *Harris v. Harris*, 157 N.C. App. 364, 578 S.E.2d 710 (2003) (**unpublished**) (not paginated on Westlaw), the district court erred when, in determining equitable distribution, it considered "the obligations for support arising out of this marriage." G.S. 50-20(c)(2) allows the court to consider obligations from a prior marriage, not the marriage (or former marriage) of the parties before the court.

C. Duration of the Marriage and Age and Physical and Mental Health of Both Parties [G.S. 50-20(c)(3).]

1. Duration of the marriage. [*Davis v. Sineath* (*Davis*), 129 N.C. App. 353, 498 S.E.2d 629 (1998) (trial court properly considered that marriage lasted only ten months).]
2. Health.
   a. A spouse's alcoholism cannot be considered as fault or misconduct but may be relevant to her physical and mental health. [*Smith v. Smith*, 71 N.C. App. 242, 322 S.E.2d 393 (1984), *aff'd in part and modified on other grounds*, 314 N.C. 80, 331 S.E.2d 682 (1985).]
   b. The court of appeals has implied that a need to occupy the marital residence based on the age or physical health of a spouse would be a valid distributional factor. [*Burnett v. Burnett,* 122 N.C. App. 712, 471 S.E.2d 649 (1996) (dictum).]
   c. When evidence was presented as to the health of the parties, it was error for trial court not to make a finding that it considered that evidence. [*Collins v. Collins,* 125 N.C. App. 113, 479 S.E.2d 240, *review denied*, 346 N.C. 277, 487 S.E.2d 542 (1997); *Taylor v. Taylor*, 92 N.C. App. 413, 374 S.E.2d 644 (1988).]
   d. Once a party testified at length about his health, the trial court was required to make appropriate findings of fact as to his health situation. If the trial court found the party's testimony not to be credible, it should have made findings to indicate that it considered and rejected the evidence or gave it little weight. [*Wall v. Wall*, 140 N.C. App. 303, 536 S.E.2d 647 (2000).]

e. Recitation of medical testimony bearing on a spouse's mental health is not equivalent to a finding of fact. [*Alexander v. Alexander*, 68 N.C. App. 548, 315 S.E.2d 772 (1984) (failure of trial court to make findings as to the parties' physical health rendered findings deficient).] Findings must include ultimate facts considered by the trial court in applying the factors set out in G.S. 50-20(c). [*See Rosario v. Rosario*, 139 N.C. App. 258, 533 S.E.2d 274 (2000) (where Judge Greene, concurring, provided as an example that evidentiary facts may include testimony from a doctor regarding the plaintiff's medical condition and medical bills, while the related ultimate facts would be that plaintiff is in poor health and has incurred particular expenses as a result).]

D. Need of a Parent with Custody of Children of the Marriage to Occupy or Own the Marital Residence and to Use or Own its Household Effects [G.S. 50-20(c)(4).]

1. Trial court's consideration of wife's custody of parties' children related to her need to occupy marital residence and was not an impermissible consideration of custody. [*Mrozek v. Mrozek*, 129 N.C. App. 43, 496 S.E.2d 836 (1998).]
2. Legislature unambiguously limited the scope of G.S. 50-20(c)(4) to "children of the marriage." [*Pott v. Pott,* 126 N.C. App. 285, 484 S.E.2d 822 (1997) (term would not include wife's illegitimate child born during the marriage to someone other than her husband).]
3. Testimony at equitable distribution hearing showing that the minor children had lived in the marital home for most of their lives, remained there while the parties were separated, and attended schools very nearby justified award of marital residence to the custodial spouse. [*Hendricks v. Hendricks*, 96 N.C. App. 462, 386 S.E.2d 84 (1989), *cert. denied,* 326 N.C. 264, 389 S.E.2d 113 (1990).]
4. Fact that one party has custody of the children born of the marriage is not alone a proper distributional factor. [*Gum v. Gum*, 107 N.C. App. 734, 421 S.E.2d 788 (1992) (when the marital home had been sold and there was no evidence of the custodial spouse's need to use or own household effects, it was error for the court to consider as a distributional factor wife's custody of the children).]
5. G.S. 50-20(c)(4) should not be construed to require that a party must be a custodial parent to be awarded ownership of the marital residence. The court has equitable authority to compel one spouse to convey title to another spouse when justice requires. [*Geer v. Geer*, 84 N.C. App. 471, 353 S.E.2d 427 (1987) (trial court's order requiring custodial parent, the wife, to convey title to the marital residence to the noncustodial parent, the husband, to effect reimbursement of the costs of wife's medical education was upheld).]

E. The Expectation of Pension, Retirement, or Other Deferred Compensation Rights That Are Not Marital Property [G.S. 50-20(c)(5).]

1. If a pension, retirement, or other deferred compensation right is classified as one spouse's separate property, it must be considered as a distributional factor under G.S. 50-20(c)(5). [*Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994); *Johnson v. Johnson,* 230 N.C. App. 280, 750 S.E.2d 25 (2013) (trial court did not distribute defendant's military pension because there was no competent evidence as to value; trial court considered fact that husband's pension was not distributed as a distributional factor warranting unequal division in favor of wife; appellate court affirmed decision not to distribute pension and unequal

distribution in wife's favor, but it was not clear whether the court of appeals considered nondistribution of husband's pension as a distributional factor).]

2. Trial court did not have to find present value of the portion of husband's pension that was his separate property. Court's finding of annual sum that husband was to receive was sufficient under G.S. 50-20(c)(1) and (c)(5). [*Dewey v. Dewey*, 77 N.C. App. 787, 336 S.E.2d 451 (1985) (case involved prior version of statute), *review denied*, 316 N.C. 376, 344 S.E.2d 1 (1986).]

F. Any Equitable Claim to, Interest in, or Direct or Indirect Contribution to the Acquisition of Marital Property by the Spouse Not Having Title, Including Joint Efforts or Expenditures and Contributions and Services, or Lack Thereof, as a Spouse, Parent, Wage Earner, or Homemaker [G.S. 50-20(c)(6).]

1. G.S. 50-20(c)(6) is not relevant when property is held as tenants by the entirety because this factor relates only to property to which one spouse has sole title. [*Smith v. Smith*, 71 N.C. App. 242, 322 S.E.2d 393 (1984), *aff'd in part and modified on other grounds,* 314 N.C. 80, 331 S.E.2d 682 (1985).]
2. Distribution was upheld when both parties offered evidence on wife's role or lack thereof as a spouse, parent, wage earner, or homemaker, but the trial court concluded that this distributional factor should be given no weight. [*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).]
3. Wife's efforts in the marriage and the relatively small size of the marital estate were appropriate facts to consider in the context of wife's contributions as a homemaker. [*Conway v. Conway*, 131 N.C. App. 609, 508 S.E.2d 812 (1998) (the short period of time between the opening of husband's medical practice and the date of separation was relevant to the consideration of wife's marital efforts), *review dismissed, denied,* 350 N.C. 593, 537 S.E.2d 210 (1999).]
4. Fact that one spouse worked outside the home and participated in childrearing and homemaking while the other spouse participated only in homemaking and childrearing was properly considered as a distributional factor. [*Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985).] This also was properly considered as a distributional factor under G.S. 50-20(c)(12) ("catch-all" provision).

G. Any Direct or Indirect Contribution Made by One Spouse to Help Educate or Develop the Career Potential of the Other Spouse [G.S. 50-20(c)(7).]

1. The completion of husband's medical residency, the family's move to a new location, wife's efforts in the marriage, and the relatively small size of the net marital estate were all relevant considerations under G.S. 50-20(c)(7). [*Conway v. Conway*, 131 N.C. App. 609, 508 S.E.2d 812 (1998), *review dismissed, denied,* 350 N.C. 593, 537 S.E.2d 210 (1999).]
2. Consideration of husband's contribution to wife's medical degree was especially appropriate where the evidence showed that he interrupted his career, relocated twice, and assumed a greater role than his wife in child care and homemaking duties. [*Geer v. Geer*, 84 N.C. App. 471, 353 S.E.2d 427 (1987).]

3. Direct out-of-pocket expenses of the nonstudent spouse in support of a student spouse's education should be considered by the trial court when dividing marital property. [*Pellom v. Pellom,* 194 N.C. App. 57, 669 S.E.2d 323 (2008) (interpreting *Geer v. Geer*, 84 N.C. App. 471, 353 S.E.2d 427 (1987), to so hold), *review denied,* 363 N.C. 375, 678 S.E.2d 667 (2009).]
4. Note that when the nonstudent spouse benefits from the contributions to the student spouse's education for a number of years thereafter, a dollar-for-dollar reimbursement of the contributions is an abuse of discretion. [*Pellom v. Pellom,* 194 N.C. App. 57, 669 S.E.2d 323 (2008) (where wife received financial and other benefits during the twenty years after her retirement earnings were used to support husband during medical school, including no longer working full-time and financial security, it was error to award complete reimbursement of her contribution in present-day dollars), *review denied,* 363 N.C. 375, 678 S.E.2d 667 (2009).]
5. Trial court properly considered that husband had provided for wife to obtain her master's degree, thereby advancing her career and increasing her potential salary. [*Smith v. Smith*, 71 N.C. App. 242, 322 S.E.2d 393 (1984), *aff'd in part and modified on other grounds*, 314 N.C. 80, 331 S.E.2d 682 (1985).]
6. Trial court is not required to place a value on wife's contribution to husband's legal education and career development before using her contribution as the basis for an unequal distribution. [*Gum v. Gum*, 107 N.C. App. 734, 421 S.E.2d 788 (1992).]
7. While generally one spouse's contribution to the attainment of a professional degree by the other is a distributional factor to be considered under G.S. 50-20(c)(7), not all contributions will warrant an unequal distribution of marital assets. [*See Haywood v. Haywood*, 333 N.C. 342, 425 S.E.2d 696 (1993) (competent evidence supported court's finding that plaintiff's contributions to defendant's degree did not warrant an unequal distribution), *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).]
8. A spouse's voluntary postseparation disbursement from separate property for the other spouse's education and other expenses was considered as a distributional factor. [*Peltzer v. Peltzer*, 222 N.C. App. 784, 732 S.E.2d 357 (distributional factor not specified; the case is included in this section for ease of reference), *review denied*, 366 N.C. 417, 735 S.E.2d 186 (2012).]

H. Any Direct Contribution to an Increase in Value of Separate Property That Occurs During the Course of the Marriage [G.S. 50-20(c)(8).]

1. The completion of husband's medical residency, the family's move to a new location, wife's efforts in the marriage, and the relatively small size of the net marital estate were all relevant considerations under G.S. 50-20(c)(8). [*Conway v. Conway*, 131 N.C. App. 609, 508 S.E.2d 812 (1998), *review dismissed, denied,* 350 N.C. 593, 537 S.E.2d 210 (1999).]
2. A spouse's contribution of separate property to acquire or fund marital property is considered under G.S. 50-20(c)(12), rather than under G.S. 50-20(c)(8). [*Finney v. Finney,* 225 N.C. App. 13, 736 S.E.2d 639 (2013) (citing *Collins v. Collins*, 125 N.C. App. 113, 479 S.E.2d 240 (1997)) (husband's use of his separate funds during the marriage to purchase a

car for both parties to use, to establish an IRA for wife, and to make a down payment on the marital residence should be considered under G.S. 50-20(c)(12)).]

3. See *Classification*, Part 2 of this Chapter, Section VI.E for cases holding that active appreciation of separate property during the marriage is marital property.

I. The Liquid or Nonliquid Character of All Marital and Divisible Property [G.S. 50-20(c)(9).]

1. Equal distribution does not mean that each party must receive an equal percentage of liquid assets. [*Eubanks v. Eubanks*, 109 N.C. App. 127, 425 S.E.2d 742 (1993) (court rejected husband's argument that wife's half of the marital estate consisted of a greater percentage of liquid assets than he received in his half).]
2. Findings as to the liquidity of IRA accounts, checking and savings accounts, and certain other marital assets were not required when husband failed to present evidence of their liquidity or nonliquidity. [*Troutman v. Troutman*, 193 N.C. App. 395, 667 S.E.2d 506 (2008).]
3. The court of appeals has cited this distributional factor as support for the requirement that a trial court find that a party has sufficient liquid assets from which to pay a distributive award. [*Urciolo v. Urciolo,* 166 N.C. App. 504, 601 S.E.2d 905 (2004).] For more on distributive awards, see Section X, below.

J. Difficulty of Evaluating any Component Asset or Interest in a Business, Corporation, or Profession and the Economic Desirability of Retaining the Asset or Interest Intact and Free from any Claim or Interference by the Other Party [G.S. 50-20(c)(10).]

1. Trial court's finding that it was desirable to keep husband's medical practice intact under G.S. 50-20(c)(10), along with other findings, was basis for upholding distribution ordered. [*Munn v. Munn*, 112 N.C. App. 151, 435 S.E.2d 74 (1993).]
2. Fact that property owned by a marital limited liability company (LLC) had been transferred to the LLC during the marriage by husband's parents as part of their estate planning process was properly considered as a distributional factor under G.S. 50-20(c)(12) and (c)(10). [*Montague v. Montague*, 238 N.C. App. 61, 767 S.E.2d 71 (2014).]

K. Tax Consequences to Each Party [G.S. 50-20(c)(11).]

1. For actions filed on or after Oct. 1, 2005, G.S. 50-20(c)(11) provides that:
   a. A trial court shall consider the tax consequences to each party, including federal and State tax consequences that would have been incurred if the marital and divisible property had been sold or liquidated on the date of valuation. The trial court may, however, in its discretion consider whether or when such consequences are reasonably likely to occur in determining the equitable value deemed appropriate for this factor. [S.L. 2005-353, § 1, applicable to actions filed on or after Oct. 1, 2005.]
2. For actions filed before Oct. 1, 2005, G.S. 50-20(c)(11) provided only that a trial court should consider "the tax consequences to each party."
3. Under both the current and former statutes, a trial court is required to consider tax consequences as a distributional factor only when sufficient evidence is presented to allow the court to make the findings required by the statute.

a. Cases applying the current statute.

i. *Power v. Power*, 236 N.C. App. 581, 763 S.E.2d 565 (2014) (trial court could not consider tax consequences where no evidence of the consequences was presented at trial; mention of tax consequences during closing argument and in email sent to judge following the conclusion of the trial was not evidence).]

ii. *Plummer v. Plummer*, 198 N.C. App. 538, 680 S.E.2d 746 (2009) (where only mention of tax consequences was when each party's counsel noted in final arguments—which would not be evidence—that due to distribution not being ordered until six years after the parties' divorce, parties had lost the presumption of a nontaxable exchange between spouses, the trial court erred when it made a finding about the tax consequences of the exchange without evidence having been presented on that point); *Binder v. Binder,* 222 N.C. App. 634, 731 S.E.2d 275 (**unpublished**) (not paginated on Westlaw) (verified statement that if defendant was ordered to make a distributive award, "defendant will be required to liquidate his interest in one or more of his real estate holdings, incurring substantial tax liability for so doing" was "plainly inadequate," without any details such as amount of tax or tax rate, and did not meet burden of proof; defendant did not present expert testimony and could not complain on appeal about his failure to "present the evidence he now claims was crucial for the trial court to consider"), *review denied,* 366 N.C. 414, 735 S.E.2d 181 (2012).]

b. Cases applying the former statute.

i. *Wall v. Wall*, 140 N.C. App. 303, 536 S.E.2d 647 (2000) (trial court is not required to consider tax consequences unless the parties offer evidence about them; when parties offered no evidence about tax consequences, trial court did not err in failing to consider same); *Smith v. Smith*, 111 N.C. App. 460, 433 S.E.2d 196 (1993) (court rejected husband's argument that no evidence was required because adverse tax consequences were "common knowledge"), *rev'd in part on other grounds,* 336 N.C. 575, 444 S.E.2d 420 (1994); *Lawing v. Lawing,* 81 N.C. App. 159, 344 S.E.2d 100 (1986) (accountant's statements of general tax principles not sufficient to require findings).]

4. A trial court is not required to consider tax consequences as a distributional factor when the court determines, or the parties have stipulated, that an equal division is equitable. [*See Stovall v. Stovall,* 205 N.C. App. 405, 698 S.E.2d 680 (2010) (when parties stipulated to an equal division, except as to certain postseparation debt payments, trial court could not consider tax implications to defendant related to a pending sale of a tobacco warehouse; distributional factors are to be considered only if court determines that an equal division is not equitable).]

5. Under the current statute, a trial court is required to consider evidence of tax consequences that would occur if property was sold on the date of valuation but may give little or no weight to that evidence if it determines that a sale, and related tax consequences, are not likely to occur. [*See Peltzer v. Peltzer*, 222 N.C. App. 784, 797, 732 S.E.2d 357, 366 (citing *Cochran v. Cochran*, 198 N.C. App. 224, 238, 679 S.E.2d 469, 478 (2009), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010), and *Crowder v. Crowder*, 147 N.C. App. 677, 683, 556 S.E.2d 639, 643 (2001)) (trial court in *Peltzer* considered expert testimony that

tax consequences of a sale of defendant's interest in a medical practice would decrease the date of separation value by approximately $130,000 but gave little or no weight to the testimony in the distribution decision, as it found that a sale was "unlikely given the Defendant's relative youth and his vested interest in continuing the protective and financially rewarding practice"), *review denied*, 366 N.C. 417, 735 S.E.2d 186 (2012).]

6. Cases applying the former statute interpreted it consistently.
   a. To forbid consideration of speculative or hypothetical tax consequences. [*Dolan v. Dolan*, 148 N.C. App. 256, 558 S.E.2d 218 (citing *Wilkins v. Wilkins*, 111 N.C. App. 541, 432 S.E.2d 891 (1993)) (error to consider as a distributional factor hypothetical and speculative tax consequences arising from the liquidation of multiple rental properties without finding that the parties would have to, or were ordered to, liquidate the properties or that there would be any actual tax consequences), *aff'd per curiam,* 355 N.C. 484, 562 S.E.2d 422 (2002); *Wilkins* (error to consider hypothetical tax consequences as a distributional factor favoring husband based on certain events, none of which had occurred on or before the date of separation or the date of the hearing and many of which could not occur until at least several years after entry of equitable distribution judgment).]
   b. To allow consideration of only those tax consequences that would result from the distribution of property that the court actually ordered. [*Smith v. Smith*, 111 N.C. App. 460, 433 S.E.2d 196 (1993) (citing *Weaver v. Weaver*, 72 N.C. App. 409, 324 S.E.2d 915 (1985)) (trial court does not have to consider tax consequences that are purely speculative and are not inherent in distribution actually ordered), *rev'd in part on other grounds,* 336 N.C. 575, 444 S.E.2d 420 (1994); *Weaver* (in a case determining the value of defendant's partnership practice, the court construed former G.S. 50-20(c)(11) to require a trial court to consider only those tax consequences that will result from the distribution of the property that the court actually orders).]
7. Even though the statute was amended in 2005, cases applying the current statute have continued to cite and apply the holdings of the earlier cases. [*See Pellom v. Pellom,* 194 N.C. App. 57, 66, 669 S.E.2d 323, 328 (2008) (quoting *Weaver v. Weaver*, 72 N.C. App. 409, 416, 324 S.E.2d 915, 920 (1985), *disapproved of on other grounds by Armstrong v. Armstrong,* 322 N.C. 396, 368 S.E.2d 595 (1988)) (G.S. 50-20(c)(11) requires "the court to consider tax consequences that will result from the distribution of property that the court actually orders"), *review denied,* 363 N.C. 375, 678 S.E.2d 667 (2009); *Cochran v. Cochran*, 198 N.C. App. 224, 238, 679 S.E.2d 469, 478 (2009) (citing *Crowder v. Crowder*, 147 N.C. App. 677, 556 S.E.2d 639 (2001), *Dolan v. Dolan*, 148 N.C. App. 256, 558 S.E.2d 218, *aff'd per curiam,* 355 N.C. 484, 562 S.E.2d 422 (2002), *Weaver,* and *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)) (emphasis in original) (when sale of the marital residence was not necessary or imminent, evidence that wife would not be taxed on any gain presented only a "speculative tax consequence as to which the trial court *may not* make a finding;" also, findings were not required about the tax consequences of husband's future receipt of pension benefits when the fact that husband's pension, when received, would constitute taxable income was not the result of the ordered distribution), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010).]

L. Acts of Either Party to Maintain, Preserve, Develop, or Expand, or to Waste, Neglect, Devalue, or Convert, Marital or Divisible Property, or Both, During the Period After Separation and Before Distribution [G.S. 50-20(c)(11a).]

1. Postseparation appreciation of marital property.
   a. In cases filed before Oct. 1, 1997, postseparation appreciation of marital property may be treated as a distributional factor under G.S. 50-20(c)(11a) or (12). [*Mrozek v. Mrozek*, 129 N.C. App. 43, 496 S.E.2d 836 (1998); *Truesdale v. Truesdale*, 89 N.C. App. 445, 366 S.E.2d 512 (1988), *superseded in part by statute as stated in Offerman v. Offerman*, 137 N.C. App. 289, 527 S.E.2d 684 (2000).]
   b. In cases filed after Oct. 1, 1997:
      i. Postseparation appreciation of a marital asset that is not attributable to the actions of a spouse is to be considered divisible property pursuant to G.S. 50-20(b)(4)a. [*But see Fitzgerald v. Fitzgerald,* 161 N.C. App. 414, 588 S.E.2d 517 (2003) (where court of appeals, in a case filed after Oct. 1, 1997, assumed without discussion that postseparation appreciation of the marital residence would be a distributional factor rather than divisible property pursuant to G.S. 50-20(b)(4)a.).]
      ii. Apparently, postseparation appreciation of a marital asset that is the result of the efforts of a spouse will remain a distributional factor. [*See Allen v. Allen,* 168 N.C. App. 368, 607 S.E.2d 331 (2005) (if postseparation diminution in value of the parties' investment accounts was due to husband's actions, the diminution may be considered a distributional factor).]
   c. When postseparation appreciation is a distributional factor rather than divisible property:
      i. Court may not distribute postseparation appreciation, even when it distributes it in the same ratio deemed equitable under G.S. 50-20(c). [*Truesdale v. Truesdale*, 89 N.C. App. 445, 366 S.E.2d 512 (1988), *superseded in part by statute as stated in Offerman v. Offerman*, 137 N.C. App. 289, 527 S.E.2d 684 (2000).] Postseparation changes in the value of certain assets and debts that were considered as distributional factors in cases filed before Oct. 1, 1997, may be distributed in cases filed after that date if they meet the definition for divisible property.
      ii. Rather than distribute postseparation appreciation, the trial court must consider the existence of postseparation appreciation, determine to whose benefit the increase in value will accrue, and then consider that benefit when determining whether an equal or unequal distribution of marital property would be equitable. [*Gum v. Gum,* 107 N.C. App. 734, 421 S.E.2d 788 (1992).]
      iii. Trial court properly considered as a distributional factor that the value of the marital property had increased from the date of separation (DOS) to the date of trial and that the increase inured to the benefit of husband. [*Atkins v. Atkins*, 102 N.C. App. 199, 401 S.E.2d 784 (1991).]
      iv. Only appreciation that actually accrued between the DOS and the date of distribution may be considered as a distributional factor. [*Cobb v. Cobb,* 107 N.C. App. 382, 420 S.E.2d 212 (1992) (trial 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 equitable distribution order).]

v. Postseparation appreciation of a marital asset also may be considered a distributional factor under G.S. 50-20(c)(1) and (c)(12). [*Gum v. Gum*, 107 N.C. App. 734, 421 S.E.2d 788 (1992); *Chandler v. Chandler,* 108 N.C. App. 66, 422 S.E.2d 587 (1992) (postseparation rental income, which was not the result of either party's acts, can be considered under G.S. 50-20(c)(12)).]

2. When postseparation diminution of value of marital property is a distributional factor rather than divisible property.

   a. Appellate court held that if, on remand, the court finds that the postseparation diminution in value of the parties' investment accounts was due to husband's actions, the diminution may be considered a distributional factor. [*Allen v. Allen,* 168 N.C. App. 368, 607 S.E.2d 331 (2005).]

   b. The court held that the active postseparation diminution of the parties' checking account, resulting from both parties' continued use of the account without accounting to each other, could be considered as a distributional factor. [*Larkin v. Larkin,* 165 N.C. App. 390, 598 S.E.2d 651 (2004) (postseparation withdrawals by both parties depleted the account by the date of distribution; postseparation withdrawals by both parties could not be considered divisible property), *aff'd per curiam as modified,* 359 N.C. 316, 608 S.E.2d 754 (2005). *But see Robertson v. Robertson*, 167 N.C. App. 567, 605 S.E.2d 667 (2004) (postseparation decrease in value of marital home due to lack of maintenance by both parties was divisible property).]

3. Postseparation payment or reduction of marital debt.

   a. Effective Oct. 11, 2002, a postseparation **decrease** in marital debt is divisible property. [G.S. 50-20(b)(4)d., *amended by* S.L. 2002-159, § 33.5.] Effective Oct. 1, 2013, only passive postseparation decreases in marital debt and finance charges and interest related to marital debt are divisible property. [G.S. 50-20(b)(4)d., *amended by* S.L. 2013-103, § 1 to add "passive" before decreases.]

   b. Before the 2002 amendment to G.S. 50-20(b)(4)d., postseparation payments could be a distributional factor as a preserver of marital property, [*Hay v. Hay*, 148 N.C. App. 649, 559 S.E.2d 268 (2002).] but after 2002 decreases are divisible property. Postseparation mortgage payments are excluded from the definition of divisible property under G.S. 50-20(b)(4)d. after Oct. 1, 2013.

4. Preservation of the marital estate.

   a. G.S. 50-20(c)(11a) permits the trial court to consider a spouse's maintenance of the property and retention of the benefits of the property. [*Plummer v. Plummer*, 198 N.C. App. 538, 680 S.E.2d 746 (2009).]

   b. A spouse's postseparation payment of mortgage payments and payments for routine maintenance of the marital residence, including lawn care, extermination services, natural gas, and utilities, was properly considered a distributional factor under G.S. 50-20(c)(11a), despite trial court's failure to value those expenditures. [*Peltzer*

v. Peltzer, 222 N.C. App. 784, 732 S.E.2d 357 (citing *Plummer v. Plummer*, 198 N.C. App. 538, 547, 680 S.E.2d 746, 752 (2009)) (amount of mortgage payments was easily determined from the findings, and there was no requirement that routine maintenance be valued; because husband lived part-time and later full-time in the martial home while paying for routine maintenance, he benefitted from the maintenance of the home, which is a proper consideration under G.S. 50-20(c)(11a)), *review denied*, 366 N.C. 417, 735 S.E.2d 186 (2012).] Postseparation payments made between Oct. 11, 2002, and Oct. 1, 2013, for upkeep and repair of the marital home may be classified as divisible property. [*Bodie v. Bodie,* 221 N.C. App. 29, 34, 727 S.E.2d 11, 15 (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).]

c. Husband's postseparation payments of the mortgage, one year's property taxes, and three years of homeowner's insurance premiums were properly considered as a distributional factor. [*Fox v. Fox,* 103 N.C. App. 13, 404 S.E.2d 354 (1991) (citing *Miller v. Miller,* 97 N.C. App. 77, 387 S.E.2d 181 (1990)) (postseparation mortgage payments properly considered under G.S. 50-20(c)(11a) or (c)(12)).]

d. In deciding whether an equal distribution was equitable, trial court properly considered under G.S. 50-20(c)(11a) husband's acts to preserve the marital estate. [*Brackney v. Brackney,* 199 N.C. App. 375, 682 S.E.2d 401 (2009) (acts of preservation included husband's obtaining and closing a loan in his own name on a home under contract on the date of separation, which preserved the parties' down payment, fact that husband did not withdraw equity in the house and did not permit foreclosure of the house), *review withdrawn,* 363 N.C. 853, 694 S.E.2d 200 (2010).]

5. Waste, neglect, devaluation, or conversion of marital or divisible property.

a. Marital property is wasted, neglected, devalued, or converted only if, at the time of distribution, it is either not available for distribution or has, as a result of a spouse's acts, decreased in value from its date of separation (DOS) value. [*Walter v. Walter,* 149 N.C. App. 723, 561 S.E.2d 571 (2002) (trial court erred in treating wife's postseparation removal of property from the marital home as a distributional factor under G.S. 50-20(c)(11a) when there was no evidence that removal of the property had any impact on the value of the marital estate).]

b. Postseparation withdrawals by both parties from a joint checking account for various expenses for themselves and their children could be considered by the trial court on remand as "acts of either party to . . . devalue . . . the marital property" under G.S. 50-20(c)(11a). [*Larkin v. Larkin,* 165 N.C. App. 390, 397, 598 S.E.2d 651, 655 (2004), *aff'd per curiam as modified,* 359 N.C. 316, 608 S.E.2d 754 (2005).]

c. Trial court properly considered under G.S. 50-20(c)(11a) husband's separate use of his retirement funds before distribution. [*Plummer v. Plummer*, 198 N.C. App. 538, 680 S.E.2d 746 (2009) (when interim distribution order was entered eight years after the DOS and ED judgment was entered nine years after the DOS, trial court

permitted to consider plaintiff's retention of real property and retirement funds during that time).]

d. Trial court properly considered under G.S. 50-20(c)(11a) "dramatic" and "significant" postseparation losses in wife's investment account caused by postseparation actions of husband, who was solely responsible for management of the account. [*Melson v. Crane,* 220 N.C. App. 416, 725 S.E.2d 472 (2012) (**unpublished**) (not paginated on Westlaw) (mismanagement of wife's account included act of husband, as a licensed investment advisor, attaching a margin account to wife's investment account and directing that related statements be sent to his office so that wife was unaware of the status of the account, and other acts that caused the account to lose more than half its value by the date of distribution).]

6. Other.

a. No error in considering as a distributional factor under G.S. 50-20(c)(11a) husband's postseparation use of a rental house. [*Edwards v. Edwards*, 110 N.C. App. 1, 428 S.E.2d 834 (husband used house for storage and rented it at various times), *cert. denied*, 335 N.C. 172, 436 S.E.2d 374 (1993).]

b. Fact that wife caused marital property to become encumbered **after separation** may be considered a distributional factor. [*Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985).] Even though court identified G.S. 50-20(c)(12) ("catch-all" provision) as the distributional factor, the case is included in this section for ease of reference.

M. Property the Surviving Spouse Will Receive upon Death of Spouse Before Equitable Distribution Order Is Entered [G.S. 50-20(c)(11b).]

1. In the event of the death of either party prior to the entry of any order for the distribution of property, the court shall consider:

a. Property passing to the surviving spouse by will or through intestacy due to the death of a spouse;

b. Property held as tenants by the entirety or as joint tenants with rights of survivorship passing to the surviving spouse due to the death of a spouse;

c. Property passing to the surviving spouse from life insurance, individual retirement accounts, pension or profit-sharing plans, any private or governmental retirement plan or annuity of which the decedent controlled the designation of beneficiary (excluding any benefits under the federal Social Security system), or any other retirement accounts or contracts, due to the death of a spouse; and

d. The surviving spouse's right to claim an "elective share" pursuant to G.S. 30-3.1 through 30-33, unless otherwise waived. [S.L. 2001-364, § 3, effective Aug. 10, 2001, adding G.S. 50-20(c)(11b).]

N. Any Other Factor the Court Finds to Be Just and Proper [G.S. 50-20(c)(12).]

1. Generally.

a. As the state supreme court observed, "it is clear that only items affecting the marital economy are considered under the first eleven factors of . . . G.S. 50-20(c). Thus, under 50-20(c)(12), the only other considerations which are 'just and proper' . . . are

those which are relevant to the marital economy." [*Smith v. Smith*, 314 N.C. 80, 87, 331 S.E.2d 682, 687 (1985) (footnote omitted); *Plummer v. Plummer*, 198 N.C. App. 538, 680 S.E.2d 746 (2009); *Fountain v. Fountain,* 148 N.C. App. 329, 559 S.E.2d 25 (2002); *Becker v. Becker,* 127 N.C. App. 409, 489 S.E.2d 909 (1997).] "Marital economy" means "the source, availability, and use by a husband and wife of economic resources during the course of the marriage." [*Smith v. Smith*, 314 N.C. 80, 86, 331 S.E.2d 682, 686 (1985); *Plummer; Hill v. Hill,* 229 N.C. App. 511, 748 S.E.2d 352 (2013) (citing *Smith*) (trial court's consideration of the amount of equity in the marital home, high monthly payments, and the reason the debt was incurred was proper as relating to the economics of the marriage).]

b. "Any other" factor cannot include factors explicitly excluded from consideration by another provision of G.S. 50-20. [*Wiencek-Adams v. Adams*, 331 N.C. 688, 417 S.E.2d 449 (1992) (trial court properly refused to consider as a distributional factor under G.S. 50-20(c)(12) wife's waiver of child support and fact that wife supported children for three years after parties separated, because G.S. 50-20(f) requires the court to provide for equitable distribution without regard to support of the children).]

2. Factors proper to consider under G.S. 50-20(c)(12).

a. Misconduct during the marriage that dissipates or reduces the value of marital assets for nonmarital purposes. [*Smith v. Smith*, 314 N.C. 80, 331 S.E.2d 682 (1985).]

i. Court could consider that wife had "looted" estate and had removed and disposed of husband's separate property. [*Glaspy v. Glaspy,* 143 N.C. App. 435, 545 S.E.2d 782 (2001).]

ii. Court could consider how husband's abandonment and other misconduct dissipated value of the marital home. [*Coleman v. Coleman*, 89 N.C. App. 107, 365 S.E.2d 178 (1988) (court could not consider fact that husband abandoned wife).]

iii. Wife's conversion of corporate funds from the parties' close corporation, ultimately precipitating the corporation's demise, clearly dissipated marital property and could be considered a distributional factor. [*Wornom v. Wornom*, 126 N.C. App. 461, 485 S.E.2d 856 (1997).]

b. Presumptions applicable in determining whether misconduct dissipated or reduced marital property for nonmarital purposes:

i. Presumption that each spouse consents to the other spouse's withdrawal of funds from a joint account. [*Wornom v. Wornom*, 126 N.C. App. 461, 485 S.E.2d 856 (1997) (presumption was overcome by husband's testimony that he was unaware that wife was converting funds).]

ii. Presumption that each spouse's use of funds from a joint account was for purpose of sustaining the family. [*Wornom v. Wornom,* 126 N.C. App. 461, 467, 485 S.E.2d 856, 860 (1997) (presumption was overcome by wife's own acknowledgement that she "basically threw $150,000 . . . out the window").]

c. Misconduct during separation that results in economic harm.

i. Trial court properly considered husband's criminal conduct on the day the parties separated and on another occasion five years later, which resulted in both instances in substantial damage to the marital home. [*Troutman v. Troutman*,

193 N.C. App. 395, 398, 667 S.E.2d 506, 509 (2008) (emphasis in original) (trial court made clear that it was "*not considering the actions of the Defendant against the Plaintiff in this case, but considers his actions against the property*").]

d. Misconduct during litigation that results in economic harm.

   i. When misconduct during litigation causes one party to incur additional expenses, the court may consider the increased expense to the other party in making its distributive award. [*Shoffner v. Shoffner*, 91 N.C. App. 399, 371 S.E.2d 749 (1988).]

   ii. Court properly considered that wife had secreted funds determined to be marital, had attempted to devalue the marital estate, and was less than truthful in her testimony about the matters. [*Albritton v. Albritton*, 109 N.C. App. 36, 426 S.E.2d 80 (1993).]

   iii. But a court may not consider under G.S. 50-20(c)(12) misconduct during litigation that is not related to marital economy. [See *Smith v. Smith*, 314 N.C. 80, 331 S.E.2d 682 (1985), and other cases set out in Section V.N.1.a, above.]

e. A spouse's contribution of separate property to the marital estate.

   i. Trial court properly considered wife's substantial loans from her separate property to the marital business, a landscaping company, during the marriage as a distributional factor justifying an unequal distribution in wife's favor, given the nonliquid nature of the parties' assets, the amount of the loan, and the fact that it had not been repaid. [*McNeely v. McNeely,* 195 N.C. App. 705, 673 S.E.2d 778 (2009).]

   ii. Even though a spouse's use of separate funds to acquire property titled as tenants by the entirety creates a presumption of a gift to the marital estate by application of the marital gift presumption, the use of the funds may properly be considered as a distributional factor. [*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, 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); *Collins v. Collins*, 125 N.C. App. 113, 479 S.E.2d 240, *review denied*, 346 N.C. 277, 487 S.E.2d 542 (1997).]

   iii. Fact that husband and wife both contributed to the marital estate their separate interests in a tree farm, received as gifts from husband's mother, could be considered a distributional factor under G.S. 50-20(c)(12). [*Daetwyler v. Daetwyler,* 130 N.C. App. 246, 502 S.E.2d 662 (1998) (trial court could not consider as a distributional factor the source of the separate property), *aff'd per curiam,* 350 N.C. 375, 514 S.E.2d 89 (1999).]

   iv. Fact that wife contributed substantially more of her separate property than husband to the down payment on the marital residence may be relevant under G.S. 50-20(c)(12). [*Hunt v. Hunt*, 85 N.C. App. 484, 355 S.E.2d 519 (1987) (court may find it appropriate on remand to consider manner in which the marital property was acquired).]

v. Husband's contribution of his separate property investments to the marital estate over the course of the marriage should have been considered as a distributional factor under G.S. 50-20(c)(12). [*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).]

vi. Findings as to a spouse's use of separate property to acquire or fund marital property should identify G.S. 50-20(c)(12) as the statutory basis for the finding. [*Finney v. Finney,* 225 N.C. App. 13, 736 S.E.2d 639 (2013) (citing *Collins v. Collins*, 125 N.C. App. 113, 479 S.E.2d 240 (1997)) (findings that husband had used his separate funds during the marriage to purchase a car for both parties to use, to establish an IRA for wife, and to make a down payment on the marital residence should be considered under G.S. 50-20(c)(12) rather than G.S. 50-20(c)(8)).]

f. A spouse's exclusive use of the marital residence after the date of separation (DOS). [*Walter v. Walter,* 149 N.C. App. 723, 561 S.E.2d 571 (2002); *Burnett v. Burnett*, 122 N.C. App. 712, 471 S.E.2d 649 (1996).]

i. A court may not award the fair rental value of the marital residence for the postseparation period during which the residence was occupied exclusively by one spouse but may consider the rental value as a distributional factor if use of the marital residence was not granted pursuant to a temporary support order. [*Wilkins v. Wilkins,* 111 N.C. App. 541, 432 S.E.2d 891 (1993) (remanded for trial court to determine whether use of the marital residence was awarded to wife as part of the ancillary order for alimony pendente lite)*; Black v. Black,* 94 N.C. App. 220, 379 S.E.2d 879 (1989) (citing *Becker v. Becker*, 88 N.C. App. 606, 364 S.E.2d 175 (1988)) (trial court cannot award rental value of the marital residence for the postseparation period in an equitable distribution (ED) proceeding); *Martin v. Martin,* 202 N.C. App. 584, 691 S.E.2d 133 (2010) (**unpublished**) (citing *Black*) (husband lived in marital home for thirty-nine months between DOS and date of ED trial; trial court erred by providing wife a credit in the amount of one-half of its fair rental value).]

ii. The trial court properly considered as a distributional factor that after the DOS wife lived in the marital home rent- and mortgage-free; consideration of the fair market rental value during her occupancy was also proper. [*Davis v. Sineath* (*Davis*)*,* 129 N.C. App. 353, 498 S.E.2d 629 (1998); *Fox v. Fox*, 216 N.C. App. 585, 718 S.E.2d 424 (2011) (**unpublished**) (no abuse of discretion in considering as separate distributional factors wife's postseparation mortgage payments on the marital home of $20,000 and the rental value owed to husband for her possession, valued at $20,000; postseparation payments and rental value offset each other).]

iii. Trial court did not err in failing to classify wife's postseparation payment of debt associated with the marital residence as divisible debt where the trial court determined that the rental value of the home of which wife had exclusive possession during separation far exceeded any amounts she paid. [*Smith v. Smith*, 786 S.E.2d 12 (N.C. Ct. App. 2016).]

g. Miscellaneous matters proper to consider under G.S. 50-20(c)(12).

i. Trial court properly considered under G.S. 50-20(c)(12) husband's argument that a portion of a home's appreciation was the result of husband's active efforts, but court rejected that argument and found the appreciation to be passive. [*Brackney v. Brackney,* 199 N.C. App. 375, 682 S.E.2d 401 (2009), *review withdrawn,* 363 N.C. 853, 694 S.E.2d 200 (2010).]

ii. Husband's opinion that it was fair that he receive all retirement and all other property except one house spoke to the availability of economic resources and was appropriate for trial court to consider. [*Plummer v. Plummer*, 198 N.C. App. 538, 680 S.E.2d 746 (2009).]

iii. Even though husband's interest in medical practice was classified as marital in the pretrial order and ED judgment, the trial court did not err in considering as a G.S. 50-20(c)(12) distributional factor expert testimony that most of husband's interest in the practice was a gift and, therefore, was his separate property. [*White v. Davis,* 163 N.C. App. 21, 592 S.E.2d 265, *review denied,* 358 N.C. 739, 603 S.E.2d 127 (2004).]

iv. Husband's voluntary payment of certain expenses for wife's daughter, for whom he had no legal obligation, was properly considered a G.S. 50-20 (c)(12) distributional factor. [*Rice v. Rice,* 159 N.C. App. 487, 584 S.E.2d 317 (2003) (prohibition in G.S. 50-20(f) against consideration of the "support of the children of both parties" not implicated, since husband was not father of wife's child).]

v. For payments made between Oct. 11, 2002, and Oct. 1, 2013, the postseparation payment of marital debt was divisible property rather than a distributional factor. After the October 2013 amendment to G.S. 50-20(b)(4)d., such payments again will be considered distributional factors as required by *Hay v. Hay*, 148 N.C. App. 649, 559 S.E.2d 268 (2002). See discussion of the postseparation payment of divisible debt in Section VIII.C, below.

vi. Expenditure of marital assets for nonmarital purposes by either spouse in anticipation of separation is properly considered under the catch-all factor, G.S. 50-20(c)(12). [*Fountain v. Fountain*, 148 N.C. App. 329, 559 S.E.2d 25 (2002) (wife's cosmetic surgeries did not occur in anticipation of separation, so they could not be considered a distributional factor).]

vii. A reduction during marriage in the separate debt of a party, caused by the expenditure of marital funds, is properly considered a distributional factor under G.S. 50-20(c)(12). [*Adams v. Adams*, 115 N.C. App. 168, 443 S.E.2d 780 (1994).]

viii. Fact that property owned by a marital limited liability company (LLC) had been transferred to the LLC during the marriage by husband's parents as part of their estate planning process was properly considered as a distributional factor under G.S. 50-20(c)(12) and (c)(10). [*Montague v. Montague*, 238 N.C. App. 61, 767 S.E.2d 71 (2014).]

h. Postseparation appreciation or depreciation of marital property may be considered under either G.S. 50-20(c)(11a) or (c)(12) and is discussed in Section V.L, above. In

cases filed after Oct. 1, 1997, passive postseparation appreciation or depreciation is to be considered divisible property pursuant to G.S. 50-20(b)(4)a. Active postseparation appreciation or depreciation of marital property remains a distributional factor.

i. Postseparation payment or reduction of debt may be considered under either G.S. 50-20(c)(11a) or (c)(12) and is discussed in Section V.L, above. In cases filed after Oct. 2, 2013, passive decreases in marital debt is to be considered divisible property pursuant to G.S. 50-20(b)(4)d. Active decreases in marital debt may be considered a distributional factor.

3. Matters not proper to consider under G.S. 50-20(c)(12).

a. Marital fault or misconduct that does not adversely affect the value of marital assets may not be considered under G.S. 50-20(c)(12). [*Smith v. Smith*, 314 N.C. 80, 331 S.E.2d 682 (1985); *Fountain v. Fountain,* 148 N.C. App. 329, 559 S.E.2d 25 (2002) (citing *Smith*) (marital fault, without economic consequences, is not properly considered under G.S. 50-20(c)(12)); *Conway v. Conway*, 131 N.C. App. 609, 508 S.E.2d 812 (1998) (citing *Smith*), *review dismissed, denied,* 350 N.C. 593, 537 S.E.2d 210 (1999).]

i. This kind of marital fault or misconduct is conduct that undermines the marital relationship, such as cruelty, abandonment, adultery, or indignities. [*Hinton v. Hinton*, 70 N.C. App. 665, 321 S.E.2d 161 (1984).]

ii. Court improperly considered evidence that husband had physically abused wife in determining the distribution of property. [*Hinton v. Hinton*, 70 N.C. App. 665, 321 S.E.2d 161 (1984). *See also Troutman v. Troutman*, 193 N.C. App. 395, 667 S.E.2d 506 (2008) (trial court made clear that it was not considering the criminal actions of husband against wife but only the damage his actions caused to marital property).]

iii. Court could not consider fact that husband abandoned wife. [*Coleman v. Coleman*, 89 N.C. App. 107, 365 S.E.2d 178 (1988) (court could consider how husband's abandonment and other misconduct dissipated value of the marital home).]

iv. Husband's attempt to dissuade wronged party from seeking criminal charges against wife did not affect the marital economy and should not have been considered under G.S. 50-20(c)(12). [*Wornom v. Wornom*, 126 N.C. App. 461, 485 S.E.2d 856 (1997) (but error was harmless).]

v. Court could not consider wife's failure to contribute "emotionally" to the marriage, as doing so was fault-based. [*Smith v. Smith*, 71 N.C. App. 242, 322 S.E.2d 393 (1984), *aff'd in part and modified on other grounds,* 314 N.C. 80, 331 S.E.2d 682 (1985).]

b. Other conduct or matters that may not be considered under G.S. 50-20(c)(12).

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

ii. To include as a distributional factor any expenditure of marital funds for a nonmarital purpose occurring at any point in the marriage simply would not be workable and, in any event, is inconsistent with the concept of the equitable distribution (ED) statute, which primarily focuses on events surrounding the dissolution of the marriage. [*Fountain v. Fountain,* 148 N.C. App. 329, 559 S.E.2d 25 (2002).]

iii. Trial court erred when it considered as a distributional factor husband's future inheritance under his father's will when the father was still alive. Husband's expectancy was too speculative to be considered as a distributional factor. [*Petty v. Petty,* 199 N.C. App. 192, 680 S.E.2d 894 (2009), *appeal dismissed, review denied,* 363 N.C. 806, 691 S.E.2d 16, *cert. denied,* 561 U.S. 1030, 130 S. Ct. 3512 (2010).]

iv. Trial court should not have considered wife's cosmetic surgeries as a distributional factor under G.S. 50-20(c)(12), unless they were shown to be in anticipation of separation. [*Fountain v. Fountain,* 148 N.C. App. 329, 559 S.E.2d 25 (2002).]

v. Court may not consider under G.S. 50-20(c)(12) misconduct during litigation that was not related to marital economy. [*Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260 (husband failed to comply with discovery orders, falsified documents, and testified untruthfully), *review denied,* 313 N.C. 612, 330 S.E.2d 616 (1985).] But misconduct during litigation that results in economic harm to the marital estate may be considered. See Section V.N.2.d, above.

vi. Need of a noncustodial spouse to occupy the marital residence. Noncustodial spouse's need to occupy the marital residence is not related to the economic condition of the marriage, so it should not be considered as a distributional factor. [*Burnett v. Burnett,* 122 N.C. App. 712, 471 S.E.2d 649 (1996).] But a court can consider as a distributional factor a custodial spouse's need to occupy the marital home [G.S. 50-20(c)(4).] and a spouse's need to occupy the marital home based on the spouse's lack of earning potential. [*Becker v. Becker*, 127 N.C. App. 409, 489 S.E.2d 909 (1997).]

vii. Fact that wife had no other place to live other than the marital residence was not a proper consideration because it did not relate to the economic condition of the marriage. [*Becker v. Becker,* 127 N.C. App. 409, 489 S.E.2d 909 (1997).]

viii. Postseparation support and alimony payments should not be considered as distributional factors. [*Miller v. Miller*, 778 S.E.2d 451, 455 (N.C. Ct. App. 2015) ("Pursuant to N.C. Gen. Stat. §§ 50-20(b)(3) and (f), it would have been error for the trial court to consider [the postseparation support payments] in its equitable distribution order.").] See Section XI.B, below.

c. Custody and support of children are not proper matters to consider under G.S. 50-20(c)(12).

i. Custody is not an appropriate consideration under G.S. 50-20(c)(12). [*Gum v. Gum,* 107 N.C. App. 734, 421 S.E.2d 788 (1992).]

ii. Trial court properly excluded from consideration under G.S. 50-20(c)(12) wife's waiver of support and fact that wife supported children for three-year period

following separation. [*Wiencek-Adams v. Adams*, 331 N.C. 688, 417 S.E.2d 449 (1992).]

iii. Wife's failure to contribute to support and education of children were not proper factors for consideration because G.S. 50-20(f) directs the court to equitably distribute property without regard to support of the children. [*Smith v. Smith*, 71 N.C. App. 242, 322 S.E.2d 393 (1984), *aff'd in part and modified on other grounds*, 314 N.C. 80, 331 S.E.2d 682 (1985).]

iv. Fact that the parties' 18- and 22-year-old children resided with the wife at the time of trial should not be considered as a distributional factor. [*Godley v. Godley,* 110 N.C. App. 99, 429 S.E.2d 382 (1993).]

v. Fact that husband supported children for more than two years after the date of separation was irrelevant to ED. [*Bowman v. Bowman*, 96 N.C. App. 253, 385 S.E.2d 155 (1989).]

vi. Wife's obligation to care for an illegitimate child born during the marriage does not fall within the "catch-all" provision of G.S. 50-20(c)(12). [*Pott v. Pott,* 126 N.C. App. 285, 290 n.1, 484 S.E.2d 822, 827 n.1 (1997).]

vii. See Section XI.B, below, discussing G.S. 50-20(f) (ED is to be without regard to alimony or child support).

VI. Value of Distributional Factors

A. Generally a Court Is Not Required to Value Distributional Factors

1. G.S. 50-20(c) contains no language "which would indicate that the trial court is required to place a monetary value on any distributional factor." [*Gum v. Gum*, 107 N.C. App. 734, 739, 421 S.E.2d 788, 791 (1992) (trial court was not required to place a value on wife's contribution to husband's legal education and career development before using her contribution as the basis for an unequal distribution); *Conway v. Conway*, 131 N.C. App. 609, 615, 508 S.E.2d 812, 817 (1998) (citing *Gum*) (trial court determined that husband's medical license had a "very significant value" without assigning a numeric value as part of its consideration of wife's contributions toward the license), *review dismissed, denied*, 350 N.C. 593, 537 S.E.2d 210 (1999); *Peltzer v. Peltzer*, 222 N.C. App. 784, 732 S.E.2d 357 (spouse's postseparation payments for routine maintenance of the marital residence, including lawn care, extermination services, natural gas, and utilities, were properly considered a distributional factor under G.S. 50-20(c)(11a), even without a specific value; trial court is not required, when it considers G.S. 50-20(c)(11a), to find the exact value of expenditures for routine maintenance), *review denied*, 366 N.C. 417, 735 S.E.2d 186 (2012).]

B. Consideration of Postseparation Events When Determining Date of Separation Values

1. After Oct. 1, 1997, evidence of preseparation and postseparation occurrences or values is competent as corroborative evidence of the value of marital property as of the date of separation (DOS). [G.S. 50-21(b), *added by* S.L. 1997-302, § 2 and applicable to equitable distribution actions pending or filed on or after that date.]

a. In *Jones v. Jones,* 193 N.C. App. 610, 670 S.E.2d 644 (2008) (**unpublished**), the trial court did not abuse its discretion when it did not consider the postseparation loss of military contracts when determining the value of parties' closely held business on the DOS. The trial court valued the business based in part on the actual preseparation revenues of the business without subtracting the value of military contracts that were lost postseparation. Husband's postseparation decision to sever a supplier relationship resulted in loss of the military contracts.

2. Before Oct. 1, 1997, trial courts in the following cases, filed before the effective date of the 1997 amendment to G.S. 50-21(b) set out in Section VI.B.1, above, erred by considering postseparation events when determining the value of marital property as of the DOS.

a. In *Offerman v. Offerman,* 137 N.C. App. 289, 296, 527 S.E.2d 684, 688 (2000) (emphasis in original), the trial court erred when its valuation of parties' closely held corporation "rel[ied] heavily on the events which occurred *after* the date of separation." Postseparation events were to be considered only as distributional factors.

b. In *Christensen v. Christensen*, 101 N.C. App. 47, 398 S.E.2d 634 (1990), *superseded by statute in part as stated in Offerman v. Offerman*, 137 N.C. App. 289, 527 S.E.2d 684 (2000), the trial court improperly considered wife's postseparation out-of-state residency when valuing parties' management company. Even though wife had failed to object at trial, the court of appeals vacated the trial court's valuation as being based on circumstances not in existence on the DOS.

VII. Distribution of Real Property

A. Transfer of Real Property within North Carolina

1. If a trial court orders the transfer of real or personal property, or of an interest therein, the court may also enter an order transferring title, as provided in G.S. 1A-1, Rule 70 and G.S. 1-228. [G.S. 50-20(g).] For an example of language deemed sufficient to transfer title from one spouse to another, see *Ellis v. Ellis*, 68 N.C. App. 634, 315 S.E.2d 526 (1984).

2. Property can be transferred by court order pursuant to G.S. 50-20(g) even if it is separate, as long as the party is given credit for the value of that part which is separate in character. [*Glaspy v. Glaspy,* 143 N.C. App. 435, 545 S.E.2d 782 (2001) (dicta).]

3. The order transferring title to real property must describe the land with sufficient definiteness and certainty so that it may be located and distinguished from other land. [*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 also Dabbondanza v. Hansley*, 791 S.E.2d 116 (N.C. Ct. App. 2016) (equitable distribution judgment is not effective to transfer title to real property unless the land is described in sufficient detail and the judgment is recorded with the register of deeds).]

4. The trial court has authority to order that real property be sold and the proceeds distributed, even though both parties have requested that they be awarded the marital home. [*Wall v. Wall*, 140 N.C. App. 303, 536 S.E.2d 647 (2000) (trial court authorized to order a sale as long as it first classifies and values the property on the date of separation).]

5. The trial court may forbid either party from receiving a commission or fee on the sale of the marital home. [*Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E.2d 415 (1985) (fact that net proceeds will be greater if neither party is allowed a commission may be considered a distributional factor under G.S. 50-20(c)(12)).]
6. Order for transfer of real property in the future.
    a. Consent order entered into during a divorce proceeding, whereby husband was to convey to wife his one-half interest in property held as tenants by the entirety within thirty days of execution and filing of the order, was insufficient to constitute a conveyance of husband's interest when the order called for husband to convey his interest on a future date, failed to provide a legal description of the property to be conveyed, did not state the location of the property, and was not filed with the register of deeds. [*Martin, Adams v. Roberts,* 177 N.C. App. 415, 628 S.E.2d 812 (2006) (consent order constituted a statement concerning a planned future conveyance).]
7. NOTE: Judgment lien held by third party may be enforced against real property formerly held by spouses as tenants by the entirety.
    a. When husband's entirety interest was converted by operation of law to a tenancy in common upon entry of a divorce judgment, a previously docketed judgment creditor's lien against husband attached automatically to husband's interest as a tenant in common. When husband subsequently conveyed his interest in the tenancy in common to his former wife, she took title to husband's interest subject to the judgment creditor's lien. [*Martin, Adams v. Roberts,* 177 N.C. App. 415, 628 S.E.2d 812 (2006) (trial court erred in finding that judgment lien did not constitute an encumbrance against the property formerly held by husband and in finding that wife's interest in the real property was not encumbered by the judgment lien to the extent of husband's interest).]

B. Jurisdiction Over Real Property in Another State

1. Real property located outside of North Carolina is subject to equitable distribution (ED) in accordance with the provisions of G.S. 50-20. [G.S. 50-21(a).]
    a. If the North Carolina court has jurisdiction of the parties, the court "may, in a proper case, by a decree in personam, require the execution of a conveyance of real property in another state . . ." [*McRary v. McRary,* 228 N.C. 714, 717, 47 S.E.2d 27, 30 (1948) (recognizing "familiar principle" quoted was not involved in *McRary*).] The North Carolina decree may not purport to "award or vest title consonant with the nature of an in rem proceeding, but operate[s] strictly in personam and attempt[s] to affect the realty only indirectly." [*See Courtney v. Courtney*, 40 N.C. App. 291, 297, 253 S.E.2d 2, 5 (1979) (Texas in personam judgment directing the conveyance of North Carolina real property was entitled to full faith and credit in North Carolina).]
    b. For an example of a trial court distributing property located out of state, see *Loeb v. Loeb*, 72 N.C. App. 205, 324 S.E.2d 33 (real property distributed to husband was in North Carolina; real property distributed to wife was in Tennessee; no error), *cert. denied*, 313 N.C. 508, 329 S.E.2d 393 (1985), *overruled in part on other grounds by Johnson v. Johnson,* 317 N.C. 437, 346 S.E.2d 430 (1986), *disapproved of on other grounds by Armstrong v. Armstrong,* 322 N.C. 396, 368 S.E.2d 595 (1988).

For an example of a trial court distributing property located in a foreign country, see *Duruanyim v. Duruanyim*, 204 N.C. App. 210, 694 S.E.2d 522 (2010) (**unpublished**) (a 1.25-acre lot, a three-bedroom house, and 6.25 acres of land, all in Nigeria, distributed to husband).]

2. The court may include in its order appropriate provisions to ensure compliance with the order of ED. [G.S. 50-21(a).]
   a. The probable practical implication is that a North Carolina court may order a party over whom it has personal jurisdiction to convey title to real property located in another state but cannot actually transfer title to that property.
   b. If necessary, the injured party could attempt to enforce the order through the contempt powers of the court.
   c. If a judgment directs a party to execute a deed and the party fails to comply, the judge may direct the act to be done by some other person appointed by the judge. [G.S. 1A-1, Rule 70. *See Sturgill v. Sturgill,* 49 N.C. App. 580, 272 S.E.2d 423 (1980) (trial judge acted properly in authorizing a Rule 70 assignment of husband's wages on judge's own motion to satisfy alimony arrears); *Courtney v. Courtney*, 40 N.C. App. 291, 253 S.E.2d 2 (1979) (Texas in personam judgment directing the conveyance of North Carolina real property was entitled to full faith and credit in North Carolina).]
   d. However, a G.S. 1A-1, Rule 70 order directing that another person sign a deed is not effective until it is reduced to writing, signed by the judge, and filed with the clerk of court. [*Dabbondanza v. Hansley*, 791 S.E.2d 116 (N.C. Ct. App. 2016) (trial court's oral statement to the clerk of court directing the clerk to sign the deed was ineffective to authorize the clerk to convey title).]

C. Jurisdiction of an Out-of-State Court Over Real Property in North Carolina

1. An out-of-state court cannot determine title to real property located in North Carolina. Because the out-of-state court lacks jurisdiction over the property, the Full Faith and Credit Clause is not applicable. [*Buchanan v. Weber,* 152 N.C. App. 180, 567 S.E.2d 413 (trial court erred in enforcing a provision in a Kansas divorce judgment purporting to convey title to real property located in North Carolina), *review denied,* 356 N.C. 433, 572 S.E.2d 427 (2002).]
2. An out-of-state court with in personam jurisdiction over the parties can require a party to convey or sell his interest in real property located in North Carolina. [*Buchanan v. Weber,* 152 N.C. App. 180, 567 S.E.2d 413, *review denied,* 356 N.C. 433, 572 S.E.2d 427 (2002).]

D. When the Real Property is a "Mixed" Asset

1. When a mixed asset is being distributed, the court should return that part of the asset that is separate to the person contributing it, if it is practical to do so, and divide the marital property interest between the parties in the same proportion as other marital property. [*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. If the division set out in Section VII.D.1, immediately above, is not possible, the court may award the separate property of one spouse to the other spouse if necessary to achieve an equitable distribution, as long as the owner of the separate property is compensated.

[*Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260 (unimproved land on which marital residence was built was husband's separate property; house constructed during marriage with marital funds was marital property; court ordered husband either to deed his separate property to wife or pay a certain sum of money in lieu thereof; husband had to be reimbursed or given credit for value of his separate property contribution), *review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985); *Glaspy v. Glaspy,* 143 N.C. App. 435, 545 S.E.2d 782 (2001) (court noted that real property can be transferred by court order pursuant to G.S. 50-20(g) even if it is separate, so long as the party is given credit for the value of that part which is separate in character).]

E. Notice of Lis Pendens [G.S. 50-20(h).]

1. If either party claims that any real property is marital property or divisible property, that party may cause a lis pendens to be recorded. [G.S. 50-20(h).]
2. Any person whose conveyance or encumbrance is recorded or whose interest is obtained by descent, before the filing of the lis pendens, shall take the real property free of any claim resulting from the equitable distribution proceeding. [G.S. 50-20(h).]
3. The court may cancel the notice of lis pendens upon substitution of a bond with surety in an amount determined by the court to be sufficient, provided the court finds that the claim of the spouse against the property can be satisfied by money damages. [G.S. 50-20(h).]

F. Protection of Rights of Creditors Without Notice

1. The legislature intended that rights of creditors without notice be protected in the equitable distribution of real property. Distribution of real property in an equitable distribution action will not bar a nonparty creditor from foreclosing on the asset to collect its claim. [*Branch Bank & Tr. Co. v. Wright,* 74 N.C. App. 550, 328 S.E.2d 840, *review allowed*, 314 N.C. 662, 335 S.E.2d 321 (1985). *See also Martin, Adams v. Roberts,* 177 N.C. App. 415, 628 S.E.2d 812 (2006) (when husband's interest in real property owned as tenants by the entirety was converted to a tenancy in common upon entry of a divorce judgment, a previously docketed judgment creditor's lien against husband attached automatically to husband's interest as a tenant in common; when husband subsequently conveyed his interest in the tenancy in common to his former wife, she took title to husband's interest subject to the judgment creditor's lien).]

VIII. Distribution of Marital Debt

A. Generally

1. A trial court has an obligation to classify, value, and distribute marital debt between the parties. [See *Classification,* Part 2 of this Chapter, Section XII, and *Valuation,* Part 3 of this Chapter, Section II; *Smith v. Smith,* 111 N.C. App. 460, 433 S.E.2d 196 (1993) (citing *Byrd v. Owens*, 86 N.C. App. 418, 358 S.E.2d 102 (1987)) (marital debts must be valued and distributed), *rev'd in part on other grounds,* 336 N.C. 575, 444 S.E.2d 420 (1994).]

2. A trial court must distribute marital debt even if it is paid in full by the date of trial, [*Loving v. Loving*, 118 N.C. App. 501, 455 S.E.2d 885 (1995).] and even if the marital estate has no assets. [*Rawls v. Rawls,* 94 N.C. App. 670, 381 S.E.2d 179 (1989).]
3. It is error not to distribute a marital debt in the equitable distribution (ED) order. [*Hill v. Hill,* 229 N.C. App. 511, 748 S.E.2d 352 (2013) (credit card debt husband incurred prior to separation and for a marital purpose that was not distributed in the ED order was remanded for distribution); *Plummer v. Plummer*, 198 N.C. App. 538, 680 S.E.2d 746 (2009) (when it was not clear from the trial court's order whether the outstanding debt secured by one of the marital properties was to be distributed to defendant along with the property, or to plaintiff separate from the property, matter was remanded for clarification).]
4. A trial court has discretion to apportion or distribute marital debt in an equitable manner. [*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 *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) (both citing *Geer v. Geer,* 84 N.C. App. 471, 353 S.E.2d 427 (1987)).]
5. A trial court can distribute all assets to one spouse and all debt to another. [*Conway v. Conway*, 131 N.C. App. 609, 508 S.E.2d 812 (1998) (distributional factors justified an unequal distribution of marital assets to plaintiff and distribution of all marital debt to defendant; trial court had discretion to distribute assets and debts independently; distribution of 83 percent of assets to plaintiff, all marital debt to defendant, and a distributive award to plaintiff was affirmed), *review dismissed, denied*, 350 N.C. 593, 537 S.E.2d 210 (1999).]
6. A distribution to one spouse of all marital debt, and all the property to which the debts were attached, has been affirmed. [*Smith v. Smith,* 111 N.C. App. 460, 433 S.E.2d 196 (1993) (extensive findings of fact supported the distribution, including that all debts were of a business nature, were integrally related to the continuation of defendant's complex business activities, and some of the debts had been guaranteed by the defendant), *rev'd in part on other grounds,* 336 N.C. 575, 444 S.E.2d 420 (1994).]
7. For distribution of postseparation payments on marital debt classified as divisible property, see Section IX, below.

B. Rights of Third Parties

1. In distributing marital debt between spouses or former spouses, the trial court cannot affect the rights of creditors. [*Branch Banking & Tr. Co. v. Wright,* 74 N.C. App. 550, 553, 328 S.E.2d 840, 842 (when marital home was distributed to wife, she took fee simple title subject to creditor's deed of trust on husband's interest; court of appeals stated "[w]e find no authority for using the Equitable Distribution Act to defeat the rights of creditors"), *review allowed*, 314 N.C. 662, 335 S.E.2d 321 (1985). *See also Union Grove Mill & Mfg. Co. v. Faw,* 103 N.C. App. 166, 404 S.E.2d 508 (1991) (spouse receiving real property in equitable distribution (ED) took the property subject to lien arising from husband's debt).]
2. The trial court has no authority within the ED action to order a third party to repay a debt owed to the spouses or former spouses. [*Mugno v. Mugno,* 205 N.C. App. 273, 695 S.E.2d

495 (2010) (trial court had no authority to order a corporation, in which husband owned stock and that by consent order was a necessary party and joined for ED purposes only, to make payments to wife as reimbursement for funds husband transferred during the marriage to the corporation; court of appeals stated that while wife could seek repayment of the funds by an equitable lien or pursuant to a separate cause of action against the corporation, an ED order is not the proper means to hold the corporation, a third party, responsible for that debt; court of appeals recognized that corporations or individuals, holding marital assets in trust or that are transferees defrauding a creditor spouse, may be subject to legal action to secure marital property in an ED action, but noted that no such subterfuge was present in *Mugno*).]

C. Consideration of Postseparation Payments of Marital Debt

1. Payments made after Oct. 1, 2013, that reduce marital debt are not considered divisible property but must be considered by the trial court. [G.S. 50-20(b)(4)d., *amended by* S.L. 2013-103, § 1, effective Oct. 1, 2013, 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.]
2. Payments between Oct. 11, 2002, and Oct. 1, 2013, made after the date of separation (DOS) that reduce marital debt are divisible debt and must be classified, valued, and distributed between the parties. [G.S. 50-20(b)(4)d., *amended by* S.L. 2002-159, § 33.5, effective Oct. 11, 2002, to provide that divisible property includes decreases in marital debt.] See discussion in *Classification,* Part 2 of this Chapter, Section IX.B.2.d.]
3. Cases decided under G.S. 50-20(b)(4)d. in effect between Oct. 11, 2002, and Oct. 1, 2013 (all decreases in marital debt after the DOS resulted in divisible property).
    a. A trial court must identify the source of funds used for a spouse's postseparation payment of marital debt, and an appropriate level of consideration must be given to the payor spouse; stated another way, the trial court must account for the payments in the distribution decision. [*See Bodie v. Bodie,* 221 N.C. App. 29, 727 S.E.2d 11 (2012) (citing *Walter v. Walter,* 149 N.C. App. 723, 561 S.E.2d 571 (2002)) (after finding that husband paid $216,000 of marital debt after the date of separation 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); *Shope v. Pennington,* 231 N.C. App. 569, 753 S.E.2d 688 (2014) (citing *Bodie*) (trial court classified postseparation payments in excess of $500,000 related to operation of the family business as divisible property but failed to identify the source of the funds); *Washburn v. Washburn,* 228 N.C. App. 570, 749 S.E.2d 111 (2013) (**unpublished**) (not paginated on Westlaw) (citing *Edwards v. Edwards*, 110 N.C. App. 1, 428 S.E.2d 834 (1993)) (trial court failed to address husband's postseparation payments "at all," so appellate court was unable to determine whether husband was entitled to some consideration, as either a distributional factor or as a direct credit); *Martin v. Martin,* 202 N.C. App. 584, 691 S.E.2d 133 (2010) (**unpublished**) (postseparation decrease in

mortgage principal, resulting from postseparation mortgage payments on the marital residence, was divisible property and had to be classified as such; same for postseparation mortgage payments on marital rental property).]

b. A trial court must classify and distribute any divisible property resulting from postseparation payments of marital debt and must include findings as to the source of the payments. [*Bodie v. Bodie,* 221 N.C. App. 29, 34, 727 S.E.2d 11, 15 (2012) (quoting *Robinson v. Robinson*, 210 N.C. App. 319, 324, 707 S.E.2d 785, 790 (2011)) ("[i]t is not enough that evidence can be found within the record which could support" the classification (and distribution) of postseparation payments of marital debt as divisible property).]

4. Payments before Oct. 11, 2002, made after the date of separation (DOS).

a. Before Oct. 11, 2002, a trial court had discretion to determine how to address payments made after the DOS toward marital debts or obligations flowing from marital property, including mortgage payments and payment of property taxes, in the final distribution. In the following cases, postseparation payments were treated as payments toward a marital debt, even though the obligation was not owed on the DOS: *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).

b. Options that were available to the court. 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. Considering postseparation payments as a distributional factor,

iv. "Crediting" a spouse in an appropriate manner for postseparation payments, or

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); *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).]

c. The use of more than one option in the treatment of postseparation debt payments in a case has been upheld. [*Smith v. Smith,* 111 N.C. App. 460, 433 S.E.2d 196 (1993) (husband given full credit for postseparation payment of property taxes, partial credit for mortgage payments on first mortgage by awarding credit for principal but not interest payments, while postseparation payments to reduce marital business debt

were considered as a distributional factor), *rev'd in part on other grounds,* 336 N.C. 575, 444 S.E.2d 420 (1994).]

5. Consideration of postseparation payments as a distributional factor.
   a. See cases in Sections V.L and V.N, above, considering postseparation payment of marital debt as preserving marital property under G.S. 50-20(c)(11a) or under (c)(12) ("catch-all" provision).
6. Crediting a spouse for postseparation payments.
   a. For a spouse to be entitled to a credit for postseparation payment of marital debt:
      i. The payments must be made with separate funds, [*Bodie v. Bodie,* 221 N.C. App. 29, 727 S.E.2d 11 (2012) (noting the absence of cases holding that a spouse is entitled to a credit for postseparation payments made using marital funds and requiring a trial court to identify the source of funds used to pay marital debt).]
      ii. The payments must be for the benefit of the marital estate, [*Williamson v. Williamson,* 217 N.C. App. 375, 719 S.E.2d 628 (2011) (citing *Walter v. Walter,* 149 N.C. App. 723, 561 S.E.2d 571 (2002)) (a credit for a spouse's postseparation payment of marital debt is limited to those debts that benefit the marital estate); *Johnson v. Johnson,* 230 N.C. App. 280, 750 S.E.2d 25 (2013) (no credit for wife's postseparation mortgage payments on the residence that she received in a consent interim distribution; trial court correctly classified the increase in value of the marital residence as divisible property, which was distributed to wife; after interim distribution of property to wife, payments were for her benefit, not for the benefit of the marital estate).] and
      iii. The order must clearly identify who made the payments at issue and the amount thereof. [*Martin v. Martin,* 202 N.C. App. 584, 691 S.E.2d 133 (2010) (**unpublished**) (without findings identifying who made the postseparation mortgage payments at issue, court of appeals was unable to determine if credit apportioned equally between the parties was an abuse of discretion); *Hill v. Hill,* 229 N.C. App. 511, 748 S.E.2d 352 (2013) (where husband failed to provide sufficient evidence to establish which postseparation mortgage payments he made and in what amount, and where trial court indicated that the payments were to be addressed at a later hearing, denial of credit for payments was not error).]
   b. It is not always clear what giving "credit" means. [*See Stovall v. Stovall,* 205 N.C. App. 405, 698 S.E.2d 680 (2010) (trial court awarded defendant a "credit" for his postseparation payment of two mortgages on a warehouse, totaling $160,000; according to the court of appeals, although denominated as a credit, the trial court actually considered the $160,000 as divisible property, which it divided unequally by giving defendant $160,000 more of the warehouse's value). *See also* 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), www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/flb26.pdf (hereinafter 2014 Howell Bulletin) (while many court opinions use the term "credit" when discussing postseparation payment of marital debt, no appellate opinion explains what it means to give a party a credit; "credit" seems to refer

more generally to a trial court's chosen method of accounting for the payments made by one spouse in an individual case).]

c. There is no requirement that the payor spouse receive a "dollar-for-dollar" credit for the postseparation payment of marital debt, but a trial court has discretion to order such a credit.

i. Trial court properly "credited" husband for his postseparation payment in full from his separate funds of a mortgage on marital property, even though trial court did not give "dollar-for-dollar" credit. [*McNeely v. McNeely*, 195 N.C. App. 705, 673 S.E.2d 778 (2009) (postseparation payment was divisible debt).]

ii. Appellate court upheld dollar-for-dollar credit to husband for the amount by which his postseparation mortgage payments reduced the principal balance of the mortgage, even though husband received the marital residence in equitable distribution and the mortgage payments were credited as spousal support in calculating the award of alimony. [*Kiell v. Kiell,* 221 N.C. App. 669, 729 S.E.2d 127 (2012) (**unpublished**) (wife's postseparation possession of the marital residence payment-free for at least five years balanced out distribution of the house to husband).]

iii. No abuse of discretion in awarding wife dollar-for-dollar credit for postseparation mortgage payments on the marital residence during time wife was in possession; court considered payments to be divisible property. [*Jones v. Jones,* 193 N.C. App. 610, 670 S.E.2d 644 (2008) (**unpublished**) (wife also received credit for postseparation payments of taxes and insurance on the marital residence; husband also given a dollar-for-dollar credit for three postseparation mortgage payments he made).]

d. Credit for postseparation mortgage payments: treatment of principal and interest.

i. The court of appeals has upheld a full dollar-for-dollar credit to husband for payments discharging a second mortgage on the marital residence and for payments of principal, but not interest, on the first mortgage on the same property. The trial court reasoned that since defendant had postseparation use of the home and received the home in distribution, defendant should receive no credit for interest. [*Smith v. Smith,* 111 N.C. App. 460, 433 S.E.2d 196 (1993) (remanded to ensure that defendant was not given double credit for discharge of second mortgage), *rev'd in part on other grounds,* 336 N.C. 575, 444 S.E.2d 420 (1994); *Martin v. Martin,* 202 N.C. App. 584, 691 S.E.2d 133 (2010) (**unpublished**) (trial court divided equally between the parties a credit for postseparation mortgage payments on the marital residence; trial court erred when it did not classify the postseparation payments as divisible property and when it included in the credit for those payments only the reduction in interest and related tax savings, and not the reduction of principal).] See also *Kiell v. Kiell,* 221 N.C. App. 669, 729 S.E.2d 127 (2012) (**unpublished**), discussed in Section VIII.C.6.c.ii, above.

ii. When trial court gave no consideration to defendant's postseparation mortgage payments from his separate funds, matter was remanded for trial court to determine whether defendant should be credited with at least the amount of principal reduction. [*Hunt v. Hunt*, 85 N.C. App. 484, 355 S.E.2d 519 (1987).]

e. Credit for other postseparation payments.

i. Credit in full for payment of property taxes on the marital residence has been upheld. [*Smith v. Smith,* 111 N.C. App. 460, 433 S.E.2d 196 (1993) (rejecting wife's argument that husband should have received only a partial credit since he had use of the marital home postseparation; husband received a partial credit (for principal but not interest) for postseparation payments on the first mortgage on home based on his postseparation use), *rev'd in part on other grounds,* 336 N.C. 575, 444 S.E.2d 420 (1994).]

ii. Trial court did not err in giving husband a credit against the distributive award he was ordered to pay to wife for amounts he paid to her during separation in excess of his postseparation support obligation. [*Miller v. Miller*, 778 S.E.2d 451 (N.C. Ct. App. 2015).]

f. Cases denying a credit.

i. The trial court erred in giving husband a credit for his postseparation payment of wife's health insurance, medical bills, Sam's Club account, cable TV bill, utility bills, telephone service including long distance, and water service, amounting to more than $20,000, when it was unclear whether those payments were for the benefit of the marital estate. [*Williamson v. Williamson,* 217 N.C. App. 375, 380, 719 S.E.2d 628, 632 (2011) (a trial court is limited to crediting a party for payments made for the benefit of the marital estate, notwithstanding that party's "expectation that he would receive credit for them in the parties' [ED proceeding]").

ii. Wife was not entitled to credit for postseparation mortgage payments on the marital residence that she received in a consent interim distribution. [*Johnson v. Johnson,* 230 N.C. App. 280, 750 S.E.2d 25 (2013) (no abuse of discretion when trial court distributed postseparation increase in value of $12,000 to wife as divisible property and declined to give wife a credit for her postseparation mortgage payments; wife's payments after she received the marital residence in the interim distribution were for her benefit, not for the benefit of the marital estate).]

g. There is no authority holding that a spouse is entitled to a "credit" for postseparation debt payments made from marital funds. [*Bodie v. Bodie,* 221 N.C. App. 29, 727 S.E.2d 11 (2012) (plaintiff had not cited any cases so holding, and court of appeals did not know of one).] If, however, a spouse uses marital property to pay down marital debt, the nonpayor spouse is entitled to some consideration of the use of the marital funds in the distribution decision. [*Shope v. Pennington,* 231 N.C. App. 569, 570, 753 S.E.2d 688, 689 (2014) (citing *Walter v. Walter*, 149 N.C. App. 723, 731, 561 S.E.2d 571, 576–77 (2002)) (husband made postseparation payments on marital business debt from "funds generated from" the business; on remand, if court determined that funds used to make the postseparation marital debt payments were marital property, husband would not be entitled to full credit for those payments and wife would be entitled to some consideration of those payments); *Bodie* (citing *Walter*) (a spouse is entitled to some consideration for any postseparation use of marital property by the other spouse).]

h. Court should be aware of possibility of an unintentional double credit. [*See Smith v. Smith,* 111 N.C. App. 460, 433 S.E.2d 196 (1993) (when it appeared that husband received double credit for his postseparation discharge in full of a second mortgage on the marital residence, matter was remanded), *rev'd in part on other grounds,* 336 N.C. 575, 444 S.E.2d 420 (1994).]

IX. Distribution of Divisible Property

A. Generally

1. Divisible property is a category of property that the trial court must classify, value, and distribute. [G.S. 50-20(a); S.L. 1997-302, § 1, applicable to actions filed on or after Oct. 1, 1997.] Divisible property is not marital property.
2. Divisible property is 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; [G.S. 50-20(b)(4)a.]
      i. 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; result also could have been upheld based on trial court's consideration of distributional factors and related findings).]
   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; [G.S. 50-20(b)(4)b.]
   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.]
   d. Passive increases and passive decreases in marital debt and financing 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.]
3. Postseparation changes in the value of certain assets and debts that were considered as distributional factors in cases filed before Oct. 1, 1997, may be distributed in cases filed after that date if they meet the definition for divisible property. [See *Classification,* Part 2

of this Chapter, Section IX.B.] Before Oct. 1, 1997, postseparation changes in the value of marital property were considered only as a distributional factor and were not distributed between the parties.

B. Presumption

1. Divisible property is subject to the same statutory presumption in favor of equal division as marital property.
   a. The net value of divisible property is to be divided equally, unless the court determines that an equal division is not equitable. [G.S. 50-20(c).]
   b. If an equal division is not equitable, the court must divide divisible property equitably, considering the twelve factors set out in G.S. 50-20(c). Specific statutory factors are discussed in Section V, above.
   c. A trial court may, after classifying postseparation debt payments as divisible property, distribute the payments unequally. [*Bodie v. Bodie,* 221 N.C. App. 29, 727 S.E.2d 11 (2012) (citing *Stovall v. Stovall,* 205 N.C. App. 405, 409, 698 S.E.2d 680, 684 (2010)); *Shope v. Pennington,* 231 N.C. App. 569, 753 S.E.2d 688 (2014) (citing *Stovall*); *Stovall* ($160,000 of postseparation mortgage payments on a warehouse classified as divisible property and divided unequally); *Jones v. Jones,* 193 N.C. App. 610, 670 S.E.2d 644 (2008) (**unpublished**) (citing *Warren v. Warren,* 175 N.C. App. 509, 623 S.E.2d 800 (2006)) (rejecting husband's apparent argument that because the postseparation mortgage payments were divisible property, an equal division was required).]
2. No language in G.S. Chapter 50 requires that divisible property be divided in the same proportion as marital property.
3. A trial court is not required to distribute divisible property to the spouse who receives the marital asset. [*Zurosky v. Shaffer,* 236 N.C. App. 219, 763 S.E.2d 755 (2014) (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).]
4. Trial court properly "distributed" rental income that was divisible property when it concluded that husband was not entitled to a credit for his postseparation payment of marital debt because his payments were "more than offset" by his receipt of the rental income during separation. [*Lund v. Lund*, 779 S.E.2d 175, 183 (N.C. Ct. App. 2015).]

X. Distributive Awards

A. Generally

1. A distributive award is a cash payment made payable either in a lump sum or over a period of time in fixed amounts, but shall not include alimony payments or other similar payments for support and maintenance that are treated as ordinary income to the recipient under the Internal Revenue Code. [G.S. 50-20(b)(3).]

2. An in-kind distribution of marital cash is not a distributive award; it is simply a distribution of marital property. [*Sauls v. Sauls*, 236 N.C. App. 371, 763 S.E.2d 328 (2014) (rejecting husband's contention that the trial court must identify liquid assets from which he could pay wife for the $178,667 marital uncashed checks and cash distributed to her by the trial court; the checks and cash were in husband's possession on the date of separation but they no longer existed at the time of trial).]

B. When Trial Court May Order a Distributive Award

1. In any action in which the presumption in favor of an in-kind distribution (see Section X.C, immediately below) is rebutted, the court in lieu of in-kind distribution shall provide for a distributive award to achieve equity between the parties. [G.S. 50-20(e).]
2. The court may provide for a distributive award to facilitate, effectuate, or supplement a distribution of marital or divisible property. [G.S. 50-20(e).]

C. Statutory Presumption in Favor of an In-Kind Distribution

1. Subject to the presumption that an equal division is equitable, it shall be presumed in every action that an in-kind distribution of marital or divisible property is equitable. [G.S. 50-20(e).] (Distributive award of divisible property applicable to actions filed on or after Oct. 1, 1997.)
2. The presumption may be rebutted by the greater weight of the evidence, or by evidence that the property is a closely held business entity or is otherwise not susceptible of division in-kind. [G.S. 50-20(e); *Allen v. Allen,* 168 N.C. App. 368, 607 S.E.2d 331 (2005); *Urciolo v. Urciolo*, 166 N.C. App. 504, 601 S.E.2d 905 (2004).]
3. The rebuttable presumption that an in-kind distribution is equitable was added by statutory amendment in 1997. [S.L. 1997-302, § 1, effective Oct. 1, 1997, and applicable to actions for equitable distribution filed on or after that date.] Before amendment, the statute was interpreted to require a finding that an in-kind distribution was "impractical." [*Brown v. Brown*, 112 N.C. App. 15, 434 S.E.2d 873 (1993). *But 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); *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); *Harris v. Harris*, 84 N.C. App. 353, 362, 352 S.E.2d 869, 875 (1987) (using an alternative test that allowed a distributive award when an in-kind distribution would be impractical or when a distributive award would "facilitate, effectuate or supplement a distribution of marital property" as provided in G.S. 50-20(e).]
4. By creating a statutory rebuttable presumption, the General Assembly "discarded the impracticality standard." [*Urciolo v. Urciolo*, 166 N.C. App. 504, 507, 601 S.E.2d 905, 908 (2004).] However, recent cases have carried forward the requirement that an in-kind distribution would be "impractical." [*Wirth v. Wirth,* 193 N.C. App. 657, 668 S.E.2d 603 (2008) (citing *Allen v. Allen,* 168 N.C. App. 368, 607 S.E.2d 331 (2005), and *Brown v. Brown*, 112 N.C. App. 15, 434 S.E.2d 873 (1993)) (to rebut the presumption in favor of an in-kind distribution, the court must find, supported by evidence in the record, that an in-kind distribution would be impractical); *Smith v. Smith,* 213 N.C. App. 424, 714 S.E.2d 276 (**unpublished**) (citing *Wirth*), *review denied,* 365 N.C. 347, 717 S.E.2d 739 (2011).]

D. Court Must Find That In-Kind Presumption Has Been Rebutted

1. The court must make findings of fact to support the conclusion that the presumption in favor of an in-kind-distribution has been rebutted and that the distributive award will achieve equity between the parties. [*Warren v. Warren,* 175 N.C. App. 509, 623 S.E.2d 800 (2006); *Allen v. Allen,* 168 N.C. App. 368, 607 S.E.2d 331 (2005) (equitable distribution judgment must contain a finding, supported by evidence in the record, that the presumption in favor of an in-kind distribution was rebutted); *Urciolo v. Urciolo*, 166 N.C. App. 504, 601 S.E.2d 905 (2004) (court must make findings and conclusions to support determination that presumption in favor of an in-kind distribution was rebutted). *See Heath v. Heath*, 132 N.C. App. 36, 509 S.E.2d 804 (1999) (it is unclear whether G.S. 50-20(e) also requires a finding that the award is necessary to facilitate, effectuate, or supplement the distribution).]
2. The presumption in favor of an in-kind distribution was rebutted through evidence that a business was a closely held corporation owned by wife, physician husband, from whom wife was estranged, and three of husband's partners, making a business relationship difficult. [*Pellom v. Pellom,* 194 N.C. App. 57, 669 S.E.2d 323 (2008) (distributive award of $175,000 to wife instead of award of corporate stock upheld), *review denied,* 363 N.C. 375, 678 S.E.2d 667 (2009).]
3. Evidence in the record that husband's business was a closely held corporation, and thus was not susceptible of division, would support a finding that the in-kind presumption was rebutted. [*Allen v. Allen,* 168 N.C. App. 368, 607 S.E.2d 331 (2005); *Clark v. Dyer,* 236 N.C. App. 9, 762 S.E.2d 838 (2014) (citing *Allen*) (appellate court found that the logic applied in *Allen* to a closely held corporation applies to a sole proprietorship; even though the structure of the business supports a finding that the in-kind presumption has been rebutted, there must be an actual finding to that effect; matter was remanded for that finding to be made), *cert. denied*, 778 S.E.2d 279 (N.C. 2015); *Williams v. Williams,* 213 N.C. App. 219, 714 S.E.2d 210 (2011) (**unpublished**) (in-kind presumption was rebutted by findings that the financial viability of a dairy farm would be negatively impacted by dividing the farm in-kind and that it would be "inequitable" to order the sale of the property due to the length of time the parties had used the property as a dairy farm).]
4. A finding that "a like kind distribution/exchange of property is not feasible due to the nature of the property" was insufficient to show that the presumption in favor of an in-kind distribution had been rebutted. [*Smith v. Smith,* 193 N.C. App. 753, 671 S.E.2d 72 (2008) (**unpublished**) (not paginated on Westlaw) (finding was insufficient to allow the appellate court to determine whether the trial court properly exercised its discretion in ordering a distributive award instead of an-kind distribution), *review denied,* 675 S.E.2d 659 (N.C. 2009).]
5. It is not enough that the record on appeal may contain evidence sufficient to support a finding that the presumption in favor of an in-kind distribution has been rebutted. The trial court itself must determine the findings that are established by the evidence before it. [*Warren v. Warren,* 175 N.C. App. 509, 623 S.E.2d 800 (2006).]
6. Even when the presumption in favor of an in-kind distribution can be rebutted, the court may still order an in-kind distribution when neither party has the financial ability to pay a distributive award. [*See Edwards v. Edwards,* 152 N.C. App. 185, 566 S.E.2d 847 (trial court

did not err in ordering an in-kind distribution that divided a hunting lodge and surrounding property between the parties, even though the division prevented both parties from owning enough land to operate a hunting business; neither party could buy out the other), *cert. denied*, 356 N.C. 611, 574 S.E.2d 679 (2002). *Cf. Copeland v. Copeland,* No. COA11-1602, 2012 WL 6572053 (N.C. Ct. App. Dec. 18, 2012) (**unpublished**) (although *Edwards* considered the financial ability of each party to buy out the other before dividing real property, a trial court is not required to find that neither party can buy out the other before ordering an in-kind division of real property; ability to buy out the other spouse is not enumerated as a factor in G.S. 50-20(c)).]

E. Findings as to Ability to Pay a Distributive Award

1. Findings should show the existence of liquid or nonliquid assets to use to pay the award.
   a. When there are no obvious liquid assets, a trial court must identify assets from which a distributive award can be made, and if there are none, the court must determine the means by which defendant is to pay the award and must adjust the award between defendant and plaintiff to offset any adverse financial consequences of using nonliquid assets. [*Embler v. Embler,* 159 N.C. App. 186, 582 S.E.2d 628 (2003).]
   b. Trial court erred when it ordered husband to pay a lump sum distribution of $8,300 without determining whether he had assets, other than his thrift (retirement) plan, from which he could make payment. [*Shaw v. Shaw*, 117 N.C. App. 552, 451 S.E.2d 648 (1995) (on remand, if husband were to show he had no other assets, trial court would have to provide for another means of payment or determine negative tax consequences to husband and adjust award accordingly).]
   c. Trial court's distributive award of $15,000,000 payable over ten years was upheld, based in part on fact that trial court had "addressed in detail defendant's ability to pay the distributive award as ordered." [*Smith v. Smith,* 111 N.C. App. 460, 516, 433 S.E.2d 196, 229 (1993), *rev'd in part on other grounds,* 336 N.C. 575, 444 S.E.2d 420 (1994).]
   d. Trial court identified a source of liquid assets from which to pay the distributive award when it found that refinancing the marital home provided funds to pay the initial award and found that defendant's business and rental income provided funds to pay the remainder of the award over time. [*Allen v. Allen,* 168 N.C. App. 368, 607 S.E.2d 331 (2005).]
   e. Trial court did not err in ordering payment of a distributive award from defendant's separate Individual Retirement Account even though the amount to be paid exceeded 50 percent of the value of the account. [*Comstock v. Comstock*, 240 N.C. App. 304, 771 S.E.2d 602 (2015) (provision in G.S. 50-20.1(e) restricting court's ability to distribute marital retirement account to 50 percent of the value in certain circumstances does not apply when court is not distributing the account as marital property but is considering the account as a source for the payment of a distributive award).]
   f. Trial court erred when it ordered husband to pay a distributive award within ninety days of the equitable distribution judgment without finding that he had sufficient liquid assets with which to pay the award. [*Robertson v. Robertson,* 167 N.C. App. 567, 605 S.E.2d 667 (2004) (a finding that identified husband's annual income as an asset

from which a distributive award might be paid was insufficient without consideration of husband's liabilities; as to other available assets, trial court failed to make findings concerning difficulty and possible tax consequences of borrowing money against or liquidating closely held stock, real property, and certain personal property).]

g. Identification of liquid assets sufficient to pay only a portion of the award is not satisfactory. [*Urciolo v. Urciolo*, 166 N.C. App. 504, 601 S.E.2d 905 (2004) (remanded for additional findings when court listed only a trust account of approximately $5,000 to pay distributive award of $25,000); *Robertson v. Robertson,* 167 N.C. App. 567, 605 S.E.2d 667 (2004) (a finding that identified husband's annual income as an asset from which a distributive award might be paid was insufficient without consideration of husband's liabilities).]

2. However, distributive awards have been upheld if sufficient liquid assets can be ascertained from the record.

a. "[I]f a party's ability to pay an [distributive] award with liquid assets can be ascertained from the record, then the distributive award must be affirmed." [*Pellom v. Pellom,* 194 N.C. App. 57, 69, 669 S.E.2d 323, 329–30 (2008) (citing *Allen v. Allen,* 168 N.C. App. 368, 607 S.E.2d 331 (2005)) (where husband did not contend that he would have to liquidate assets or obtain a loan to pay the award and was given more than ten years to complete payments, and where trial court made findings regarding husband's substantial income from an anesthesiology practice, as well as other liquid assets, from which to pay the award, award was affirmed), *review denied,* 363 N.C. 375, 678 S.E.2d 667 (2009); *Peltzer v. Peltzer*, 222 N.C. App. 784, 791, 732 S.E.2d 357, 362 (quoting statement from *Pellom* set out in text above), *review denied*, 366 N.C. 417, 735 S.E.2d 186 (2012).]

b. Distributive award of $220,000 was affirmed based on defendant having sufficient liquid assets to pay the award. The portion of the award payable initially at $2,000 a month for eighteen months could be paid from defendant's monthly disposable income of $8,500 after child support. The remaining balance could be paid by the sale or refinancing of the marital residence as "money derived from refinancing the mortgage on the marital home [is] a source of liquid funds available to [a] defendant." [*Peltzer v. Peltzer*, 222 N.C. App. 784, 791, 732 S.E.2d 357, 362 (quoting *Allen v. Allen,* 168 N.C. App. 368, 376, 607 S.E.2d 331, 337 (2005)), *review denied*, 366 N.C. 417, 735 S.E.2d 186 (2012).]

c. Order for husband to pay a distributive award of $8,193 did not need specific findings of fact to show how award would be paid where record showed that several bank accounts, valued in excess of $60,000, distributed to husband "could logically serve as a source of payment" and husband was given nine months to make the payment. [*Clark v. Dyer,* 236 N.C. App. 9, 31, 762 S.E.2d 838, 850 (2014), *cert. denied*, 778 S.E.2d 279 (N.C. 2015).]

d. Trial court had found that husband had ability to pay distributive award of $90,000 from an earlier $99,000 withdrawal from his retirement account. Husband contended that there was no evidence that those funds existed when the distributive award was made. Appellate court noted that the balance of the retirement account had been distributed five months earlier, from which husband received $120,000, which was

sufficient to satisfy the distributive award. [*Plummer v. Plummer*, 198 N.C. App. 538, 680 S.E.2d 746 (2009).]

e. If a question is raised as to the ability of the payor spouse to pay the award with liquid assets, the trial court must make findings regarding the spouse's liquid and nonliquid assets and must adjust the award for any financial ramifications. [*Pellom v. Pellom,* 194 N.C. App. 57, 669 S.E.2d 323 (2008), *review denied,* 363 N.C. 375, 678 S.E.2d 667 (2009).]

F. Security for Payment of a Distributive Award

1. The court may provide that a distributive award payable over time be secured by a lien on specific property. [G.S. 50-20(e).]
2. In addition, a distributive award is enforceable by execution, even if not specifically secured by a lien on specific property. [See *Equitable Distribution Overview and Procedure,* Part 1 of this Chapter, Section X.]

G. Six-Year Limitation on Length of Time for Payment of a Distributive Award

1. Court is authorized to make distributive awards for periods of not more than six years after the date on which the marriage ceases, unless the payor spouse shows that legal or business impediments, or some overriding social policy, prevent completion of the distribution within the six-year period. [*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); *Harris v. Harris*, 84 N.C. App. 353, 352 S.E.2d 869 (1987); *Lawing v. Lawing*, 81 N.C. App. 159, 344 S.E.2d 100 (1986).]
2. Basis for six-year limitation is language in G.S. 50-20(b)(3) that a distributive award is not to include payments treated as ordinary income to the recipient.
   a. A transfer of property is related to the cessation of the marriage, and thus is not ordinary income, if the transfer occurs no more than six years after the date on which the marriage ceases. [26 C.F.R. § 1.1041-1T(b) (note especially A-7, the response in this regulation to the question, "When is a transfer of property *related to the cessation of the marriage*?"), available on the website of the U.S. Government Publishing Office, www.ecfr.gov/cgi-bin/text-idx?SID=c88f262400299f95d24f0ec6de78bda3&mc=true&node=se26.13.1_11041_61t&rgn=div8 ("e-CFR data" on site current as of Jan. 11, 2017).]
   b. Cases have interpreted this language to limit the trial court's discretion so that the court may not permit a distributive award more than six years after the cessation of the marriage, except as set out in Section X.H, below. [*Harris v. Harris*, 84 N.C. App. 353, 352 S.E.2d 869 (1987); *Lawing v. Lawing*, 81 N.C. App. 159, 344 S.E.2d 100 (1986).]
3. The six-year period begins with the order granting divorce, not the entry of an order for alimony pendente lite or child support or an order in equitable distribution (ED). [*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).] This is so even if the ED order providing for the distributive award is entered some years after the date of divorce. [*See Gould v. Gould,* 225 N.C. App. 264, 736 S.E.2d 649 (2013) (**unpublished**) (distributive award payment period was five years, but

ED order was entered four years after the date of divorce, making a portion of the payments payable more than six years after divorce; portion of distributive award allowing payments for a period of more than six years after marriage ceased was vacated and matter remanded for required findings).]

H. Distributive Awards Payable Over a Period in Excess of Six Years

1. Requirements for the award.
   a. The payor spouse must show that legal or business impediments, or some overriding social policy, prevent completion of the distribution within six years. [*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); *Harris v. Harris*, 84 N.C. App. 353, 352 S.E.2d 869 (1987); *Lawing v. Lawing*, 81 N.C. App. 159, 344 S.E.2d 100 (1986).]
   b. The trial court has a duty to affirmatively find the existence of grounds preventing distribution within six years. [*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); *Harris v. Harris*, 84 N.C. App. 353, 352 S.E.2d 869 (1987). *But see Pellom v. Pellom,* 194 N.C. App. 57, 669 S.E.2d 323 (2008) (court made no such findings here; error for trial court to consider tax consequences of payments in excess of six years without specific evidence of such tax consequences), *review denied,* 363 N.C. 375, 678 S.E.2d 667 (2009).]
   c. The award should be crafted to assure completion of payment as promptly as possible. [*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); *Lawing v. Lawing*, 81 N.C. App. 159, 344 S.E.2d 100 (1986).]
2. Court of appeals upheld a distributive award of $15,000,000 payable over ten years when award was supported by "numerous detailed findings" setting out why payment could not be completed within six years. [*Smith v. Smith*, 111 N.C. App. 460, 516, 433 S.E.2d 196, 229 (1993), *rev'd in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994).]
3. Court's order directing wife to begin making monthly distributive payments more than six years after the parties' divorce was reversed when court did not make the requisite findings under *Harris v. Harris*, 84 N.C. App. 353, 352 S.E.2d 869 (1987). Award also deficient in that it was not crafted to assure completion of payment as promptly as possible. [*Becker v. Becker,* 127 N.C. App. 409, 489 S.E.2d 909 (1997). *See also Gould v. Gould,* 225 N.C. App. 264, 736 S.E.2d 649 (2013) (**unpublished**) (citing *Becker* and *Harris*) (trial court's failure to find that legal or business impediments, or some overriding social policy, prevented completion of the distribution within six years required that the portion of the distributive award allowing for payments more than six years after the marriage ended be vacated and remanded for findings).]

I. Other Attributes of a Distributive Award at the Trial Court's Discretion

1. Except for the restriction on the length of payment of a distributive award, the structure and timing of a distributive award lies within the discretion of the trial judge. [*Smith v. Smith*, 111 N.C. App. 460, 433 S.E.2d 196 (1993) (citing *Sonek v. Sonek*, 105 N.C. App.

247, 412 S.E.2d 917 (1992)), *rev'd in part on other grounds,* 336 N.C. 575, 444 S.E.2d 420 (1994).]

2. Trial court has discretion to determine whether a distributive award is to be made payable as a lump sum or over a fixed period of time. [*Atkins v. Atkins*, 102 N.C. App. 199, 401 S.E.2d 784 (1991).]
3. Whether to order interest on a distributive award is a decision that lies within the discretion of the trial judge. [*Mrozek v. Mrozek*, 129 N.C. App. 43, 496 S.E.2d 836 (1998).]
4. Interest on a distributive award.
   a. Date from which interest is to accrue.
      i. Interest on any distributive award accrues from the date of entry of judgment, not from the date of separation. [*Ice v. Ice*, 136 N.C. App. 787, 525 S.E.2d 843 (2000) (citing *Appelbe v. Appelbe*, 76 N.C. App. 391, 333 S.E.2d 312 (1985)). *Cf. Smith v. Smith,* 213 N.C. App. 424, 714 S.E.2d 276 (**unpublished**) (citing *Mrozek v. Mrozek*, 129 N.C. App. 43, 496 S.E.2d 836 (1998)) (affirming interest on distributive award from date of the equitable distribution trial), *review denied,* 365 N.C. 347, 717 S.E.2d 739 (2011).]
   b. Effect of appeal on accrual of interest.
      i. When a judgment is undisturbed on appeal, interest runs from the date of the original judgment. [*Ice v. Ice*, 136 N.C. App. 787, 525 S.E.2d 843 (2000).]
      ii. When a judgment is reversed or vacated on appeal, interest runs from the date of the amended judgment. [*Ice v. Ice*, 136 N.C. App. 787, 525 S.E.2d 843 (2000).]
   c. A change in the date on which interest begins to accrue on a distributive award is a matter that the trial court could effectuate through G.S. 1A-1, Rule 60(a). [*Ice v. Ice*, 136 N.C. App. 787, 525 S.E.2d 843 (2000).]
   d. Applicable interest rate.
      i. Interest on a distributive award would arguably be the rate set by statute (currently 8 percent per G.S. 24-1). Clarence E. Horton, Jr., *Equitable Distribution: Distributional Factors and Divisible Property* (updated Sept. 1998).]
      ii. An award of greater than 8 percent interest has been upheld when parties in a consent order granted the trial court the power to set whatever interest rate it found was supported by the evidence. [*Coston v. Coston*, 109 N.C. App. 306, 426 S.E.2d 460 (1993) (award of 10 percent interest, applicable to payment due pursuant to a distributive award, upheld).]

J. A Distributive Award is Enforceable by Execution. [See *Equitable Distribution Overview and Procedure*, Part 1 of this Chapter, Section X.]

XI. Miscellaneous Matters Pertaining to Distribution

A. Rights of Subsequent Spouse

1. G.S. 50-20(c1) limits the rights of a second or subsequent spouse's acquisition of an interest in the marital and divisible property of his or her spouse from a former marriage.
2. Notwithstanding any other provision of law, a second or subsequent spouse acquires no interest in the marital and divisible property of his or her spouse until a final determination of equitable distribution is made of the marital and divisible property from the spouse's former marriage. [G.S. 50-20(c1).]

B. Distribution to Be Without Regard to Alimony or Child Support

1. The court must provide for an equitable distribution (ED) without regard to alimony for either party or support of the children for both parties. After the determination of an equitable distribution, the court, upon request of either party, must consider whether an order for alimony or child support should be modified or vacated pursuant to G.S. 50-16.9 or 50-13.7. [G.S. 50-20(f).]
    a. Husband who made postseparation mortgage payments pursuant to a temporary support order was not entitled to credit for those payments. [*Morris v. Morris*, 90 N.C. App. 94, 367 S.E.2d 408 (1988), *disapproved of on other grounds by Armstrong v. Armstrong,* 322 N.C. 396, 368 S.E.2d 595 (1988); *Wirth v. Wirth,* 193 N.C. App. 657, 668 S.E.2d 603 (2008) (where husband's postseparation payment of marital debt was credited to his postseparation support arrears, trial court's finding that after the credit there was no divisible property related to the payments was not an abuse of discretion).]
    b. If use of the residence was awarded to wife as part of a temporary support order, the trial court could not consider its rental value as a distributional factor. [*Wilkins v. Wilkins*, 111 N.C. App. 541, 432 S.E.2d 891 (1993).]
2. The term "children of both parties" in G.S. 50-20(f) includes any child, legitimate or illegitimate, born to either spouse. [*Pott v. Pott,* 126 N.C. App. 285, 484 S.E.2d 822 (1997) (finding that G.S. 50-20(f) prevents trial court from considering as a distributional factor wife's obligation to care for an illegitimate child born during the marriage to a man other than husband).]
3. Pursuant to G.S. 50-20(f), trial court properly refused to consider as a distributional factor under G.S. 50-20(c)(12) wife's waiver of child support and fact that wife supported children for three years after parties separated. [*Wiencek-Adams v. Adams*, 331 N.C. 688, 417 S.E.2d 449 (1992).]
4. Amount owed by one party pursuant to an ED judgment may not be offset against the child support obligation owed by the other party. [*Brinkley v. Brinkley*, 135 N.C. App. 608, 522 S.E.2d 90 (1999) (husband was improperly given a credit against future child support in the amount of $500, which was amount wife owed him under the parties' ED judgment; the court cited G.S. 50-20(f), requiring that ED actions be decided independently of support actions, as one basis, among others, for denying the credit sought by husband).]

5. Child support may not be considered as a distributional factor under G.S. 50-20(c)(12), nor may any debt payments made pursuant to a child support order. See Section V.N.3.c, above.
6. Postseparation support and alimony payments should not be considered as distributional factors. [*Miller v. Miller*, 778 S.E.2d 451, 455 (N.C. Ct. App. 2015) ("Pursuant to N.C. Gen. Stat. §§ 50-20(b)(3) and (f), it would have been error for the trial court to consider [the postseparation support payments] in its equitable distribution order.").]
7. However, trial court did not err in giving husband a credit against wife's distributive award for amount he paid to her during separation in excess of his postseparation support obligation. [*Miller v. Miller*, 778 S.E.2d 451, 455 (N.C. Ct. App. 2015).]

C. Interim Distribution

1. G.S. 50-20(i1) was amended in 1997 "to encourage interim distribution of property or debt." [S.L. 1997-302, § 1, applicable to actions filed on or after Oct. 1, 1997 (quoted language appears in title of this session law).]
2. The statute now provides that unless good cause is shown that there should not be an interim distribution, the court may, at any time after an action for equitable distribution (ED) has been filed and before final judgment of equitable distribution, enter orders declaring what is separate property and may also enter orders dividing part of the marital property, divisible property or debt, or marital debt between the parties. [G.S. 50-20(i1).]
3. The partial distribution described in Section XI.C.2, immediately above, may provide for a distributive award and may also provide for a distribution of marital property, marital debt, divisible property, or divisible debt. [G.S. 50-20(i1).] The 1997 amendment to G.S. 50-20(i1) overruled the holding in *Brown v. Brown*, 112 N.C. App. 15, 434 S.E.2d 873 (1993) (not allowing a cash distributive award before final classification and valuation of the marital estate).]
4. Any order for interim distribution must be taken into consideration at trial and proper credit given. [G.S. 50-20(i1).]
5. Interim ED orders are by nature preliminary to entry of a final ED judgment, and thus are interlocutory. [*Hunter v. Hunter*, 126 N.C. App. 705, 486 S.E.2d 244 (1997) (interim order ruling that insurance proceeds were husband's separate property not immediately appealable).]
6. Depending on the language used, an order for interim distribution can be final for certain purposes.
    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).]
    b. Where a consent order making an interim distribution of property provided for the sale of the marital residence with the net proceeds thereof to be distributed to wife and provided that a sale before the ED trial would establish the net fair market value

of the marital residence for purposes of ED, the proceeds upon distribution to wife became her separate property. Interest earned on the proceeds was wife's separate property and could not be considered divisible property. [*Wirth v. Wirth,* 193 N.C. App. 657, 668 S.E.2d 603 (2008).]

7. Depending on the language used, an order for interim distribution can preserve certain claims of the parties.
   a. When an interim order providing for husband to close on a house under contract on the date of separation included language that the transaction was "subject to Defendant's [wife's] rights to an equitable distribution of property, both as marital and divisible property" and further stated that "Defendant's rights and claims to said property are preserved until an equitable distribution of marital and divisible property," the interim order preserved wife's claim for equitable distribution of marital and divisible property related to that house. [*Brackney v. Brackney,* 199 N.C. App. 375, 378, 682 S.E.2d 401, 403 (2009), *review withdrawn,* 363 N.C. 853, 694 S.E.2d 200 (2010).]

D. Interest on an Equitable Distribution (ED) Award

1. The court is not authorized by the Equitable Distribution Act or any other statute to award prejudgment interest on an ED award. [*Appelbe v. Appelbe*, 76 N.C. App. 391, 333 S.E.2d 312 (1985).]
2. Postjudgment interest on an ED award is allowed. [*Loye v. Loye*, 93 N.C. App. 328, 377 S.E.2d 804 (1989; *Appelbe v. Appelbe*, 76 N.C. App. 391, 333 S.E.2d 312 (1985).]
   a. On a distributive award, interest runs from the date judgment is entered. [*Loye v. Loye*, 93 N.C. App. 328, 377 S.E.2d 804 (1989).] For more on distributive awards, see Section X, above.
   b. When a judgment is undisturbed on appeal, interest runs from the date of the original judgment. [*Ice v. Ice*, 136 N.C. App. 787, 525 S.E.2d 843 (2000).]

E. For Distribution of Pension and Retirement Benefit Plans, Including Stock Options, see *Pension and Retirement Benefits*, Part 5 of this Chapter.

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