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Chapter 6: **Equitable Distribution**

Part 5. Pension and Retirement Benefits

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Part 5. Pension and Retirement Benefits

I. Classification

A. Generally

1. Vested and nonvested pension, retirement, and other deferred compensation rights are marital property to the extent the value was earned during the marriage and before the date of separation (DOS). [G.S. 50-20(b)(1); *Rowland v. Rowland*, 175 N.C. App. 237, 623 S.E.2d 287 (2005) (plain language of G.S. 50-20(b)(1) makes all pensions marital property; wife's civil service retirement pension earned during marriage was marital property).]
    a. For actions filed before Oct. 1, 1997, only pensions and retirement rights that were vested on the DOS were subject to classification and distribution. [*See George v. George*, 115 N.C. App. 387, 444 S.E.2d 449 (1994), *cert. denied*, 342 N.C. 192, 463 S.E.2d 236 (1995); *Milam v. Milam*, 92 N.C. App. 105, 373 S.E.2d 459 (1988), *review denied*, 324 N.C. 247, 377 S.E.2d 755 (1989).] G.S. 50-20(b)(1) was amended effective Oct. 1, 1997, to include nonvested pensions. [S.L. 1997-212, § 2.]
2. While "pension, retirement, and other deferred compensation" is not defined in G.S. 50-20(b)(1), the court of appeals has adopted a broad interpretation. In *Poore v. Poore*, 75 N.C. App. 414, 423, 331 S.E.2d 266, 272–73, *review denied*, 314 N.C. 543, 335 S.E.2d 316 (1985), the court held that the statute includes any "deferred compensation plan, whether structured as a pension, a profit sharing, or retirement plan." [*See also* 3 Lee's North Carolina Family Law § 12.71a, at 12-237 (5th ed. 2002) (listing as types of "deferred compensation" subject to distribution "commissions and bonuses, stock options, vacation pay, sick leave, voluntary separation incentives, and early retirement incentives, among others"). *But see Ubertaccio v. Ubertaccio*, 359 N.C. 175, 604 S.E.2d 912 (2004), *aff'g per curiam for reasons stated in concurring opinion in* 161 N.C. App. 352, 363, 588 S.E.2d 905, 912 (2003) (Levinson, J., concurring in result only) (where Judge Levinson states that the clear intent of G.S. 50-20.1 is to provide for "classification and distribution of only those other forms of deferred compensation that are in the nature of pension and retirement benefits"), and *Watkins v. Watkins*, 228 N.C. App. 548, 746 S.E.2d 394 (2013) (G.S. 50-20.1 applicable only to pensions and retirements accounts that are deferred compensation), *review denied*, 367 N.C. 290, 753 S.E.2d 670 (2014).]
3. However, in *Watkins v. Watkins,* 228 N.C. App. 548, 746 S.E.2d 394 (2013), *review denied*, 367 N.C. 290, 753 S.E.2d 670 (2014), the court of appeals held that 401(k) plans and IRAs are not deferred compensation if the owner of the plan/account has access to the funds. For further discussion, see Cheryl Daniels Howell, *When Is a 401K Not a Retirement Account?* UNC Sch. of Gov't: On the Civil Side Blog (Mar. 20, 2015), http://civil.sog.unc.edu/when-is-a-401k-not-a-retirement-account.

4. Military pensions eligible under the Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C. § 1408, as well as most state-administered retirement plans, are subject to classification and distribution. [G.S. 50-20.1(h); *Johnson v. Johnson,* 230 N.C. App. 280, 750 S.E.2d 25 (2013) (military pension eligible under USFSPA is marital property).] See Section I.B, below.
5. A distribution of pension or retirement rights may not include contributions, years of service, or compensation that may accrue after the DOS. [G.S. 50-20.1(d); *Wall v. Wall,* 140 N.C. App. 303, 536 S.E.2d 647 (2000) (error for court to distribute postseparation increases in profit-sharing plan).]
6. The "coverture fraction" is used to determine the portion of the pension that was acquired during the marriage. [*Bishop v. Bishop,* 113 N.C. App. 725, 440 S.E.2d 591 (1994); *Robertson v. Robertson,* 167 N.C. App. 567, 605 S.E.2d 667 (2004) (the coverture fraction applies to defined contribution as well as defined benefit plans).] The numerator of the coverture fraction represents the total number of years of the marriage, up to the DOS, which occurred "simultaneously with the employment which earned the vested and nonvested pension . . ." [*See* G.S. 50-20.1(d).] The denominator represents the total years of employment during which the pension accrued. [*Bishop*; *Lewis v. Lewis*, 83 N.C. App. 438, 350 S.E.2d 587 (1986). *Cf. Watkins v. Watkins,* 228 N.C. App. 548, 746 S.E.2d 394 (2013) (coverture fraction applicable only to pensions and retirement accounts that are deferred compensation), *review denied*, 367 N.C. 290, 753 S.E.2d 670 (2014).] For a discussion of *Watkins*, see Cheryl Daniels Howell, *Equitable Distribution Update: Tenancy by the Entirety, Postseparation Payment of Debt, and Defined Contribution Retirement Accounts*, Fam. L. Bull. No. 26 (UNC School of Government, Mar. 2014) (hereinafter 2014 Howell Bulletin), www.sogpubs.unc.edu/electronicversions/pdfs/flb26.pdf. See also Section II.C.2, below, and *Valuation*, Part 3 of this Chapter.
7. Because the marital property component of an award of a vested pension, retirement, or other deferred compensation benefit is to be determined pursuant to the coverture fraction in G.S. 50-20.1(d), a trial court is not to use a source of funds approach to determine the portion of the account's date of separation value attributable to the spouse's employment before marriage. [*Robertson v. Robertson,* 167 N.C. App. 567, 605 S.E.2d 667 (2004); *Watkins v. Watkins,* 228 N.C. App. 548, 746 S.E.2d 394 (2013), *review denied*, 367 N.C. 290, 753 S.E.2d 670 (2014).] For a discussion of the source of funds approach, see *Classification,* Part 2 of this Chapter, Section VIII.C.
8. A stipulation as to the classification of a plan is binding. [*Helms v. Helms,* 191 N.C. App. 19, 661 S.E.2d 906 (no abuse of discretion in awarding wife half of husband's 401(k) account when husband presented no evidence to establish the number of years his 401(k) account existed prior to the marriage and stated in the inventory affidavit that the account was marital property and put "none" under the affidavit section on separate property), *review denied,* 362 N.C. 681, 670 S.E.2d 233 (2008).] For more on stipulations, see *Equitable Distribution Overview and Procedure,* Part 1 of this Chapter, Section V, and *Valuation*, Part 3 of this Chapter, Section III.A.

B. Examples of Plans/Benefits Subject to Equitable Distribution (ED)

1. All plans qualified under the federal Employee Retirement Income Security Act of 1974 (ERISA) are subject to ED. ERISA plans include most private, nongovernmental pension and retirement plans.
   a. However, all ERISA qualified plans must be distributed by a Qualified Domestic Relations Order (QDRO). [29 U.S.C. § 1056(d)(3); 26 U.S.C. § 414(p)(1).] See Section III, below.
   b. Survivor benefits in ERISA-qualified plans also are subject to distribution by the court. [*See Workman v. Workman*, 106 N.C. App. 562, 418 S.E.2d 269 (1992) (QDRO awarding wife a share of plan's pre-retirement survivor benefit as well as a share of plan's postretirement joint and survivor annuity benefit upheld).]
2. Plans such as IRAs, 401(k) plans, and Keogh plans (whether ERISA-qualified or not). [*Bodie v. Bodie,* 221 N.C. App. 29, 727 S.E.2d 11 (2012) (trial court erred in failing to classify, value, and distribute postseparation passive increase in the value of the martial portion of husband's 401(k)); *Allen v. Allen*, 118 N.C. App. 455, 455 S.E.2d 440 (1995) (distributing marital portion of a 401(k) plan). *Cf. Watkins v. Watkins,* 228 N.C. App. 548, 746 S.E.2d 394 (2013) (G.S. 50-20.1(d) applicable only to deferred compensation; funds in an IRA are not deferred compensation to the extent they are accessible to the employee/owner at any time; same for employee contributions to a 401(k) and employer contributions to a 401(k) that provide for immediate vesting of employer contributions), *review denied*, 367 N.C. 290, 753 S.E.2d 670 (2014). See discussion in Cheryl Daniels Howell, *When Is a 401K Not a Retirement Account?* UNC Sch. of Gov't: On The Civil Side Blog (Mar. 20, 2015), http://civil.sog.unc.edu/when-is-a-401k-not-a-retirement-account (further discussion of *Watkins*).]
3. State retirement plans. [*See 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); *Patterson ex rel. Jordon v. Patterson*, 137 N.C. App. 653, 529 S.E.2d 484, *review denied*, 352 N.C. 591, 544 S.E.2d 783 (2000).] G.S. 50-20.1(h) references the following plans/funds:
   a. Relief and Pension Funds for Firefighters and Rescue Squad Workers; [G.S. Chapter 58, Articles 84 through 88.]
   b. Legislative Retirement System; [G.S. 120-4.8 *et seq*.]
   c. North Carolina National Guard Pension; [G.S. 127A-40.]
   d. Retirement System for Employees of Counties, Cities, and Towns; [G.S. 128-21 *et seq*.]
   e. Retirement System for Teachers and State Employees; [G.S. Chapter 135.]
   f. Consolidated Judicial Retirement System of North Carolina; [G.S. 135.50 *et seq*.]
   g. Optional Retirement Program for University of North Carolina Employees; [G.S. 135-5.1.]
   h. Retirement Benefits for State and Local Governmental Law Enforcement Officers; [G.S. 143-166.30 *et seq*.; 143-166.50 *et seq*.]
   i. Sheriffs' Supplemental Pension Fund; [G.S. 143-166.80 *et seq*.]
   j. North Carolina Public Employee Deferred Compensation Plan; [G.S. 143B-426.24 and 147-9.4.]

k. Annuity Contracts for Employees of Nonprofit Organizations and Certain Employees of Education Institutions. [G.S. 147-9.3.]

4. Federal civil service retirement programs.
   a. Federal civil service employees hired before Jan. 1, 1984, are participants in the Civil Service Retirement System (CSRS).
   b. Employees hired after Dec. 31, 1983, are members of the Federal Employees Retirement System (FERS). (Employees hired before Dec. 31, 1983, may voluntary move from CSRS to FERS.)
   c. All civil service retirement benefits have been subject to division by courts since 1978. [Pub. L. No. 95-366, 92 Stat. 600 (1978).]
      i. In 1984, the Civil Service Spouse Equity Act made survivor benefits subject to division. [Pub. L. No. 98-615, 98 Stat. 3195 (1984).]
      ii. The current provision authorizing payment of civil service retirement benefits to another person pursuant to certain court orders is found in 5 U.S.C. § 8345(j).
   d. All civil service retirement pensions, to the extent earned during the marriage, are marital property. [*Rowland v. Rowland,* 175 N.C. App. 237, 623 S.E.2d 287 (2005) (plain language of G.S. 50-20(b)(1) makes all pensions marital property; wife's civil service retirement pension earned during marriage was marital property).]

5. Vested and nonvested military pensions eligible under the federal Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C. § 1408. [G.S. 50-20.1(h); 50-20(b)(1).]
   a. Since passage of the USFSPA, for pay periods after June 25, 1981, a state court is authorized to treat a servicemember's disposable retired pay as property subject to division upon divorce. [*See* 10 U.S.C. § 1408(c)(1) ("a court may treat disposable retired pay . . . as property of the member and his spouse . . ."); *Bishop v. Bishop,* 113 N.C. App. 725, 440 S.E.2d 591 (1994) (only "disposable retired pay" may be treated as marital property).] Note that the definition of "disposable retired pay" was amended by Section 641 of the National Defense Authorization Act for Fiscal Year 2017. [S. 2943, 114th Cong. (2015–16).]
      i. Amounts excluded from disposable retired pay include amounts owed to the United States, federal and state income taxes, forfeitures resulting from a court-martial, amounts waived to receive veterans' disability benefits pursuant to 38 U.S.C. § 5305, survivor benefit plan premiums, National Service life insurance, and other amounts required by law to be deducted. [*See, in part,* 10 U.S.C. § 1408(a)(4), *amended by* S. 2943, 114th Cong. (2015–16) (defining "disposable retired pay").] For more on the treatment in divorce of retired pay waived by the servicemember to receive disability benefits from the U.S. Department of Veterans Affairs (VA), see Section I.C.3, below.
      ii. It is error for a trial court to use a definition of "disposable retired pay" that is different from the definition provided in 10 U.S.C. § 1408(a)(4). [*Halstead v. Halstead,* 164 N.C. App. 543, 596 S.E.2d 353 (2004) (trial court erred when it defined military retired pay to include amount of retired pay waived in order to receive VA disability payments, in contravention of the definition in § 1408(a)(4)).]

iii. Where an incorporated separation agreement provided that wife was the owner of, and would receive one-half of, husband's disposable retirement pay, receipt of her share of husband's retirement pay constituted taxable income to her. [*Pfister v. Comm'r of Internal Revenue*, 359 F.3d 352 (4th Cir. 2004) (rejecting wife's argument that USFSPA's definition of "disposable retirement pay" entitled her to her portion of husband's military retirement pay without any tax liability).]

b. 10 U.S.C. § 1408(c)(4) prohibits a court from distributing disposable military retirement pay unless the court has jurisdiction over the servicemember by reason of (1) the servicemember's residence in the state, other than because of military assignment, (2) the servicemember's domicile in the state, or (3) the servicemember's consent to the jurisdiction of the court. [*See Judkins v. Judkins*, 113 N.C. App. 734, 441 S.E.2d 139 (where defendant made a general appearance, jurisdictional requirements of § 1408 were met), *review denied*, 336 N.C. 781, 447 S.E.2d 424 (1994).]

c. The military retirement system is noncontributory, funded by annual contributions from Congress and administered by the Department of Defense. Therefore, military plans are generally defined benefit plans. [*Cunningham v. Cunningham,* 171 N.C. App. 550, 615 S.E.2d 675 (2005); *Seifert v. Seifert*, 82 N.C. App. 329, 346 S.E.2d 504 (1986), *aff'd*, 319 N.C. 367, 354 S.E.2d 506 (1987).] See *Valuation*, Part 3 of this Chapter.

d. There has not yet been an appellate opinion in North Carolina explicitly holding that a court has the authority to order a current or former member of the military to maintain the Survivor's Benefit Plan and to name the former spouse as beneficiary. However, in *Ellison v. Ellison*, 776 S.E.2d 522 (N.C. Ct. App. 2015), the court of appeals upheld a trial court order entered to assist a former spouse seeking to obtain military recognition and enforcement of a provision in an equitable distribution judgment which ordered defendant to maintain the Survivor Benefit with plaintiff as beneficiary.

e. 38 U.S.C. § 5301(a)(1) protects benefits administered by the VA, including VA disability pay, from "attachment, levy, or seizure" pursuant to any legal or equitable process, either before or after receipt by the beneficiary.

i. A trial court violated this provision when it required a husband to pay his former spouse any amount withheld from her share of his military retirement benefit due to future elections or to any act on his part causing a future deduction in disposable retirement pay. [*Halstead v. Halstead,* 164 N.C. App. 543, 596 S.E.2d 353 (2004) (as federal law governs state action regarding military retirement pay or disability benefits, the trial court could not use a definition of "disposable retirement pay" that is different from the definition provided in 10 U.S.C. § 1408(a)(4)).] Note that the definition of "disposable retired pay" was amended by Section 641 of the National Defense Authorization Act for Fiscal Year 2017 [S. 2943, 114th Cong. (2015–16)].

ii. For more on the treatment in divorce of retired pay waived by the servicemember to receive VA disability benefits, see Section I.C.3, below.

6. Railroad retirement system. [Railroad Retirement Act of 1974, 45 U.S.C. § 231m (U.S. Code Title 45, Chapter 9, Subchapter IV).] Only "Tier II" benefits are subject to distribution. See Section I.C.2.c, below.

7. Stock options.
    a. A stock option is "the right, or option, to buy a certain number of shares of corporate stock within a specified period at a fixed price." [Clarence E. Horton, Jr., *Principles of Valuation in North Carolina Equitable Distribution Actions*, Special Series No. 10, at 35 (UNC Institute of Government, Apr. 1993) (hereinafter *Principles of Valuation*) (also discussing methods of valuing stock options). *See also* 3 Lee's North Carolina Family Law § 12.71b ("stock options are either marital or divisible property" to which "general principles on valuation" apply).]
    b. Like retirement benefits, stock options are a salary substitute or a deferred compensation benefit. [*Fountain v. Fountain,* 148 N.C. App. 329, 559 S.E.2d 25 (2002). *But see Ubertaccio v. Ubertaccio*, 359 N.C. 175, 604 S.E.2d 912 (2004) (disagreeing with the implication in *Fountain* that all forms of salary substitutes or compensation, the receipt of which is deferred, such as stock options, must be classified and distributed pursuant to G.S. 50-20.1), *aff'g per curiam for reasons stated in concurring opinion in* 161 N.C. App. 352, 588 S.E.2d 905 (2003) (Levinson, J., concurring in result only).]
    c. Marital property. Stock options received during the marriage and before the date of separation (DOS) and acquired as a result of the efforts of either spouse during the marriage and before the DOS are marital property. [*Fountain v. Fountain,* 148 N.C. App. 329, 559 S.E.2d 25 (2002) (options were vested on the DOS because the right to exercise the options could not be canceled).]
    d. Divisible property.
        i. Stock options acquired as a result of the efforts of either spouse during the marriage and before the DOS and received after the DOS but before the date of distribution are divisible property. [*Fountain v. Fountain,* 148 N.C. App. 329, 559 S.E.2d 25 (2002).]
        ii. Trial court properly classified as divisible property proceeds from the sale of stock grants acquired as the result of the efforts of wife during marriage and before the date of separation, and received by wife before the date of distribution. [*Ubertaccio v. Ubertaccio*, 359 N.C. 175, 604 S.E.2d 912 (2004), *aff'g per curiam for reasons stated in concurring opinion in* 161 N.C. App. 352, 588 S.E.2d 905 (2003) (Levinson, J., concurring in result only).]
    e. For valuation of stock options, see Section II.E, below. For distribution of stock options, see Section III.D, below.

C. Benefits Not Subject to Equitable Distribution

1. Social Security benefits. Social Security benefits cannot be treated as marital property and distributed in an equitable distribution (ED) proceeding. [42 U.S.C. § 407(a) (U.S. Code Title 42, Chapter 7, Subchapter II); *Cruise v. Cruise,* 92 N.C. App. 586, 374 S.E.2d 882 (1989).]
    a. The court in *Cruise v. Cruise,* 92 N.C. App. 586, 374 S.E.2d 882 (1989), did not address whether the receipt of Social Security benefits by a spouse can be considered as a distributional factor but cited favorably a case which allowed such consideration, *In re Swan*, 74 Or. App. 616, 704 P.2d 136 (1985) (noting that while federal law did not allow a court to award one spouse's Social Security benefits to the other spouse,

federal law did not preclude a court from considering those benefits when dividing the parties' property), *order withdrawn,* 715 P.2d 1112 (1986), *on remand,* 301 Or. 167, 720 P.2d 747 (1986) (Oregon Supreme Court holding that value of Social Security benefits of either spouse may not be considered in making division of marital property). [*See also Sloan v. Hitt,* 163 N.C. App. 611, 594 S.E.2d 259 (**unpublished**) (citing *Cruise* and stating that Social Security benefits can be considered in an ED proceeding when dividing the parties' real or personal property if doing so is fair and equitable when considering all the circumstances), *cert. denied,* 358 N.C. 545, 599 S.E.2d 408 (2004). *But see Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802 (1979) (railroad retirement benefits that replace Social Security benefits are not subject to distribution or consideration when distributing marital assets).]

b. One authority has counseled against considering receipt of Social Security benefits as a distributional factor due to the opinion in *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802 (1979). [Clarence E. Horton, Jr., Pension, Retirement, and Deferred Compensation Rights Under the North Carolina Equitable Distribution Act (date not available).]

c. Social Security benefits may be awarded as alimony or child support. [42 U.S.C. § 659(a) (U.S. Code Title 42, Chapter 7, Subchapter IV, Part D) (allowing Social Security benefits to be subject to legal process for claims of alimony and child support); *Evans v. Evans,* 111 N.C. App. 792, 434 S.E.2d 856, *review denied*, 335 N.C. 554, 439 S.E.2d 144 (1993).]

2. Tier I railroad retirement benefits.

a. Tier I benefits are designed to take the place of Social Security by providing generally comparable benefits. Tier II benefits are comparable to those in a private defined benefit pension. [Kevin Whitman, U.S. Soc. Sec. Admin., Office of Ret. & Disability Policy, *An Overview of the Railroad Retirement Program*, 68(2) Soc. Sec. Bull. (2008), www.ssa.gov/policy/docs/ssb/v68n2/v68n2p41.html.] For a case discussing both benefits and distributing Tier II benefits upon divorce, see *Schoenwald v. Schoenwald*, 593 N.W.2d 350 (N.D. Sup. Ct. 1999).

b. A court may not distribute Tier I benefits, award other marital property as an offset, or in any way consider the Tier I benefits, in dividing marital property. [45 U.S.C. § 231m(a) (U.S. Code Title 45, Chapter 9, Subchapter IV) (generally prohibiting the assignment of Tier I benefits); *Hisquierdo v. Hisquierdo,* 439 U.S. 572, 99 S. Ct. 802 (1979) (partially superseded by statute, 45 U.S.C. § 231m(b)(2) (dealing with Tier II benefits)); *Larkin v. Larkin,* 415 N.W.2d 924 (Minn. Ct. App. 1987).]

c. Tier II benefits may be distributed upon divorce. [45 U.S.C. § 231m(b)(2); 20 C.F.R. § 295.1.]

3. Military disability benefits.

a. Disability pay is separate property and is not subject to distribution 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).]

b. A court can consider disability payments as a distributional factor but cannot give dollar-for-dollar "credit" in distribution to make up for any retirement pay lost due to conversion to disability. [*Halstead v. Halstead,* 164 N.C. App. 543, 546, 596 S.E.2d

353, 355 (2004) (agreeing with servicemember that trial court erred by providing "a dollar for dollar compensation to the non-military spouse"); *Williams v. Williams*, 167 N.C. App. 373, 605 S.E.2d 266 (2004) (**unpublished**) (applying *Halstead* to a consent order).]

c. Disability payments to a servicemember receiving retirement pay.

i. A servicemember receiving disposable retired pay ("military retiree") also may be eligible for disability compensation from the U.S. Department of Veterans Affairs (VA) pursuant to Title 38, Part IV, Chapter 53 of the U.S. Code ("VA disability pay").

ii. Before 2004, to receive VA disability pay, any military retiree had to waive the amount of retired pay, dollar for dollar, that he would receive as VA disability pay. [38 U.S.C. § 5305.] Some retirees are still required to waive retirement pay in order to receive disability pay. See discussion in Sections I.C.3.c.iii, iv, and v, immediately below.

iii. If forced to choose between the two benefits, a military retiree generally will elect VA disability pay (and waive a corresponding amount of disposable retired pay), as VA disability pay:

(a) Is not subject to taxation [38 U.S.C. § 5301(a).] and

(b) Is the separate property of the disabled spouse and is not subject to ED. [*Mansell v. Mansell,* 490 U.S. 581, 109 S. Ct. 2023 (1989) (the Uniformed Services Former Spouses Protection Act (USFSPA) does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive VA disability pay); *Hillard v. Hillard,* 223 N.C. App. 20, 733 S.E.2d 176 (2012) (disability payments are treated as the retiree's separate property), *review denied,* 366 N.C. 432, 736 S.E.2d 490 (2013); *Halstead v. Halstead,* 164 N.C. App. 543, 596 S.E.2d 353 (2004) (citing *Bishop v. Bishop,* 113 N.C. App. 725, 440 S.E.2d 591 (1994)) (military disability payments cannot be classified as marital property subject to ED); *Bishop* (military disability payments are the retiree's separate property and treated as a distributional factor).]

iv. A military retiree's election of VA disability pay will result in a former spouse receiving less or none of the military retiree's retirement benefit.

v. EXCEPTION: Federal laws effective on or after Jan. 1, 2004, provide limited relief from the waiver requirement for certain qualified servicemembers.

(a) A servicemember eligible for concurrent retirement and disability pay (CRDP), discussed in Section I.C.4.a, below, may concurrently receive VA disability compensation and military retired pay as set forth in 10 U.S.C. § 1414(a). [38 U.S.C. § 5305 (excepting 10 U.S.C. § 1414).] A servicemember who is not eligible for CRDP still must waive the amount of retired pay that is equal to the amount of VA disability pay to receive the VA disability pay. [38 U.S.C. § 5305.]

(b) A servicemember eligible for Combat-Related Special Compensation (CRSC), discussed in Section I.C.5.b, below, may receive a special type of

compensation for that portion of waived VA disability pay resulting from combat-related disabilities.

(c) A servicemember who is not eligible for CRSC is not entitled to special compensation that would reimburse the servicemember in full or in part for combat-related disabilities as provided in 10 U.S.C. § 1413a.

(d) For a resource on these developments, see Mark E. Sullivan and Charles R. Raphun, *Dividing Military Retired Pay: Disability Payments and the Puzzle of the Parachute Pension*, 24 J. Am. Acad. Matrim. Laws. 147 (2011), www.aaml.org/sites/default/files/MAT104_3.pdf.]

4. Concurrent Retirement and Disability Pay.

   a. On Jan. 1, 2004, Concurrent Retirement and Disability Pay (CRDP) went into effect. CRDP permits a servicemember with at least twenty years of qualifying military service and a service-connected disability rated by the VA at 50 percent or higher to concurrently receive both VA disability pay and military retired pay. [10 U.S.C. § 1414(a)(1) (a qualified retiree is entitled to be paid retired pay and veterans' disability compensation without regard to Sections 5304 and 5305 of U.S. Code Title 38).]

   b. Phase-in period.

      i. Full concurrent receipt of the benefits was phased in over a period beginning Jan. 1, 2004, and ending Dec. 31, 2013. [10 U.S.C. § 1414(a)(1).]

      ii. During the phase-in period, qualified disabled veterans still were required to waive military retired pay to receive disability compensation. During the phase-in period, a qualified disabled veteran's monthly amount of military retired pay gradually increased based on a mathematical formula. Effective Jan. 1, 2014, a veteran eligible for concurrent receipt is no longer required to waive military retired pay in exchange for disability pay, except as provided in 38 C.F.R. § 3.750(c) (when disability pay exceeds retired pay). [38 C.F.R. §§ 3.750(b) and (c).]

      iii. Retirees with a disability rating of 100 percent were not subject to the phase-in requirement after Dec. 31, 2004. [10 U.S.C. § 1414(a)(1).]

   c. CRDP is compensation subject to distribution under the USFSPA. [10 U.S.C. § 1408(a)(4) (definition of "disposable retired pay"), *amended by* S. 2943, 114th Cong. (2015–16); 10 U.S.C. § 1408(c)(1).]

   d. Where a military retiree eligible for CRDP receives a combination of military retired pay and VA disability payments, after Jan. 1, 2014, there is no waiver of military retired pay, so the full amount of military retired pay is subject to ED. [See definition of "disposable retired pay" in 10 U.S.C. § 1408(a)(4), *amended by* S. 2943, 114th Cong. (2015–16).]

5. Combat-Related Special Compensation.

   a. Combat-Related Special Compensation (CRSC) is a new category of compensation available to a member of the uniformed service who is entitled to retired pay and who has a combat-related disability as defined in 10 U.S.C. § 1413a(e). [10 U.S.C. §§ 1413a(c)(1)–(2).]

b. The purpose of CRSC is to provide special compensation to members of the uniformed services who have retired pay reduced because of receipt of VA disability compensation where a portion of the VA compensation is the result of disabilities that are combat-related. [Dep't of Defense, Fin. Mgt. Reg. vol. 7B ("Military Pay Policy and Procedures – Retired Pay"), ch. 63, § 630101 (Mar. 2013) (see the Nov. 2015 version: http://comptroller.defense.gov/Portals/45/documents/fmr/Volume_07b.pdf, at 63-6).]

c. A servicemember may qualify for both CRDP and CRSC but may only receive one. [10 U.S.C. §§ 1414(d)(1), 1413a(f).]

d. CRSC payments are not retired pay, [10 U.S.C. § 1413a(g).] and thus are not subject to ED.

6. Conversion of military retired pay to disability payments.

a. Treatment of conversion in ED action.

i. While a trial court may consider a party's receipt of disability payments as a distributional factor, a trial court may not distribute disability payments or give dollar-for-dollar "credit" in distribution to make up for any retirement pay lost due to conversion to disability. [*Halstead v. Halstead,* 164 N.C. App. 543, 596 S.E.2d 353 (2004); *Williams v. Williams*, 167 N.C. App. 373, 605 S.E.2d 266 (2004) (**unpublished**).]

ii. A trial court may not prohibit a servicemember from converting retirement pay to disability in the future. [*Cunningham v. Cunningham,* 171 N.C. App. 550, 558, 615 S.E.2d 675, 681–82 (2005).] In *Cunningham*, the trial court had to revise a judgment that ordered husband not to take any steps to diminish or reduce his military retired pay "to the end that the plaintiff's portion of his retirement is reduced," as this provision foreclosed husband's right to forego pension payments in favor of disability payments should he become eligible to do so.

b. Treatment of conversion after ED action.

i. Because a trial court has authority to enforce an ED judgment, a trial court can modify an order dividing a military pension to effectuate the terms of the original ED judgment. [*Cf. Hillard v. Hillard,* 223 N.C. App. 20, 24, 733 S.E.2d 176, 180 (2012) (after servicemember waived retired pay to receive disability pay, amended ED order that required servicemember to pay wife "the portion of his retirement required by the previous order" did not impermissibly distribute disability pay, as servicemember could fund payments from source of his choice), *review denied,* 366 N.C. 432, 736 S.E.2d 490 (2013), and *White v. White,* 152 N.C. App. 588, 568 S.E.2d 283 (2002) (trial court had authority to hear wife's motion to amend a qualified domestic relations order (QDRO) to seek an increase in her share of husband's retired pay after servicemember elected to receive disability pay), *aff'd per curiam*, 357 N.C. 153, 579 S.E.2d 248 (2003), with *Williams v. Williams*, 167 N.C. App. 373, 605 S.E.2d 266 (2004) (**unpublished**) (trial court properly concluded that wife was not entitled to reimbursement for losses arising from servicemember's election of disability benefits; denial of wife's motion to amend QDRO upheld).]

7. Other disability payments are subject to classification and distribution. See *Classification*, Part 2 of this Chapter, Section XI.D.

II. Valuation

A. Generally

1. All marital interest in a pension, retirement, or other deferred compensation plan must be valued as of the date of separation (DOS), regardless of the method of distribution. [*Seifert v. Seifert,* 319 N.C. 367, 354 S.E.2d 506 (valuation is necessary to determine the percentage of benefits the non-employee spouse is equitably entitled to receive) (1987); *Bishop v. Bishop,* 113 N.C. App. 725, 440 S.E.2d 591 (1994).]
2. The requirement that the trial court value the martial interest in a pension, retirement, or other deferred compensation plan exists only when evidence is presented to the trial court that supports the claimed valuation. [*Johnson v. Johnson,* 230 N.C. App. 280, 750 S.E.2d 25 (2013) (citing *Albritton v. Albritton*, 109 N.C. App. 36, 426 S.E.2d 80 (1993)) (trial court did not err when it did not value or distribute defendant's military pension when there was no competent evidence as to the value of the pension as of the DOS); *Washburn v. Washburn,* 228 N.C. App. 570, 749 S.E.2d 111 (2013) (**unpublished**) (not paginated on Westlaw) (citing *Grasty v. Grasty*, 125 N.C. App. 736, 482 S.E.2d 752 (1997), and *Albritton*) (error to order that a percentage of plaintiff's future retirement payments be distributed to defendant when trial court failed to value plaintiff's military pension; on remand, pension was to "be removed and excluded" from equitable distribution because defendant, the party claiming an interest, had failed to provide any evidence of the pension's value).]
3. The value of pension and retirement benefits is calculated as of the DOS and shall not include contributions, years of service, or compensation that may accrue after the DOS. [G.S. 50-20.1(d).]
4. A significant decrease in the value of a retirement account from the DOS to the date of distribution did not warrant setting aside a qualified domestic relations order under G.S. 1A-1, Rule 60(b). [*Lee v. Lee,* 167 N.C. App. 250, 258, 605 S.E.2d 222, 227 (2004) ("[a] change in the value of the stock market over the course of five years does not amount to an extraordinary or even unforeseeable circumstance" warranting review of the lump sum distribution originally ordered).]
5. The method of valuation will depend on the type of pension, retirement, or deferred compensation plan at issue. [*Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994).]
6. A stipulation as to the value of a plan is binding. [*Wall v. Wall*, 140 N.C. App. 303, 536 S.E.2d 647 (2000) (when parties and their counsel stipulated to the value of husband's profit-sharing plan as of the DOS, husband was bound by that stipulation and estopped from questioning the value used by the trial court, even though the value obviously included some gains on plan assets after the DOS).] For more on stipulations, see *Equitable Distribution Overview and Procedure,* Part 1 of this Chapter, Section V, and *Valuation*, Part 3 of this Chapter, Section III.A.
7. When interest in a pension, retirement, or other deferred compensation plan is separate property.
    a. 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).]

b. 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 husband was to receive was sufficient under G.S. 50-20(c)(1) and (5). [*Dewey v. Dewey*, 77 N.C. App. 787, 336 S.E.2d 451 (1985) (prior version of statute), *review denied*, 316 N.C. 376, 344 S.E.2d 1 (1986).]

8. Competent evidence of value.

a. Neither plaintiff's post-trial memorandum requesting the trial court to take judicial notice of documents not offered at trial and suggesting internet sites to assist the court with valuation, nor defendant's unsubstantiated estimates during "very limited" cross-examination as to amount of his monthly retirement benefit or possible date of retirement, constituted competent evidence as to the value of defendant's military pension. [*Johnson v. Johnson,* 230 N.C. App. 280, 750 S.E.2d 25 (2013) (without competent evidence of value, trial court did not err when it did not value or distribute defendant's military pension).]

b. Defendant's testimony at a 2011 trial that he had to retire "anywhere from July of 2012 to August of 2017" and "the earliest I can retire is 2012" was not sufficient to establish the "earliest retirement age" for valuation purposes. [*Johnson v. Johnson,* 230 N.C. App. 280, 289, 750 S.E.2d 25, 31, 32 (2013) (trial court did not err when it did not value or distribute defendant's military pension when there was no competent evidence as to the value of the pension as of the DOS).]

c. N.C. R. Evid. 703 allows an expert to give an opinion based on evidence not otherwise admissible if the information is of the type generally relied upon by experts in the particular field. [*Lund v. Lund*, 779 S.E.2d 175 (N.C. Ct. App. 2015) (expert was properly allowed to rely on an affidavit provided by the Retirement Systems Division of the Department of State Treasury for information needed to perform the valuation methodology required by *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994), even though the affidavit was not introduced into evidence).]

d. Expert's opinion as to the DOS value of a pension was not rendered incompetent by the fact that the expert based his opinion on an affidavit containing information regarding the pension as of a date that was twenty-seven days after the DOS. [*Lund v. Lund*, 779 S.E.2d 175 (N.C. Ct. App. 2015).]

B. Types of Plans

1. Defined contribution plan.

a. A plan that provides an individual account for each participant. Benefits are based solely on the amount contributed to the participant's account; any income, expenses, gains and losses; and any forfeitures of accounts of other participants that may be allocated to such participant's account. [26 U.S.C. § 414(i) (definition applicable to Part 1, Subtitle A, Chapter 1, Subchapter D).]

b. A defined contribution plan is "essentially an annuity funded by periodic contributions. At retirement the funds purchase an annuity for the rest of the employee's life or an actuarily reduced pension for the lives of the employee and spouse." [*Seifert v. Seifert*, 82 N.C. App. 329, 332, 346 S.E.2d 504, 505 (1986), *aff'd*, 319 N.C. 367, 354 S.E.2d 506 (1987).]

2. Defined benefit plan.
   a. A defined benefit plan is any plan that is not a defined contribution plan. [26 U.S.C. § 414(j) (definition applicable to Part 1, Subtitle A, Chapter 1, Subchapter D); *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) (citing *Bishop*) (any pension, such as military retirement, that is not a defined contribution plan is considered to be a defined benefit plan).]
   b. Future benefits are determined by the terms of the plan and are not based upon actual contributions by either the employer or the employee. Benefits are based on factors such as years of service and compensation received. [*Herring v. Herring,* 231 N.C. App. 26, 29 n.2, 752 S.E.2d 190, 193, n.2 (2013) (citing *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)); *Cunningham v. Cunningham,* 171 N.C. App. 550, 615 S.E.2d 675 (2005); *Cochran*; *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994).]
   c. The North Carolina Teachers' and State Employees' Retirement System (TSERS) pension is a defined benefit plan and, as such, is valued under the five-step method set out in *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994), and not by the total contribution method. [*Herring v. Herring,* 231 N.C. App. 26, 752 S.E.2d 190 (2013) (citing *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)) (TSERS pension to be valued using *Bishop* five-step method); *Cochran*.] The *Bishop* five-step method is set out in Section II.D.2, below.

C. Valuation of a Defined Contribution Plan

1. Since an employee has an individual account, and the retirement benefits are based solely on the value of contributions to the account, valuation of such a plan merely requires that the court determine the value of the participant's account on the date of separation (DOS). [*Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994).]
2. The coverture fraction, discussed in Section I.A.6, above, is applied to the DOS value of the defined contribution plan to determine what portion of the total value is marital property. [*See Robertson v. Robertson,* 167 N.C. App. 567, 605 S.E.2d 667 (2004) (rejecting husband's contention that use of a coverture fraction was limited to defined benefit plans); *see also Curtis v. Curtis,* 220 N.C. App. 415, 725 S.E.2d 472 (2012) (**unpublished**) (trial court erred when it did not apply the coverture fraction to the 401(k)'s DOS value to determine the marital portion).] *But see Watkins v. Watkins,* 228 N.C. App. 548, 746 S.E.2d 394 (2013) (distinguishing both *Robertson* and *Curtis* and holding that the coverture fraction in G.S. 50-20.1(d) is applicable only to pensions and retirement plans that are comprised of deferred compensation), *review denied*, 367 N.C. 290, 753 S.E.2d 670 (2014). According to *Watkins*:
   a. Individual Retirement Account (IRA) analysis.
      i. Funds in an IRA are not deferred compensation because typically the funds have been contributed by the employee, belong to the employee, and are accessible to the employee at any time.
      ii. To the extent that funds in an IRA are from a pension, retirement, or other form of deferred compensation, those funds would be deferred compensation.

b. 401(k) analysis.

i. A 401(k) account may contain both employer contributions and employee contributions.

ii. Employee contributions to a 401(k) may be withdrawn at any time and are not deferred compensation benefits subject to G.S. 50-20.1.

iii. Employer contributions to a 401(k) that provide for immediate vesting of employer contributions are not deferred compensation benefits subject to G.S. 50-20.1.

iv. Whether employer contributions to a 401(k) that vest over a specified time may be construed as deferred compensation was not before the court in *Watkins v. Watkins,* 228 N.C. App. 548, 746 S.E.2d 394 (2013), *review denied*, 367 N.C. 290, 753 S.E.2d 670 (2014).

c. Holding as to two accounts opened during the marriage.

i. Husband's 401(k) Rollover IRA. This account was funded entirely from funds rolled over from husband's 401(k) plan from his former employment and contained contributions made both before and after marriage. Because there was no evidence that any portion of the funds included deferred compensation from husband's former employer, G.S. 50-20.1 was not applicable. Thus, it was appropriate for the trial court to use the source of funds approach to trace the portion of the original account, the 401(k) from husband's former employment, that was earned before the date of marriage, which was classified as his separate property.

ii. Husband's Pension Rollover IRA. This account was funded entirely from funds rolled over from husband's defined benefit pension earned by husband through his former employment both before and after marriage. This account was subject to G.S. 50-20.1, which requires application of the coverture fraction to determine the marital component of the account. Thus, the trial court erred when it classified this account using the source of funds approach.

d. Distinguishing prior case law.

i. The plan in *Robertson v. Robertson,* 167 N.C. App. 567, 605 S.E.2d 667 (2004), was distinguished as being neither an IRA nor a 401(k) but, rather, a deferred contribution plan that provided company stock as a deferred compensation benefit. According to *Watkins v. Watkins,* 228 N.C. App. 548, 746 S.E.2d 394 (2013), *review denied*, 367 N.C. 290, 753 S.E.2d 670 (2014), *Robertson* held that G.S. 50-20.1 applies to deferred compensation benefits, regardless of whether those benefits are derived from a defined benefit plan or a defined contribution plan.

ii. *Curtis v. Curtis,* 220 N.C. App. 415, 725 S.E.2d 472 (2012) (**unpublished**), involved a 401(k), and while the court of appeals in that decision approved application of the coverture fraction to determine the marital and separate components of the 401(k), it was distinguished because neither party had argued that the coverture fraction should not be utilized, nor was *Curtis* binding legal precedent, being unpublished.

e. For a discussion of *Watkins v. Watkins,* 228 N.C. App. 548, 746 S.E.2d 394 (2013), *review denied*, 367 N.C. 290, 753 S.E.2d 670 (2014), see 2014 Howell Bulletin.

3. Use of the coverture fraction to determine the percentage of the retirement benefit that is marital is proper, even though it may take into account benefits earned before marriage. [*See Gagnon v. Gagnon,* 149 N.C. App. 194, 560 S.E.2d 229 (2002) (even though a portion of husband's military retirement was directly attributable to benefits husband earned before marriage, trial court's award of 26 percent of the retirement benefits to wife was affirmed).]
4. When the percentage found to be marital property is divided between the parties, one case has upheld an order in which the nonemployee spouse's share was rounded up. [*Gagnon v. Gagnon,* 149 N.C. App. 194, 198 n.1, 560 S.E.2d 229, 232 n.1 (2002) (when husband and wife were married for 51.25 percent of the time husband served in the military, no error when trial court rounded up wife's equal share of 25.625 percent to 26 percent).]
5. Although most funds in defined contribution accounts cannot be withdrawn without tax penalty, the DOS value should not be reduced to reflect the tax consequences of an early withdrawal when there is no evidence that the employee spouse planned or would be required to withdraw funds from the account as a result of the equitable distribution order. [*Smith v. Smith,* 104 N.C. App. 788, 411 S.E.2d 197 (1991) (error for trial court to reduce value of 401(k) retirement account); *Principles of Valuation*, at 31.]

D. Valuation of a Defined Benefit Plan

1. Because future benefits are not based upon contributions to the account of a particular employee, using the "withdrawal value" of a defined benefit plan does not "reasonably approximate" the values of the interests of the parties. [*Stiller v. Stiller,* 98 N.C. App. 80, 389 S.E.2d 619 (1990).]
2. In *Bishop v. Bishop*, 113 N.C. App. 725, 731, 440 S.E.2d 591, 595–96 (1994), the court set forth the following five-step process for valuing a defined benefit plan:
    a. "First, the trial court must calculate the amount of monthly pension payment the employee, assuming he retired on the date of separation, will be entitled to receive at the later of the earliest retirement age or the date of separation. [*Bishop*, 113 N.C. App. at 731, 440 S.E.2d at 595 (trial court in this case erred by determining value on basis that husband would not retire until age 65 when plan provided that he could retire with reduced benefits at age 50).] This calculation is made as of the date of separation and "shall not include contributions, years of service, or compensation which may accrue after the date of separation." [*Bishop*, 113 N.C. App. at 731, 440 S.E.2d at 595 (quoting former G.S. 50-20(b)(3)).] The calculation will include "gains and losses on the prorated portion of the benefit vested at the date of separation." [*Bishop*, 113 N.C. App. at 731, 440 S.E.2d at 595 (quoting former G.S. 50-20(b)(3)).] NOTE: The new statutory reference for the language quoted above is G.S. 50-20.1(d).
    b. "Second, the trial court must determine the employee -spouse's life expectancy as of the date of separation and use this figure to ascertain the probable number of months the employee-spouse will receive benefits under the plan." [*Bishop*, 113 N.C. App. at 731, 440 S.E.2d at 595–96.]
    c. "Third, the court must use an "acceptable discount rate" to determine the "then-present value of the pension as of the later of the date of separation or the earliest retirement date." [*Bishop*, 113 N.C. App. at 731, 440 S.E.2d at 596.]

d. "Fourth, the trial court must discount the then-present value to the value as of the date of separation. In other words, determine the value as of the date of separation of the sum to be paid at the later of the date of separation or the earliest retirement date. This calculation requires mortality and interest discounting." [*Bishop*, 113 N.C. App. at 731, 440 S.E.2d at 596 (the court noted that the mortality and interest tables of the Pension Benefit Guaranty Corporation, a corporation within the United States Department of Labor, are "well-suited for this purpose."] The tables and other information can be obtained by writing to the Pension Benefit Guaranty Corporation, 1200 K Street N.W., Suite 240, Washington, D.C. 20005 or are available at www.pbgc.gov. The phone number is (800) 736-2444 or (202) 326-4242. *But see Cochran v. Cochran*, 198 N.C. App. 224, 679 S.E.2d 469 (2009) (trial court can use updated and more sophisticated tables), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010).

e. "Finally, the trial court must reduce the present value to account for contingencies such as involuntary or voluntary employee-spouse termination and insolvency of the pension plan. This calculation cannot be made with reference to any table or chart and rests within the sound discretion of the trial court." [*Bishop*, 113 N.C. App. at 731, 440 S.E.2d at 596.]

3. In *Surrette v. Surrette*, 114 N.C. App. 368, 442 S.E.2d 123 (1994), the court approved of the five-step process provided in *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994), and emphasized that valuation is to be made on the assumption that the employee retired on the date of separation (DOS) and began receiving benefits either on the date of separation or the earliest retirement date, whichever is later. In *Seifert v. Seifert,* 319 N.C. 367, 354 S.E.2d 506 (1987), the trial court used valuation methodology similar to that described in *Bishop*. The court of appeals more recently approved of the method established in *Bishop* in *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), and in *Cunningham v. Cunningham,* 171 N.C. App. 550, 615 S.E.2d 675 (2005).

4. The first four steps set out in *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994), provide a method for determining a lump sum present value of the stream of payments that the employee spouse will likely receive under the pension plan from the earliest date of his retirement through his prolonged life expectancy (determined as of the date of separation). The fifth step allows the trial court to further reduce this figure "to account for contingencies such as involuntary or voluntary employee-spouse termination and insolvency of the pension plan." [*Cochran v. Cochran*, 198 N.C. App. 224, 229, 679 S.E.2d 469, 473 (2009) (quoting *Bishop*, 113 N.C. App. at 731, 440 S.E.2d at 595–96), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010).]

5. Specific steps set out in *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994).

   a. Step one: calculating amount of monthly pension employee spouse, assuming retirement on the DOS, will be entitled to receive at the later of the earliest retirement age or the DOS.

      i. The determination of the "earliest retirement age" in step one is critical to subsequent steps. [*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).]

ii. Without the amount of the monthly pension as of the DOS, the *Bishop* computation cannot be completed. [*Johnson v. Johnson,* 230 N.C. App. 280, 750 S.E.2d 25 (2013).]

iii. Defendant's testimony at a 2011 trial that he had to retire "anywhere from July of 2012 to August of 2017" and "the earliest I can retire is 2012" was not sufficient to establish the "earliest retirement age" for valuation purposes. [*Johnson v. Johnson,* 230 N.C. App. 280, 289, 750 S.E.2d 25, 31, 32 (2013) (trial court did not err when it did not value or distribute defendant's military pension when there was no competent evidence as to the value of the pension as of the DOS).]

b. Step two of *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994): determining life expectancy as of the DOS.

i. Life expectancy is used to ascertain the probable number of months the employee spouse will receive benefits under the plan. [*Cochran v. Cochran*, 198 N.C. App. 224, 679 S.E.2d 469 (2009) (citing *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994)), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010).]

ii. In determining the employee spouse's life expectancy as of the DOS, the trial court is not required to express its finding in a specific number of months but may determine life expectancy on a year-by-year basis. [*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).]

iii. No error when wife's expert determined "probable life expectancy" rather than "average life expectancy." [*Cochran v. Cochran*, 198 N.C. App. 224, 232, 679 S.E.2d 469, 475 (2009) (nothing in *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994), precludes use of "probable life expectancy"), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010).]

iv. Similarly, no error when the trial court approved the use of mortality tables currently mandated for use under the Employee Retirement Income Security Act of 1974 (ERISA) to value pensions. [*Cochran v. Cochran*, 198 N.C. App. 224, 231, 679 S.E.2d 469, 474 (2009) (*Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994), does not mean, for purposes of pension valuation, that North Carolina is "frozen in 1994" and precluded from using updated and more sophisticated tables), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010).]

v. A court may take judicial notice of the mortality tables contained in G.S. 8-46. [*Chandler v. Chem. Co.*, 270 N.C. 395, 154 S.E.2d 502 (1967); *Thomas v. Dixson,* 88 N.C. App. 337, 363 S.E.2d 209 (1988).] The statute requires that the court consider the tables as well as "other evidence as to the health, constitution, and habits," of the person at issue.

vi. In *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994), the trial court used the Statistical Abstract of the United States rather than G.S. 8-46 to find life expectancy. The trial court made findings to support a conclusion that the Abstract was more accurate because it took into account more details about the race and gender of the person. The court of appeals did not address that issue.

c. Steps three and four of *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994): reducing the pension benefit to present value.

i. The discount rate used to reduce a pension benefit to present value may be reduced by an annual cost of living adjustment. [*Cochran v. Cochran*, 198 N.C. App. 224, 679 S.E.2d 469 (2009) (the cost of living adjustment is a gain on the benefit vested at the time of separation that G.S. 50-21.1(d) requires the court to take into account and not a contribution to the plan that the statute prohibits the court from including), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010).]

ii. If the appropriate date to use in step three of *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994), is the date of separation (DOS), step four of *Bishop* (reducing the figure determined after step three to present value as of the DOS) is not required. If, however, the appropriate date to use in step three is the earliest retirement date, step four is required to determine the present value of the pension as of the DOS. [*See Cochran v. Cochran*, 198 N.C. App. 224, 679 S.E.2d 469 (2009) (because husband's earliest retirement date was later than the DOS, *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994), required that the trial court perform both steps three and four), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010).]

iii. If the appellate court is unable to determine, as in *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), that both steps three and four were performed when both were required, the matter will be remanded. [*Cochran* (remanding for further findings).]

d. Step five: further reduction in present value to account for contingencies.

i. The calculation in step five "cannot be made [by the use of] any table or chart and rests within the sound discretion of the trial court." [*Cochran v. Cochran*, 198 N.C. App. 224, 234, 679 S.E.2d 469, 476 (2009) (quoting *Bishop v. Bishop*, 113 N.C. App. 725, 731, 440 S.E.2d 591, 596 (1994)), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010).]

ii. A trial court in its discretion may decide not to reduce the present value due to contingencies. [*Cochran v. Cochran*, 198 N.C. App. 224, 679 S.E.2d 469 (2009) (no abuse of discretion when trial court elected not to further reduce the pension value when there was no evidence in the record of contingencies of the type discussed in step five of *Bishop v. Bishop*, 113 N.C. App. 725, 440 S.E.2d 591 (1994), that could affect the value of husband's pension), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010).]

6. Determining a reasonable rate of return.

a. A rate must be "reasonably in keeping with the fair market value of the money. Reasonable rates of comparison, for example, might include the rate used by the Internal Revenue Service in determining assessments and refunds, Treasury bill rates, or the prime rates charged by banks." [*Weaver v. Weaver*, 72 N.C. App. 409, 415, 324 S.E.2d 915, 919 (1985) (finding that a 4.5 percent rate was too low in 1983), *disapproved of on other grounds by Armstrong v. Armstrong,* 322 N.C. 396, 368 S.E.2d 595 (1988).

See also Seifert v. Seifert, 82 N.C. App. 329, 331, 346 S.E.2d 504, 505 (1986) (trial court used a 10 percent rate of return), *aff'd*, 319 N.C. 367, 354 S.E.2d 506 (1987); *Bishop v. Bishop*, 113 N.C. App. 725, 727, 440 S.E.2d 592, 594 (1994) (trial court used a 7.5 percent rate of return).]

b. For a thorough discussion of finding and using a reasonable rate of return, see *Principles of Valuation*, at 32–34.

7. The coverture fraction is applied to the DOS value of the defined benefit plan to determine what portion of the total value is marital property. See Section I.A.6, above. [*But cf. Embler v. Embler,* 159 N.C. App. 186, 582 S.E.2d 628 (2003) (pension classified as completely marital because defendant failed to produce evidence of value of pension on date of marriage). *See also Helms v. Helms,* 191 N.C. App. 19, 661 S.E.2d 906 (no abuse of discretion in awarding wife half of husband's 401(k) account when husband presented no evidence to establish the number of years his 401(k) account existed prior to the marriage and stated in the inventory affidavit that the account was marital property and put "none" under the affidavit section on separate property), *review denied,* 362 N.C. 681, 670 S.E.2d 233 (2008).]

8. Consideration of tax consequences upon receipt of benefits.

a. In valuing retirement benefits not yet distributed, a trial court cannot deduct taxes that would be payable upon receiving benefits. [*See Wilkins v. Wilkins*, 111 N.C. App. 541, 432 S.E.2d 891 (1993) (early withdrawal of benefits considered "speculative" and could not have been made on the DOS under the terms of the plan). *But compare Mishler v. Mishler*, 90 N.C. App. 72, 367 S.E.2d 385 (wife's employer terminated pension plan and distributed lump sum benefit; court did not err when it valued benefit after deduction of taxes that had already been paid), *review denied*, 323 N.C. 174, 373 S.E.2d 111 (1988).]

b. Findings as to tax consequences are not required when no tax consequences result from the distribution the court actually ordered. [*Cochran v. Cochran*, 198 N.C. App. 224, 679 S.E.2d 469 (2009) (findings were not required about the tax consequences of husband's future receipt of pension benefits when fact that husband's pension, when received, would constitute taxable income to husband was not the result of the ordered distribution), *review denied*, 363 N.C. 801, 690 S.E.2d 533 (2010).]

E. Valuation of Stock Options

1. The court of appeals has not adopted any single approach for valuing stock options.

2. The court of appeals will uphold a valuation if it appears that the trial court reasonably approximated the net value of the option based on competent evidence and on a sound valuation method or methods. [*Fountain v. Fountain,* 148 N.C. App. 329, 339, 559 S.E.2d 25, 33 (2002) (upholding trial court's valuation of options by "intrinsic value method").]

III. Distribution

A. Generally [G.S. 50-20.1(a) and (b).]

1. Vested and nonvested benefits may be made payable:
   a. As a lump sum by agreement;
   b. Over a period of time in fixed amounts by agreement; or
   c. By appropriate domestic relations order as a prorated portion of the benefits made to the designated recipient at the time the party against whom the award is made actually begins to receive the benefits. [G.S. 50-20.1(a).] This method has been referred to as the "fixed percentage method" [*Seifert v. Seifert,* 319 N.C. 367, 370, 354 S.E.2d 506, 509 (1987).] and as a "deferred distribution." [3 Lee's Family Law § 12.68 (5th ed. 2002).] See Section III.C, below.
2. Vested benefits may be made payable by the three methods listed in Section III.A.1, immediately above, or by awarding a larger portion of other assets to the party not receiving the benefits and a smaller share of other assets to the party entitled to receive the benefits. [G.S. 50-20.1(b).] This method has been referred to as the "present value method" [*Seifert v. Seifert,* 319 N.C. 367, 370, 354 S.E.2d 506, 509, *reh'g denied,* 319 N.C. 678, 356 S.E.2d 790 (1987).] and as the "immediate offset" method. [3 Lee's Family Law, § 12.68 (5th ed. 2002).] See Section III.B, below.
   a. Benefits are "vested" when an employee "has completed the minimum terms of employment necessary to be entitled to receive retirement pay at some point in the future." [*George v. George*, 115 N.C. App. 387, 389, 444 S.E.2d 449, 450 (1994) (quoting *Milam v. Milam*, 92 N.C. App. 105, 107, 373 S.E.2d 459, 460 (1988), *review denied,* 324 N.C. 247, 377 S.E.2d 755 (1989)), *cert. denied*, 342 N.C. 192, 463 S.E.2d 236 (1995).]
   b. Military retirement vests at twenty years for a commissioned officer and thirty years for an enlisted member. [*See Seifert v. Seifert,* 82 N.C. App. 329, 346 S.E.2d 504 (1986), *aff'd,* 319 N.C. 367, 354 S.E.2d 506 (1987).]
   c. Army and Air Force.
      i. Air Force and Army members with more than twenty years of service are all classified as retired and receive retired pay.
      ii. A regular or reserve commissioned Army officer with at least twenty years of service, at least ten of which have been active service as a commissioned officer, may be retired. [10 U.S.C. § 3911(a).]
      iii. An enlisted member of the Army who has at least twenty, but less than thirty, years of service may, upon request, be retired. [10 U.S.C. § 3914.]
      iv. A regular or reserve commissioned officer of the Air Force with at least twenty years of service, at least ten of which have been active service as a commissioned officer, may be retired. [10 U.S.C. § 8911.]
      v. An enlisted member of the Air Force who has at least twenty, but less than thirty, years of service may, upon request, be retired. [10 U.S.C. § 8914.]

d. Navy and Marine Corps.

i. An officer of the Navy or the Marine Corps who applies for retirement after completing more than twenty years of active service, of which at least ten years was as a commissioned officer, may, in the discretion of the President, be retired. [10 U.S.C. § 6323(a)(1).]

ii. An officer of the Regular Navy or the Regular Marine Corps holding a permanent appointment in the grade of warrant officer, W-1 or above who applies for retirement after completing thirty or more years of active service may, in the discretion of the Secretary of the Navy, be retired. [10 U.S.C. § 6322(a).]

iii. An enlisted member of the Regular Navy or the Regular Marine Corps who applies for retirement after completing thirty or more years of active service in the armed forces shall be retired. [10 U.S.C. § 6326(a).]

e. Temporary Early Retirement Authority (TERA).

i. The National Defense Authorization Act for fiscal year 2012 [Pub. L. No. 112-81, enacted Dec. 31, 2011.] authorized an offer of early retirement to all Department of Defense Armed Forces who have completed at least fifteen years but less than twenty years of total active duty service. [*See* Defense Finance and Accounting Service, "2012-2018 Temporary Early Retirement Authority," www.dfas.mil/retiredmilitary/plan/retirement-types/2012-18tera.html (updated May 3, 2012).]

3. A trial court may use more than one of the distribution methodologies authorized by G.S. 50-20.1 when distributing a single pension. [*Lund v. Lund*, 779 S.E.2d 175 (N.C. Ct. App. 2015) (trial court did not err by using the fixed percentage method to distribute 10 percent of the marital portion of wife's pension to husband when she begins to receive payments in the future while also awarding husband a larger share of other marital property to offset the value of the marital portion of the pension distributed to wife).]

4. A court may not distribute more than 50 percent of the benefits payable under a plan or benefit unless the plan or benefit does not prohibit an award of more than 50 percent and:

a. Other assets subject to distribution are insufficient; or

b. There is difficulty in distributing any asset or any interest in a business, corporation, or profession; or

c. It is economically desirable for one party to retain an asset or interest that is intact and free from any claim or interference by the other party; or

d. More than one pension or retirement system or deferred compensation plan or fund is involved, but the benefits award may not exceed 50 percent of the total benefits of all plans added together; or

e. Both parties consent. [G.S. 50-20.1(e).]

5. *But cf. Comstock v. Comstock*, 240 N.C. App. 304, 771 S.E.2d 602 (2015) (limitation in G.S. 50-20.1(e) did not prohibit judge from finding that a distributive award could be paid from a retirement account even though the amount to be paid exceeded 50 percent of the value of the account. While G.S. 50-20.1(e) prohibits the distribution of more than 50 percent of a pension, retirement, or other deferred compensation account in some circumstances, considering the account as a source of payment for a distributive award was not a distribution of the account by the court).

6. An award of pension, retirement, or other deferred compensation benefits may not include contributions, years of service, or compensation which may accrue after the date of separation (DOS). [G.S. 50-20.1(d); *Wall v. Wall*, 140 N.C. App. 303, 536 S.E.2d 647 (2000).]
7. The award of pension, retirement, or other deferred compensation benefits must include gains and losses on the prorated portion vested on the DOS. [G.S. 50-20.1(d). *See Allen v. Allen*, 118 N.C. App. 455, 455 S.E.2d 440 (1995) (awarding defendant postseparation gains and losses on her portion of husband's 401(k) even though parties' agreement did not speak to gains and losses after the DOS); *compare Harvey v. Harvey,* 112 N.C. App. 788, 437 S.E.2d 397 (1993) (there is no requirement that the court account for postseparation gains and losses when the retirement account is distributed immediately).]
    a. The requirement that gains and losses be included applies when a retirement account is divided between the spouses, i.e., when one party is awarded an interest in the other party's retirement account, and not when a party is directed to pay a distributive award to the other spouse from his retirement plan. [*See Harris v. Harris,* 162 N.C. App. 511, 591 S.E.2d 560 (2004) (rejecting wife's argument that gains and losses were to be included in a distributive award to be paid from husband's retirement account; origin of the money did not transform an ordinary distributive award into a division of a retirement plan).]
    b. See Section III.B, below, on the present value method of distribution.
8. G.S. 50-20.1(g) authorizes the court to order a plan administrator to certify the total contributions, years of service, and pension, retirement, or other deferred compensation payable. [*See Workman v. Workman*, 106 N.C. App. 562, 418 S.E.2d 269 (1992) (letters from employer concerning a proposed qualified domestic relations order (QDRO) were admissible pursuant to N.C. R. Evid. 401 and N.C. R. Evid. 705).]
9. The expectation of nonmarital pension, retirement, or other deferred compensation benefits is a distributional factor. [G.S. 50-20(c)(5); *Wall v. Wall*, 140 N.C. App. 303, 536 S.E.2d 647 (2000). See *Distribution*, Part 4 of this Chapter.]
10. Death after entry of equitable distribution judgment. [G.S. 50-20.1(f).]
    a. If the person receiving the award dies (the nonemployee spouse), any unpaid balance of the award passes to his beneficiaries by will, intestate succession, or by beneficiary designation unless the plan prohibits such a designation.
    b. If the person against whom the award is made (the employee spouse) dies, the award to the recipient remains payable to the extent permitted by the plan.

B. Present Value (Immediate Offset) Method of Distribution [G.S. 50-20.1(a)(4); *Seifert v. Seifert*, 319 N.C. 367, 354 S.E.2d 506 (1987); *Workman v. Workman*, 106 N.C. App. 562, 418 S.E.2d 269 (1992); *Seifert*, 82 N.C. App. 329, 346 S.E.2d 504 (1986), *aff'd*, 319 N.C. 367, 354 S.E.2d 506 (1987).]

1. The present value method, also called the immediate offset method, cannot be used if the pension or retirement plan at issue has not vested as of the date of separation (DOS).

[G.S. 50-20.1(b) (listing three ways nonvested pensions may be made payable but not including G.S. 50-20.1(a)(4)).] See Section III.A.2, above.

2. When a marital estate contains adequate property other than the pension or retirement benefits at issue, an in-kind or monetary distribution can be made which takes into account the future receipt of benefits by the employee spouse. In other words, distribution "involves an 'immediate offset' of other dollars to pay the nonemployee spouse for his or her share of the benefits that the other spouse will eventually receive." [3 Lee's North Carolina Family Law § 12.68, at 12-227 (5th ed. 2002).]
3. The trial court must calculate, using actuarial evidence, the present value of a vested pension as of the DOS, discounted for interest in the future and taking into account the employee spouse's life expectancy. See Section II, above (valuation). The court would then determine the marital portion of the total DOS value by use of the coverture fraction, see Section I, above (classification), and determine the appropriate equitable share to which the nonemployee spouse is entitled. [*Seifert v. Seifert*, 82 N.C. App. 329, 334–35, 346 S.E.2d 504, 506–07 (1986), *aff'd*, 319 N.C. 367, 354 S.E.2d 506 (1987).]
4. When the present value (immediate offset) method is used to distribute a pension, the trial court makes an immediate distribution of the pension or benefit to one spouse. The other spouse's share of the value of the pension can be awarded through an in-kind distribution of other marital property or by a distributive award. [*See Seifert v. Seifert*, 319 N.C. 367, 354 S.E.2d 506 (1987); *see also Lund v. Lund*, 779 S.E.2d 175 (N.C. Ct. App. 2015) (rejecting wife's argument that giving husband more of the existing marital assets while awarding her a larger share of the marital portion of her pension was not equitable because it gave him more existing assets while she received only speculative future benefits).]
5. When the court actually distributes the pension at the time of the equitable distribution judgment, there is no requirement that the court account for gains and losses accruing to the marital portion after the DOS. [*Harvey v. Harvey*, 112 N.C. App. 788, 437 S.E.2d 397 (1993).]
6. Where husband's pension constituted just 41 percent of the marital estate, ample assets existed to divide the estate and immediately distribute the pension, and employee spouse was eligible for early retirement and was fully vested in the pension plan at the date of distribution, use of the immediate offset method of distribution was appropriate and authorized by G.S. 50-20.1(a)(4). [*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).]

C. Fixed Percentage (Deferred Distribution) Method of Distribution [*Seifert v. Seifert*, 319 N.C. 367, 354 S.E.2d 506 (1987); *Workman v. Workman*, 106 N.C. App. 562, 418 S.E.2d 269 (1992); *Seifert*, 82 N.C. App. 329, 346 S.E.2d 504 (1986), *aff'd*, 319 N.C. 367, 354 S.E.2d 506 (1987).]

1. Under this method, the court awards to the nonemployee spouse a percentage of the marital portion of the benefits to be paid when the employee spouse begins to receive benefits. The percentage is determined by applying a coverture fraction. [*See Cunningham*

v. Cunningham, 171 N.C. App. 550, 615 S.E.2d 675 (2005). *But see Watkins v. Watkins,* 228 N.C. App. 548, 746 S.E.2d 394 (2013) (coverture fraction applicable only to pensions and retirement accounts that are deferred compensation), *review denied*, 367 N.C. 290, 753 S.E.2d 670 (2014).]

2. The award resulting from application of this method is a fixed percentage of any future benefits the employee spouse receives under the pension or retirement plan. The nonemployee spouse will receive the percentage when and if the employee spouse begins to receive benefits. NOTE: The domestic relations order that provides for this method of distribution will contain a formula to be used by the plan administrator when benefits are paid in the future. The order will not set out the specific dollar amount of the future payments. [*See Seifert v. Siefert,* 319 N.C. 367, 354 S.E.2d 506 (1987) (error for trial court to award nonemployee spouse a specified dollar amount of the date of separation value of a pension but defer receipt until plan begins making payments to employee spouse).]
3. A court may not require the administrator of a fund or plan to make any payments until the party against whom the award is made (the employee spouse) actually begins to receive benefits, unless the plan permits earlier distribution. [G.S. 50-20.1(c). *See* 26 U.S.C. § 414(p)(4)(B) (ERISA-qualified plans allow payments to be made to the nonemployee spouse beginning at the employee's "earliest retirement age" as that date is defined by the Internal Revenue Code).]
4. This method does not allow the distribution of contributions made to the plan after separation, but it does provide for the gains and losses on the nonemployee spouse's share as required by G.S. 50-20.1(d). [*Seifert v. Seifert,* 319 N.C. 367, 370–71, 354 S.E.2d 506, 508–09 (1987).]
5. When using the fixed percentage method of distribution, the trial court still must find the date of separation (DOS) value of the pension or retirement plan in order to value the marital portion and to determine the appropriate percentage for the nonemployee spouse to receive. [*Seifert v. Seifert*, 319 N.C. 367, 370–71, 354 S.E.2d 506, 508–09 (1987); *Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675 (2005) (citing *Byrd v. Owens,* 86 N.C. App. 418, 358 S.E.2d 102 (1987)) (when record contained evidence of value as of the date of separation, trial court erred when it determined wife was entitled to 25.22 percent of husband's military pension but failed to value the pension; matter remanded for a new equitable distribution (ED) order to include value of the pension).] If, however, the party with the burden of proof fails to present credible evidence as to the value of the pension, the pension is not subject to distribution under the North Carolina Equitable Distribution Act. [*Johnson v. Johnson*, 230 N.C. App. 280, 750 S.E.2d 25 (2013) (citing *Albritton v. Albritton*, 109 N.C. App. 36, 426 S.E.2d 80 (1993)) (trial court did not err when it did not value or distribute defendant's military pension when there was no competent evidence as to the value of the pension as of the DOS); *Washburn v. Washburn*, 228 N.C. App. 570, 749 S.E.2d 111 (2013) (**unpublished**) (not paginated on Westlaw) (citing *Grasty v. Grasty*, 125 N.C. App. 736, 482 S.E.2d 752, *review denied*, 346 N.C. 278, 487 S.E.2d 545 (1997), and *Albritton*) (error to order that a percentage of plaintiff's future retirement payments be distributed to defendant when trial court failed to value plaintiff's military pension; on remand, pension was to "be removed and excluded" from ED because defendant, the party claiming an interest, had failed to provide any evidence of the pension's value).]

6. Trial court did not abuse its discretion when it awarded wife half of husband's 401(k) account, citing the presumption of an equal distribution in G.S. 50-20(c) as support. [*Helms v. Helms,* 191 N.C. App. 19, 661 S.E.2d 906 (husband presented no evidence to establish the number of years his 401(k) account existed prior to the marriage and stated in the inventory affidavit that the account was marital property and put "none" under the affidavit section on separate property; wife's testimony at an earlier ED proceeding that she and her attorney had determined that she was entitled to a lesser percentage of the account was not binding, given husband's failure to meet burden of showing what portion of the account was separate property), *review denied,* 362 N.C. 681, 670 S.E.2d 233 (2008).]

D. Distribution of Stock Options

1. Stock options are distributed pursuant to G.S. 50-20.1. [*Fountain v. Fountain,* 148 N.C. App. 329, 559 S.E.2d 25 (2002). *But see Ubertaccio v. Ubertaccio*, 359 N.C. 175, 604 S.E.2d 912 (2004), *aff'g per curiam for reasons stated in concurring opinion in* 161 N.C. App. 352, 588 S.E.2d 905 (2003) (Levinson, J., concurring in result only) (where Judge Levinson disagreed with the implication in *Fountain* that all forms of salary substitutes or compensation, the receipt of which is deferred, such as stock options, must be classified and distributed pursuant to G.S. 50-20.1).]
2. When stock options are vested, unless the parties agree otherwise, an award of stock options may be made payable by either the deferred distribution method or immediate offset method. [*Fountain v. Fountain,* 148 N.C. App. 329, 559 S.E.2d 25 (2002); G.S. 50-20.1(a).]
   a. Under the deferred distribution method, the trial court orders that a prorated portion of the benefit be distributed to the nonowner spouse when and if the owner spouse receives the benefit in the future. [*Fountain v. Fountain,* 148 N.C. App. 329, 559 S.E.2d 25 (2002).]
   b. Under the immediate offset method, the trial court awards a larger portion of the other marital and divisible assets to the party not receiving the benefit and allows the owner spouse to retain full ownership of the benefit. [*Fountain v. Fountain,* 148 N.C. App. 329, 559 S.E.2d 25 (2002).]
3. When stock options are not vested, unless the parties agree otherwise, an award of stock options may be made payable only by the deferred distribution method. [*Fountain v. Fountain,* 148 N.C. App. 329, 559 S.E.2d 25 (2002); G.S. 50-20.1(b)(3).]

E. The Distribution Order

1. The court may require distribution of the award of pension or retirement benefits by means of a qualified domestic relations order (QDRO), as defined in 26 U.S.C. § 414(p), or by other appropriate order. [G.S. 50-20.1(g); *Patterson ex rel. Jordan v. Patterson*, 137 N.C. App. 653, 529 S.E.2d 484 (only ERISA-qualified plans are required to be distributed by QDROs, but it is not error for court to distribute other plans by a QDRO), *review denied*, 352 N.C. 591, 544 S.E.2d 783 (2000).]
2. For a discussion of the definition of the term "domestic relations order", see Cheryl Daniels Howell, *So Someone Forgot to Draft that QDRO. Now What?* UNC Sch. of

Gov't: On the Civil Side Blog (July 24, 2015), http://civil.sog.unc.edu/so-someone-forgot-to-draft-that-qdro-now-what.

3. For a discussion of orders entered to effectuate the distribution of a pension or retirement account pursuant to a separation agreement, see Cheryl Daniels Howell, *Equitable Distribution: Can the Court Enter a QDRO Without an ED Claim?* UNC Sch. of Gov't: On the Civil Side Blog (July 31, 2015), http://civil.sog.unc.edu/equitable-distribution-can-the-court-enter-a-qdro-without-an-ed-claim.

4. Qualified domestic relations order (QDRO).
   a. All ERISA-qualified plans (includes most private, nongovernmental plans) must be distributed by a QDRO. [29 U.S.C. § 1056(d)(3); 26 U.S.C. § 414(p)(1).]
   b. Definition of a "domestic relations order." "[A]ny judgment, decree, or order (including approval of a property settlement agreement) which . . . relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and . . . is made pursuant to a State domestic relations law (including a community property law)." [29 U.S.C. § 1056(d)(3)(B)(ii); 26 U.S.C. § 414(p)(1)(B).]
   c. The order must contain:
      i. The name and last known mailing address of the participant and each alternate payee covered by the order;
      ii. The amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined;
      iii. The number of payments or period to which the order applies; and
      iv. Each plan to which the order applies. [29 U.S.C. § 1056(d)(3)(C).]
   d. A domestic relations order becomes "qualified" when accepted by the plan administrator as an order that either creates or recognizes the right of an "alternate payee"—meaning a non-employee—to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan. [29 U.S.C. § 1056(d)(3)(B)(i).] Once the order is qualified, the alternate payee receives payments directly from the plan administrator in accordance with the order. The order cannot be qualified if it:
      i. Requires a plan to provide any type of form or benefit, or any option, not provided under the plan;
      ii. Requires the plan to provide greater benefits to the alternate payee than the participant would be entitled to receive; or
      iii. Requires the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a QDRO. [29 U.S.C. § 1056(d)(3)(D).]
   e. Other provisions in a QDRO.
      i. QDROs can include provisions requiring the distribution of pre-retirement survivor benefits and postretirement joint and survivor annuity benefits. [*See Workman v. Workman*, 106 N.C. App. 562, 418 S.E.2d 269 (1992).]

ii. There was no error when a QDRO required wife to pay all fees and penalties associated with the lump sum transfer of funds from former husband's retirement account. [*Lee v. Lee,* 167 N.C. App. 250, 605 S.E.2d 222 (2004).]

f. Effect of a waiver in a divorce decree on an interest in a retirement account.

i. Wife's waiver in a divorce decree that was not a QDRO of her right to any interest in husband's savings and investment plan was inconsistent with plan document in which she was named as beneficiary. After employee spouse's death, plan administrator properly distributed benefits to wife in accordance with the plan documents pursuant to bright-line requirement to follow plan documents in distributing benefits. [*Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 129 S. Ct. 865 (2009) (husband never removed wife as beneficiary and there was no contingent beneficiary; distribution to wife did not constitute an assignment or alienation rendered void under ERISA's anti-alienation provision, 29 U.S.C. § 1056(d)(1); case did not address waiver's effect in circumstances in which a waiver is consistent with plan documents).]

g. Effect of a waiver in a separation agreement on interest in a retirement account.

i. Parties to a divorce may provide for division of retirement benefits as part of a separation agreement. [G.S. 50-20(d); *Gilmore v. Garner,* 157 N.C. App. 664, 580 S.E.2d 15 (2003).] See *Equitable Distribution and Overview*, Part 1 of this Chapter, Section VI for general discussion of agreements in bar of equitable distribution (ED). For a discussion of orders entered to effectuate the distribution of a pension or retirement account pursuant to a separation agreement, see Cheryl Daniels Howell, *Equitable Distribution: Can the Court Enter a QDRO Without an ED Claim?* UNC Sch. of Gov't: On the Civil Side Blog (July 31, 2015), http://civil.sog.unc.edu/equitable-distribution-can-the-court-enter-a-qdro-without-an-ed-claim.

ii. Unambiguous language in premarital agreement providing that the parties' retirement accounts were to remain their separate property was a valid waiver under state law, as well as under ERISA, of wife's interest in husband's retirement account. [*Stewart v. Stewart,* 141 N.C. App. 236, 541 S.E.2d 209 (2000) (holding that ERISA's spousal waiver restrictions apply to waivers of survivor benefits but do not apply to waivers of an interest in a spouse's retirement account); *Herring v. Herring,* 231 N.C. App. 26, 752 S.E.2d 190 (2013) (separation agreement that provided that wife was to retain her state retirement accounts as her separate property precluded trial court from valuing and distributing those accounts). *But cf. Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 129 S. Ct. 865 (2009) (even if rights are waived, ex-spouse will receive death benefits if ex-spouse is designated as the beneficiary in plan documents at time benefits are paid).]

iii. See Cheryl Daniels Howell, *So Someone Forgot to Draft that QDRO. Now What?* UNC Sch. of Gov't: On the Civil Side Blog (July 24, 2015), http://civil.sog.unc.edu/so-someone-forgot-to-draft-that-qdro-now-what.

h. Modification of a QDRO.

i. Trial court erred in entering a second QDRO that changed the terms of the original QDRO entered by a different trial judge when second order contained

no findings or statements by the trial judge that indicated a material change of circumstances between the parties that warranted modification. [*Morris v. Gray*, 181 N.C. App. 552, 640 S.E.2d 737 (2007).]

ii. Even if a change to the original QDRO was warranted because of the bankruptcy of the employee spouse's employer, amendment would have been more appropriately made pursuant to a G.S. 1A-1, Rule 59 or Rule 60 motion. [*Morris v. Gray*, 181 N.C. App. 552, 640 S.E.2d 737 (2007).]

i. Ammending a QDRO pursuant to G.S. 1A-1, Rule 60(a).

i. When two of the three QDRO's distributing various retirement accounts of the parties provided for an assignment of taxes, the trial court did not err in amending the other QDRO to require wife to pay all fees and penalties associated with the lump sum transfer of funds from former husband's retirement account. [*Lee v. Lee,* 167 N.C. App. 250, 605 S.E.2d 222 (2004) (exclusion was an "oversight or omission" under G.S. 1A-1, Rule 60(a)).]

j. Setting aside a QDRO pursuant to G.S. 1A-1, Rule 60(b).

i. A significant decrease in the value of the retirement account from the date of separation (DOS) to the date of distribution did not warrant setting aside the QDRO pursuant to G.S. 1A-1, Rule 60(b). [*Lee v. Lee*, 167 N.C. App. 250, 258, 605 S.E.2d 222, 227 (2004) ("[a] change in the value of the stock market over the course of five years does not amount to an extraordinary or even unforeseeable circumstance" warranting review of the lump sum distribution originally ordered).]

ii. A QDRO was properly modified under G.S. 1A-1, Rule 60(b)(6) when the QDRO, entered to implement parties' agreement for husband to pay wife a distributive award of $81,000 from husband's retirement account, inadvertently ordered payment of $81,000 plus gains and losses from the DOS. [*Harris v. Harris,* 162 N.C. App. 511, 591 S.E.2d 560 (2004) (modification of QDRO appropriate when evidence supported conclusion that both parties intended that wife only receive a set amount of $81,000).]

k. For a discussion about entering a QDRO years after the entry of the equitable distribution judgment, see Cheryl Daniels Howell, *So Someone Forgot to Draft that QDRO. Now What?* UNC Sch. of Gov't: On the Civil Side Blog (July 24, 2015), http://civil.sog.unc.edu/so-someone-forgot-to-draft-that-qdro-now-what.

5. Non-ERISA orders.

a. Federal military retirement plans.

i. Guidance on the procedures to divide military retired pay is provided in Defense Fin. & Accounting Serv., Garnishment Operations Directorate, Guidance on Dividing Military Retired Pay (rev. Jan. 29, 2012). For further discussion of procedures and samples of form orders, see Gary A. Shulman & David I. Kelley, Dividing Pensions in Divorce Ch. 23, § 23.11 (3d ed. 2009, rev. 2016) (hereinafter Dividing Pensions).

ii. Pursuant to the Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C. § 1408(e), the total amount of the disposable retired pay of a

servicemember payable under all court orders may not exceed 50 percent of such disposable retirement pay.

iii. Also pursuant to USFSPA, a court cannot order that a plan administrator make direct payments to the nonparticipant spouse unless the servicemember has at least ten years of service (the 10/10 Rule). [10 U.S.C. § 1408(d)(2); Dividing Pensions § 23.11.]

b. Railroad retirement benefits. Tier II benefits can be distributed by an order complying with regulations found in Title 20, Chapter II, Subchapter B, Part 295 of the Code of Federal Regulations. For discussion of procedures and samples of form orders, see Dividing Pensions ch. 25.

c. Federal civil service retirement systems. Guidelines for orders created by the federal Office of Personnel Management can be found in volume 50, number 92 of the Federal Register (May 23, 1985) at page 20,081 and in Title 5, Part 838 of the Code of Federal Regulations. For discussion of procedures and samples of form orders, see Dividing Pensions ch. 24.

d. North Carolina state retirement plan.

i. A participant's interest under the North Carolina Retirement System may be divided pursuant to a court-ordered equitable distribution under G.S. 50-20 by a domestic relations order. [*See* G.S. 135-9.]

ii. Plan benefits of a University of North Carolina (UNC) System participant were validly assigned by a consent order entered in an ED case. [*Patterson ex rel. Jordan v. Patterson*, 137 N.C. App. 653, 664, 529 S.E.2d 484, 490 (consent order signed and entered by the trial court became a "court-ordered equitable distribution" for purposes of G.S. 135-9; former spouse acquired an interest in the UNC retirement plan upon entry of the consent order), *review denied*, 352 N.C. 591, 544 S.E.2d 783 (2000).]

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Classification Presumptions and Burdens of Proof

Marital Property Presumption

All property acquired during the marriage by either or both parties and owned by either or both parties on the date of separation (DOS) is presumed to be marital property.

Burden of Proof for Classification of Marital Property

Party seeking marital classification of any property interest must establish by a preponderance of the evidence:

- That the property was owned by either or both parties on the DOS,
- That the property was acquired by either or both parties after the date of marriage and before the DOS, and
- The value of the property on the DOS.

If party meets that burden, the entire DOS value of the property is presumed to be marital property.

The burden then shifts to party seeking separate classification to show by a preponderance of the evidence that:

- Property owned on the DOS is all or partially separate property.

If both parties meet the burden of proof, property is all or partially separate.

If neither party meets the burden of proof, property falls out of equitable distribution (ED) (court cannot distribute the property).

Application of Marital Property Presumption to "Mixed" Assets

The party claiming a separate interest in mixed property always has the burden of tracing out his/her separate interest in the DOS value of the property.

- Party must show portion of DOS value that is separate property.

Appreciation in value of separate property that occurs during the marriage is presumed to be entirely marital. Party seeking separate classification can rebut presumption by showing appreciation was NOT caused by the actions of either spouse during the marriage.

Burden of Proof for Classification of Marital Debt

Party seeking marital classification must show by a preponderance of the evidence:

- That debt was owed by either or both parties on the DOS,
- That debt was incurred by either or both parties after the date of marriage and before the DOS,
- That debt was incurred for the joint benefit of the parties, and
- The amount owed on the debt on the DOS.

If that burden of proof is not met, debt falls out of ED (court cannot distribute the debt).

Other Classification Presumptions

- Tenancy by the entirety property is presumed to be marital.
  - Rebutted by a preponderance of the evidence.
- Property acquired by one spouse during the marriage by gift from the other spouse is presumed to be marital property, unless a contrary intention was expressly stated in the conveyance.
  - Rebutted by showing no gift was made or by an express statement in the conveyance.
- Separate property exchanged for real property held as tenants by the entirety is presumed to be a gift to the marriage.
  - Rebutted by showing that separate property was not gifted to the marriage or by an express statement in the conveyance.
- Property conveyed to one spouse from the parents of that spouse during the marriage is presumed to be a gift to the child of those parents.
  - Rebutted by showing no gift was made or that gift was to other spouse or to both spouses.
- All increase/decrease in value of marital property occurring after the DOS and before the date of distribution is presumed to be divisible property.
  - Rebutted by showing increase or decrease was caused by the actions of one spouse after the DOS.

CHECKLIST

Required Findings/Conclusions for Equitable Distribution (ED) Judgment

General

- ❑ 1. Personal jurisdiction over defendant
- ❑ 2. Date of marriage
- ❑ 3. Date of separation (DOS)
- ❑ 4. Date ED claim was filed
- ❑ 5. Date of divorce, if judgment has been entered
- ❑ 6. Make sure all persons who hold legal title to property to be distributed are joined as parties
- ❑ 7. Include total net value of marital and divisible property

Property

- ❑ 1. Identify all property that evidence or stipulations establish was owned by either or both parties on the DOS
- ❑ 2. Classify all marital property. Required findings:
  - ❑ Date property was acquired
  - ❑ Who acquired the property and how it was acquired
  - ❑ Property was actually owned by one or both parties on the DOS
  - ❑ Value on the DOS
    - ❑ If property is a business, must identify valuation methodology used to determine value
  - ❑ Value on date of distribution, if shown by the evidence
- ❑ 3. Classify all separate property. Required findings:
  - ❑ Sufficient to show property fits one of categories of separate property listed in G.S. 50-20(b)(2)
- ❑ 4. Classify all divisible property
  - ❑ Sufficient to show property fits one of the categories of divisible property listed in G.S. 50-20(b)(4)

Debt

- ❏ 1. Identify all debt that evidence showed was owed by either or both parties on the DOS
- ❏ 2. Classify the marital debt. Required findings:
  - ❏ Date debt was incurred
  - ❏ Who incurred the debt and how it was incurred
    - ❏ Conclusion, based on these findings, that the debt was incurred for the joint benefit of the parties
  - ❏ Debt was actually owed by one or both parties on the date of separation
  - ❏ Value on the DOS
  - ❏ Value on date of distribution, if shown by the evidence
- ❏ 3. Classify the divisible debt
  - ❏ Increase or decrease in amount of debt between the DOS and date of distribution
  - ❏ Cause of the increase or decrease
    - ❏ Effective Oct. 1, 2013, only passive changes in value of debt will be divisible debt
    - ❏ Before Oct. 1, 2013, any change in value of debt was divisible debt

Distribution

- ❏ 1. All marital and divisible property and debt identified in the judgment must be distributed in the judgment to one or both parties, even if no longer owned/owed when judgment entered
- ❏ 2. Finding required for every distribution factor established by the evidence
  - ❏ Factors listed in G.S. 50-20(c)
- ❏ 3. Conclusion that an equal division of marital and divisible property and debt is equitable or conclusion that equal is not equitable
  - ❏ Specific division percentage is not required
- ❏ 4. For distributive award:
  - ❏ Conclusion that in-kind distribution is not equitable
    - ❏ Findings to support that conclusion:
      - ❏ Marital corporation or otherwise not practical
      - ❏ Distributive award necessary to achieve equity
  - ❏ If liquid assets sufficient to pay the award are not obvious, identify how distributive award will be paid
  - ❏ For award not payable in full until more than six years after the date of divorce, need additional findings:
    - ❏ Legal or business impediment or some overriding social policy prevents completion of payment within six years from date of divorce