

## Equitable Distribution

### Post-Trial Issues

- I. **Entry of Judgment.** Rule 58 of NC Rules of Civil Procedure
  - a. See generally discussion of entry of ED judgments in Bench Book, Family Law Volume. P. 6-36 through 6-38.
  - b. Judgment is not entered until reduced to writing, signed by judge and filed with the clerk of court.
    - i. A memorandum of judgment is an entered judgment if signed by judge and filed with clerk of court. *See Buckingham v. Buckingham*, 134 NC App 82 (1999).
    - ii. Until judgment is entered, judge can reopen evidence and hear additional testimony or take additional evidence. *See In re B.S.O.*, NC App (Feb. 13, 2013); *Wade v. Wade*, 72 NC App 372 (1985).
    - iii. *Nunc pro tunc* does not work to backdate a judgment unless judgment actually was entered (rendered?) at end of trial AND court determines no prejudice will result to either party if judgment is backdated. *Whitworth v. Whitworth*, 731 SE2d 707 (2012).
  - c. Rule 52(a)(1) of the Rules of Civil Procedure requires that the trial court make findings of fact, conclusions of law and direct entry of an appropriate judgment.
    - i. All conclusions of law must be supported by findings of fact.
    - ii. The following conclusions of law are required in ED judgments:
      1. List of all marital and divisible property
      2. Net value of all marital and divisible property
      3. Whether an equal division is equitable
      4. If distributive award is ordered, conclusion that presumption in favor of in-kind distribution has been rebutted
  - d. Delay in entry of judgment can result in retrial of distribution stage of ED trial. *Wall v. Wall*, 140 NC App 303 (2000)(30 to 60 day delay is understandable; 19

month delay requires retrial); *Plomaritis v. Plomaritis*, 730 SE2d 784 (18 month delay required retrial).

e. Consent Judgments

- i. Consent judgment is void if consent of the parties does not exist at the time judge signs the consent judgment. *McIntosh v. McIntosh*, 74 NC App 554 (2007); *Chance v. Henderson*, 134 NC App 657 (1999).
- ii. Agreements reached in family financial mediation.
  1. Rules regarding the finalizing of agreements reached during ED and Family Financial Mediations are found in Rules of Court volume of General Statutes.
  2. Rule 4(B)(4) of the Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases provides that no agreement reached during mediation is enforceable unless it is reduced to writing, signed by the parties and acknowledged as required by GS 50-20(d)[must be acknowledged in same manner as separation and property settlement agreements].
  3. Rules do not explicitly provide for entry of judgment based on the written agreement.
  4. While an acknowledged, written agreement is enforceable, it is not clear court is authorized to enter a judgment on the agreement if a party objects to entry of judgment. *See Milner v. Littlejohn*, 126 NC App 184 (1997)(judgment entered based on written agreement signed by parties, their attorneys and the judge had to be set aside where wife objected to agreement before judgment was entered).

**II. Post-Judgment Motions**

a. Motion to Amend Judgment

- i. Rule 52(b)
  1. If a motion is filed within 10 days of entry of judgment, the court may amend its findings of fact or make additional findings and amend the judgment accordingly.
  2. The rule also allows amendment of conclusions of law.

ii. Rule 59

1. If a motion is filed within 10 days of entry of judgment, or on the court's own motion within 10 days of entry of judgment, the court may order a new trial.
2. Since ED is not a jury matter, the court can order a complete new trial or simply reopen the evidence regarding specific issues. Rule 59.

iii. Unlike child and spousal support and custody, a trial court has no authority to modify an equitable distribution judgment, other than as allowed by Rules 52 and 59 discussed above. *See Whitworth v. Whitworth*, 731 SE2d 707 (2012).

1. Regarding DROs and QDROs, see section V. below.

iv. Rule 60 motions

1. Rule 60(a) to fix clerical mistakes

1. Used to correct oversights or omissions at any time on court's own motion or on motion of a party.
2. Rule 60(a) cannot be used to affect the substantive rights of the parties or to correct substantive errors in a judgment.
3. Okay to use Rule 60(a) to change QDRO to require wife to pay all fees and penalties associated with the lump sum transfer of sums from husband's retirement account where original order did not address the fees and penalties but other orders entered at same time showed clearly that failure to include the fee and penalty provision was an oversight and omission. *Lee v. Lee*, 167 NC App 250 (2004).
4. Okay to use Rule 60(a) to change date at which interest began to accrue on a distributive award to the date of the amended ED judgment rather than the original ED judgment. *Ice v. Ice*, 136 NC App 787 (2000).

2. Rule 60(b) to "relieve a party ... from a final judgment, order or proceeding" under circumstances listed in the Rule.

1. Rule 60(b) cannot be used to correct errors of law.

3. The appellate courts have stated numerous times that Rule 60(b) cannot be used to modify or amend a judgment, *see e.g., White v. White*, 152 NC App 588 (2002), but the court also has upheld a modification of an ED judgment pursuant to Rule 60(b). *See Harris v. Harris*, 162 NC App 511 (2004)(modification of QDRO).
4. A trial court cannot use Rule 60(b) to nullify or avoid one or more of the legal effects of a judgment while leaving the judgment itself intact. Rule 60(b) requires that the entire judgment be set aside. *See Howell v. Howell*, 321 NC 87 (1987)(trial court erred when it tried to set aside “effects” of divorce judgment without actually setting aside the divorce in order to allow party to assert claim for ED).
5. The decision whether to grant relief pursuant to Rule 60(b)(6) always is a discretionary one for the trial court.
6. Okay to use Rule 60(b)(6) to set aside order where after ED judgment entered, wife learned husband had encumbered a marital asset in violation of the injunction entered in the ED case while it was pending and the encumbered asset was awarded to wife in ED judgment.
7. Okay to refuse to set aside ED judgment because of significant decline in value of stock market after distribution. *Lee v. Lee*, 167 NC App 250 (2004). Court states there must be extraordinary, unforeseeable circumstances to justify use of Rule 60(b)(6).
8. Okay to use Rule 60(b) to set aside QDRO providing husband would pay a distributive award from husband’s retirement account “plus gains and losses from the date of separation” where parties’ agreement clearly showed intent for wife to receive only the amount of the distributive award. *Harris v. Harris*, 162 NC App 511 (2004).

### **III. Remand from Appellate Court**

- a. See generally discussion of remand procedure in ED cases in Bench Book, Family Law Volume, p. 6-71 through 6-72.
- b. Trial court should carefully follow remand instruction from appellate court whenever such instructions are given.
- c. Unless specifically ordered otherwise by the appellate court, trial court generally has discretion to determine whether to rely on existing record or to hear

additional arguments from parties and/or take additional evidence. *See Smith v. Smith*, 111 NC App 460 (1994).

- d. At least one case has held that anytime a case is remanded for reconsideration of distribution, the trial court should allow parties to present evidence on any distribution factor that has changed since time of original hearing. *See Fox v. Fox*, 114 NC App 125 (1994).

IV. **Enforcement of Judgment.** See generally discussion of enforcement remedies in ED cases in Bench Book, Family Law Volume. P. 6-73 through 6-76.

a. Contempt

- i. ED judgment is enforceable by contempt. *Conrad v. Conrad*, 82 NC App 758 (1986).
- ii. Trial court has no authority to order the payment of compensatory damages in a contempt matter. *See Hartsell v. Hartsell*, 99 NC App 380 (1990)(error for trial court to order husband to pay wife damages for repair and clean-up when he failed to deliver home to wife in good condition).
- iii. However, trial court can award attorney fees in a contempt proceeding even though attorney fees are not available in the underlying ED proceeding. *Hartsell v. Hartsell*, 99 NC App 380 (1990).
- iv. Unlike custody, child support and alimony, ED judgments cannot be enforced by contempt while the ED judgment is on appeal. *Guerrier v. Guerrier*, 155 NC App 154 (2002). However, violations of the judgment may be punished by contempt when appeal is complete. *See Joyner v. Joyner*, 256 NC 588 (1962)(One who violates order while appeal is pending does so at his own peril. If order is upheld on appeal, violation may be punished when jurisdiction is returned to trial court).

b. Execution

- i. In *Romulus v. Romulus*, 715 SE2d 889 (2011), the court of appeals held that execution is available for the enforcement of a distributive award.
- ii. Execution is not stayed by appeal unless a bond is posted pursuant to GS 1-289.
- iii. However, appeal does divest trial court of jurisdiction. So if a distributive award is ordered to be paid in periodic payments, the trial court cannot determine the amount presently due and payable and therefore subject to execution, while the appeal is pending. *Romulus*.

- c. Rule 70 of Rules of Civil Procedure
  - i. “If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any specific act and the party fails to comply within the time specified, the judge may direct the act to be done at the cost of the disobedient party by some other person appointed by the judge and the act when so done has like effect as if done by the party.” See *Martin v. Roberts*, 177 NC App 415 (2006).
  - ii. For real or personal property located in this state, the judge also may enter a judgment divesting the title of any party and vesting it in others.
  - iii. ED judgment actually can transfer or convey title without the need to use Rule 70, but to do so, the judgment itself must contain everything required for deeds and other instruments of conveyance. *Martin v. Roberts*.

## V. QDRO Issues

- a. Modification or correction of DRO or QDRO after entry
  - i. Rule 60(a) can be used to correct a clerical mistake in a DRO or QDRO. The key is determining when a mistake is clerical and when it is more substantive.
    - 1. Okay to use Rule 60(a) to change QDRO to require wife to pay all fees and penalties associated with the lump sum transfer of money from husband’s retirement account where original order did not address the fees and penalties. *Lee v. Lee*, 167 NC App 250 (2004). Other QDROs entered in the case included the fees and penalties provision, making it obvious the exclusion was a result of an “oversight or omission”.
    - 2. *Cf. Morris v. Gray*, 181 NC App 552 (2007) where court of appeals held trial court erred in entering a new QDRO when original employer declared bankruptcy and new entity became administrator of plan. Appellate court said trial court may have considered motion pursuant to Rule 59 or 60.
  - ii. Rule 60(b)
    - 1. The court of appeals has held that a Rule 60(b) motion cannot be used to amend a QDRO because while Rule 60(b) allows a party to seek relief from a judgment, it does not authorize a court to

amend a judgment. *White v. White*, 152 NC App 588 (2002). *But cf. Harris v. Harris*, 162 NC App 511 (2004) (modification of QDRO to reflect agreement originally entered between the parties).

2. Rule 60(b) is the appropriate rule for attacking the validity of a QDRO on the basis of a lack of subject matter jurisdiction. *Hillard v. Hillard*, 733 SE2d 176 (NC App 2012).

iii. Motion in the Cause to Amend QDRO

1. Generally, the trial court has no subject matter jurisdiction to act in a case after final resolution of all pending claims. *See Whitworth*.
2. While postjudgment motions allowed by the Rules of Civil Procedure are available in ED cases as in all other civil cases, there is no authorization of continuing jurisdiction after final resolution of the case, as there usually is in custody and support actions where court has statutory authority to modify judgments based on changed circumstances. *Whitworth*.
3. However, courts always retain jurisdiction to enforce judgments. *Whitworth, citing Wildcat v. Smith*, 69 NC App 1 (1984).
4. In addition, the court in *White v. White*, 152 NC App 588 (2002), held that the trial court had jurisdiction to consider a motion in the cause filed by party seeking to amend a DRO originally entered approximately 11 years earlier to divide a military pension. According to the court in *White*, the federal law regarding division of military pensions (10 USC sec. 1408(d)) expressly contemplates that military pension division orders may be modified. In addition, the original trial court order had expressly stated that the division order “shall remain in effect until further orders of the court.” Because the amendment in the *White* case was based on fact that after entry of the original DRO, husband elected to waive his military retirement in order to receive military disability thereby significantly reducing former wife’s share of his monthly payment, the motion in the cause may be considered a method of enforcing the original ED judgment which ordered that wife receive “one-half of the [former husband’s] pension accumulated during the marriage.” See discussion in section V.b. below.

b. Conversion of Military Pension to Disability Payments

- i. The federal Uniformed Services Former Spouses Protection Act, 10 USCA 1408, authorizes the distribution of a service member's military retirement benefits but does not allow state courts to distribute military disability payments. *Mansell v. Mansell*, 490 US 581 (1989).
- ii. Generally, a retired service member cannot receive both retirement benefits and disability payments. Instead, retirees can receive disability only to the extent they waive receipt of retirement pay. This waiver can occur at any time – before or after a trial court has entered a DRO distributing military retirement – and the election is at the will of the service member, once the service member qualifies for disability. Service members often prefer disability pay over retired pay because disability pay is not taxable income to the service member as is retirement pay. A former spouse's share of retirement pay will diminish as the retirement pay diminishes. *See Mansell; White*.
- iii. Concurrent Pay. Beginning in 2004, federal law allows some retirees to receive both retirement and disability pay. 10 USC sec. 1414. *See* discussion and citations in Mark Sullivan and Gene Brentley Tanner, *Military Pension Division and Disability: The Hillard Case*, Family Forum, Vol. 33, No. 3, March 2013. The 2004 provisions have been phased in over a 10-year period and by 2014, military retirees eligible for concurrent pay will receive their total retirement pay and their total disability pay.
  1. Concurrent pay is available only to military retirees with at least a 50% disability rating and who had 20 years of service prior to retirement. All other retirees will remain subject to the dollar-for-dollar waiver rules.
  2. Also beginning in 2004, Congress created a new form of disability pay for service members called Combat-Related Special Compensation Benefits. This form of disability pay is not subject to the Concurrent pay provisions and will be subject to the dollar-for-dollar waiver requirements. *See Sullivan, id.* This means that if a service member elects to receive Combat-Related Special



Compensation Benefits, payments made to a former spouse pursuant to a DRO will be reduced or eliminated.

- c. NC Cases Addressing Conversion of Military Pension Payments to Disability.
  - i. Summary based on cases described below:

In an original ED judgment, trial court cannot distribute military disability pay but can consider military disability pay as a distribution factor. Trial court cannot give dollar-for-dollar credit on an unequal division of remaining retirement funds or other assets to account for or offset the disability conversion.

In original ED judgment, trial court cannot prohibit military spouse from converting retirement to disability in the future.

After judgment, can amend DRO to effectuate terms of original division of assets.

Issue not addressed directly yet by NC cases: *Mansell* points out that while courts cannot order distribution of disability pay, federal law does not prohibit a military spouse from contracting away their disability benefits. See *White*, footnote 1 (citing California case indicating trial courts have authority to enforce such contracts without violating federal law).

- ii. Cases upon which summary above is based.
  - 1. *White v. White*, 152 NC App 588 (2002), *aff'd per curiam*, 357 NC 153 (2003).
    - 1. Trial court erred when it concluded it had no authority to consider amending a DRO dividing military pension to increase former spouse's share of retirement pay where, subsequent to entry of DRO, military retiree elected to receive disability pay.
    - 2. Court of appeals referred to amendment as a mechanism to "effectuate" terms of original consent order wherein parties agreed wife was entitled to one-half of the pension benefits acquired during the marriage.
    - 3. According to the court in *White*, nothing in *Mansell* or the Uniformed Services Former Spouses Protection Act prohibits a state trial court from considering federal disability payments when configuring a division of marital assets or from awarding a larger percentage of retirement pay when the military spouse elects, after entry of court order dividing retirement pay, to receive disability pay instead of retirement pay.

2. *Halstead v. Halstead*, 164 NC App 543 (2004).

Federal law prohibits a trial court – when entering the original ED judgment – from increasing wife’s share of husband’s military retirement pay based solely on fact that husband had elected to receive disability pay in lieu of some of his retirement pay.

Fact that spouse received military disability pay can be considered as a distribution factor but trial court cannot “circumvent” federal prohibition on distribution of disability pay by ordering a dollar-for-dollar increase in amount of retirement pay ordered to former spouse to reflect amount converted to disability.

Federal law also prohibits trial court from ordering military spouse to pay former spouse directly any amount later lost by former spouse due to future election by military spouse to receive disability in place of retirement funds.

3. *Williams v. Williams*, unpublished, 167 NC App 373 (2004)

Former wife brought action to enforce provisions of DRO after former husband’s military pay was converted to disability pay for a period of time. Wife sought recovery of amounts she would have received had retirement pay not been reduced. Trial court decided DRO provided only that she would receive 50% retirement pay and that she had received 50% of retirement pay.

Court of appeals upheld trial court, holding that *Halstead* controlled the outcome of the case despite the fact that the DRO in this case was entered with the consent of the parties.

While a court can consider the receipt of military disability as a distribution factor, a court may not “circumvent” federal law by increasing the former spouse’s share of retirement based solely on the former spouse’s decision to convert retirement to disability.

Wife also argued trial court erred when it refused to amend the DRO, as the trial court had done in *White v. White*, to provide her a larger share of pension to replace the share converted to disability. The court of appeals distinguished *White* by saying only that, while the trial court in *White* declined to amend the DRO due to a conclusion that the court had no authority to amend the DRO, the trial court in this case declined to amend due to a conclusion that wife was not entitled to an amendment.

4. *Cunningham v. Cunningham*, 171 NC App 550 (2005)

Trial court order providing that “defendant shall not take any steps designed to diminish or in any way reduce the amount of disposable retired or retainer pay that he is entitled to receive by virtue of his military service to the end that the plaintiff’s portion of his retirement is reduced” was inappropriate in light of *Halstead*.

On remand, trial court was ordered to “revise the ED order so as to avoid foreclosing defendant’s right to forego pension payments in favor of disability payments if he becomes so eligible.”

5. *Hillard v. Hillard*, 733 SE2d 176 (NC App 2012).

ED judgment entered in 1994 providing wife would receive one-half of husband’s military retirement benefits that accumulated during the marriage.

Judgment amended in 2008 by consent to provide wife entitled to 50% of husband’s military retirement points.

Judgment amended a second time in 2010 to provide husband would pay wife directly the amount of retirement pay that would have gone to wife had husband not elected to receive disability pay (Combat-Related Special Compensation).

Husband filed Rule 60(b) asking trial court to set aside second amendment on basis that trial court had no subject matter jurisdiction to enter an order in violation of federal law.

Court of appeals affirmed trial court order denying the Rule 60(b) motion.

Court of appeals held that this case is analogous to *White* and held that the trial court consent order was intended to protect wife’s interest in the retirement benefits she was awarded in the original 1994 order. The amended order neither required husband to pay wife a portion of his disability pay nor classified the disability pay as marital property.

2010 order upheld because it “merely required plaintiff to compensate his former spouse according to the agreed terms in the previous consent orders and it did not specify the requisite source of payment.” Court noted that “funds may come from any source that plaintiff chooses.”

Court of appeals cited as “persuasive authority” the case of *McGee v. Carmine*, 290 Mich.App. 551 (2010), holding that a military spouse remains responsible for compensating his or her former spouse in an amount equal to the share of retirement pay ordered as part of a property division pursuant to a divorce judgment when a military spouse makes a voluntary post-judgment election to waive retirement pay in favor of disability benefits.