

**Equitable Distribution Update
Cases Decided October 2009 through September 21, 2010**

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Equitable Distribution

Cases Decided Between October 2009 and June 1, 2010

Rule 60(b)(6); stipulations; divisible property

- Trial court did not err in denying defendant's motion pursuant to Rule 60(b)(4) or (6) where defendant waited eleven years after entry of judgment to file the motion to set aside the judgment.
- Where parties put stipulations in writing and signed them, trial court had no obligation to inquire of the parties to make sure they understood the impact of the stipulations.
- Where trial court determined business acquired during the marriage was 88.5% separate property of defendant and 11.5% marital property, and trial court concluded that all income earned from the business after the date of separation was passive, trial court did not err in classifying 11.5% of each piece of property acquired after separation with income from the business as divisible property.

Hodges v. Hodges, unpublished opinion, 687 S.E.2d 710 (N.C. App., Nov. 3, 2009).

Parties were divorced in 1996. In 1997, a consent order set aside the divorce and plaintiff filed an action for equitable distribution. Parties were then divorced again. In August 2008, the trial court entered an equitable distribution judgment. Also in August 2008, defendant filed a motion pursuant to Rule 60(b) asking that the consent order setting aside the original divorce be set aside. The trial court denied the Rule 60(b) motion. Defendant appealed both the ED judgment and the denial of the Rule 60(b).

The court of appeals upheld the trial court. Regarding the Rule 60 motion, the court of appeals held that while there is no specific time limit for filing a motion pursuant to Rule 60(b)(4) or (6), the motion must be filed within a reasonable amount of time under the circumstances. The court of appeals held that "as a matter of law, a delay of eleven years is not a reasonable time within which to seek relief from a consent judgment."

The court of appeals also rejected defendant's argument that the stipulations the trial court used to determine that the business acquired during the marriage was a mixed asset should be set aside because the trial court did not inquire whether the parties understood the stipulations at the time they were entered. Defendant argued that the case of *McIntosh v. McIntosh*, 74 NC App 554 (1985) requires the trial court to make such inquiries. The court of appeals disagreed, holding that *McIntosh* holds that any agreement or stipulation dividing marital property must be in writing and acknowledged, or if oral, the court must read the terms to the parties and "assure itself that the parties understand the terms and legal affects of their agreement and are entering the agreement of their own free will." In this case, the stipulations were in writing and admitted into the record by the trial court in the presence of both parties without objection from either party. Therefore, according to the court of appeals, the trial court was not required to make the *McIntosh* inquiries.

Finally, the court of appeals upheld the classification of assets purchased during the more than 10 year period of separation. The trial court concluded that the business acquired during the marriage was 11.5% marital and therefore classified 11.5% of the value of property purchased during separation with income from the business as divisible. The court of appeals held that this implied that the trial court concluded that all income from the business earned during separation was passive and therefore divisible property to the extent earned from the marital part of the

business – meaning 11.5% of all the income was divisible property. As there was no assignment of error regarding the trial court’s conclusion that all income was passive, the court of appeals held that the trial court’s classification of the assets purchased with this income as 11.5% divisible property was consistent with the source of funds doctrine.

Valuation; unequal distribution

- While trial court did not err in failing to assign value to business acquired during the marriage or to debt incurred during the marriage because the parties failed to present credible evidence of the value on the date of separation, the trial court did err when it distributed the business and the debt between the parties.
- If the trial court cannot determine date of separation value of an asset or a debt, the asset or debt falls outside of equitable distribution.
- Trial court did not err in ordering an unequal distribution where evidence supported finding numerous distribution factors.

Ikechukwu v. Ikechukwu, unpublished opinion, 687 S.E.2d 133 (N.C. App., November 3, 2009).

Trial court classified business and house as marital property and business associated debt as marital debt. The trial court found a date of separation value for the marital home but concluded that there was no evidence offered sufficient to support a finding of date of separation value for the business or the business debt. Nevertheless, the trial court distributed the business and the business debt between the parties. The court of appeals held that the trial court correctly determined there was insufficient evidence to support a date of separation value for either the business or the debt. However, a trial court cannot distribute marital property unless it first determines the value of that asset on the date of separation. Assets that cannot be valued fall outside of equitable distribution and parties are left with common law remedies to determine ownership. *Grasty v. Grasty*, 125 N.C. App. 736 (1997). The court of appeals held that the same rule applies to marital debt. If a trial court cannot value the debt, the debt falls outside of equitable distribution. The court of appeals rejected defendant’s contention that the trial court erred in ordering an unequal division, finding that the trial court made findings establishing the existence of numerous distribution factors to support the unequal division.

Divisible debt; “credit” for rental value of residence

- Trial court erred in giving party “credit” for postseparation payment of marital debt without identifying reduction in marital debt as divisible property.
- Trial court erred in giving party a “credit” in the amount of ½ rental value of marital home because other party had possession of home during separation; trial court has no authority to distribute postseparation rental value of marital property.

Martin v. Martin, unpublished opinion, 691 S.E.2d 133 (N.C. App., February 16, 2010).

Case with thirty-nine months between date of separation and date of ED trial. Trial court made detailed findings about payments made on marital debts during that postseparation period of time. Trial court distinguished principal payments from interest payments, and gave ‘credits’ to parties to account for these payments. However, the court of appeals held that the trial court erred in failing to identify these payments as divisible property and divide them between the parties. In addition, the trial court did not make findings as to which party made which payments

on the various debts. The court of appeals held that such detail is necessary to allow the appellate court to review whether the trial court abused its discretion in determining how the divisible property should be distributed between the parties. The court of appeals also held the trial court erred when it awarded one party a “credit” in the amount of one-half the rental value of the marital residence. The trial court awarded this credit to account for the fact that the other party had exclusive possession of the marital residence during the entire period of separation. Citing *Black v Black*, 94 NC App 220 (1988), the court of appeals held that trial courts have no authority to award rental value for the postseparation period in equitable distribution. The *Black* case explains that rental value cannot be distributed (which is the same thing as ‘credited’) because it is not marital or divisible property. A trial court can consider postseparation possession of marital property as a distribution factor in determining how other marital and divisible property should be allocated between the parties.

Findings necessary to support classification and valuation

- Order was remanded to trial court where judgment did not contain findings of fact to support conclusion that property was marital property and did not contain basis for court’s valuation of the property. Simply listing property with classification and value is not sufficient.
- When classification and/or value is disputed, trial court must make findings of fact to support marital classification and value.
- Judgment must specify that value found by trial court is value as of date of separation.

Duruanyim v. Duruanyim, unpublished opinion, 694 S.E.2d 522 (N.C. App., May 18, 2010).

Trial court entered an equitable distribution order awarding an unequal division of marital property and ordering that defendant pay plaintiff a \$6,000 distributive award. On appeal, defendant argued that the judgment did not contain sufficient findings of fact to support the trial court’s classification and valuation of the majority of the assets. The court of appeals agreed and remanded the case for additional findings of fact. According to the court of appeals, the parties listed all assets about which there was a dispute as to classification and/or valuation as Schedules B through E attached to the financial inventories filed in the trial court. Following the trial, the trial court resolved the disputes and identified the classification and value of all disputed assets. However, the judgment did not explain the basis for the trial court’s decisions regarding each asset. The judgment merely listed the disputed assets and identified the classification and the value of each. On remand, the trial court is instructed to supply the factual basis for the decisions on each asset. The court clarified that findings regarding value must state specifically that the value is the date of separation value. Regarding the amount of detail required, the court of appeals stated “we emphasize our holding does not require voluminous findings from the trial court, but instead simply findings sufficiently adequate to reflect that it performed the task imposed upon it by our case law and statutes.”

Third-party liability; unequal distribution

- Trial court erred in ordering that third-party corporation make payments to wife to compensate her for marital debt incurred for benefit of the corporation. Wife may have common law cause of action but relief was not appropriate in equitable distribution.
- Distribution factors justified award of 88% of marital estate to wife.

Mugno v. Mugno and Liberty Computer Systems, 695 S.E.2d 495 (N.C. App., July 6, 2010). [Opinion originally issued in June 1, 2010 but was withdrawn. It was re-issued on July 6, 2010 with only change being a clarification on the remand instructions]

Trial court joined corporation because wife claimed the corporation was marital property. Trial court concluded that husband owned stock in the corporation but that stock was his separate property. However, trial court ordered corporation to make payments to wife to repay amounts borrowed by the parties during the marriage for the benefit of the corporation through an equity line of credit secured by the marital residence. The court of appeals reversed this portion of the trial court order, holding that the equitable distribution statute does not give the trial court the authority to order the corporation to pay. According to the court of appeals, when the only claim before the trial court is equitable distribution, the trial court is limited to distributing marital and divisible property between the spouses. The court of appeals noted that wife probably has a cause of action against the corporation that can be filed to recover on the debt separate from the equitable distribution claim.

The court of appeals also upheld the trial court's distribution of the marital estate and rejected husband's argument that the division was "unconscionably disproportionate." The marital home amounted to 88% of the net marital estate and the trial court awarded the home to wife. The court of appeals held that, while there is a presumption in favor of equal distributions, trial courts can justify unequal divisions with distribution factors. In this case, the trial court found that wife earns much less income than husband, marital assets contributed to the value of his separate property during the marriage (through the loan to the corporation), and wife needed to reside in the marital home in order to care for the minor children born during the marriage.

Distribution of divisible property

- Trial court has discretion to determine most equitable way to distribute divisible property between the parties.
- Trial court is not required to distribute postseparation decrease in value of an asset to the party who receives the asset.

Wirth v. Wirth, unpublished opinion, 696 S.E.2d 202 (N.C. App., June 1, 2010).

This case is a second appeal – an appeal of the new order entered by the trial court following remand by the court of appeals. In original appeal, court of appeals held that the trial court erred in treating postseparation decrease in value of a marital business as a distribution factor rather than classifying that decrease as divisible property. In the first appeal, *Wirth v. Wirth*, 193 N.C. App. 657 (2008), the court of appeals held that an increase or decrease in the value of a marital asset after the date of separation is presumed to be divisible property. This means that if evidence is not sufficient to show whether the change in value was the result of the actions of one spouse after the date of separation, then the change in value must be classified as divisible. In this case, the trial court found that the marital business decreased significantly in value during separation but that it was impossible to separate husband's actions from market forces in causing that decrease. On remand, the trial court classified the decrease as divisible property in accordance with the mandate from the court of appeals and distributed the loss between the parties in the same percentages as the trial court distributed the rest of the marital and divisible estate; 54.27% to defendant husband and 45.73% to plaintiff wife. On the appeal following the remand, defendant husband argued that the trial court was required to distribute the loss in value to the party who received the asset, meaning he should receive 'credit' for the loss because he received

the marital business as his portion of the marital estate. Because his part of the estate was calculated using the date of separation value of the company, he argued the judge should be required to subtract the loss from the calculation of his portion of the marital estate. The court of appeals disagreed, holding that the trial court has discretion to determine the equitable distribution of all marital and divisible property. Noting that there certainly will be times when it is equitable to distribute the loss to the party receiving the asset, there is no mandate that trial courts divide divisible property in that way in all circumstances. The court of appeals stated “[w]e reiterate that the equitable distribution of marital and divisible property is within the trial court’s sole discretion, and in the absence of legal error in the classification or valuation of the property, the trial court’s decision is reversible only for an abuse of discretion.”

Equitable Distribution

Cases Decided Between June 1, 2010 and September 21, 2010

Corporations; relationship between ED and shareholder derivative suit

- Trial court did not err in denying husband's motion to dismiss claims filed by wife in superior court seeking an inspection of corporate books, an accounting, and breach of fiduciary duty owed to corporation and shareholders. However, trial court did err in denying request to dismiss the part of that action seeking to divest husband of his shares in the corporation. Equitable distribution action pending in district court between husband and wife precluded superior court from considering ownership of the corporate shares.
- When ED case involves a corporation, the property to be classified and distributed in the ED case is the corporate shares owned by either or both parties on the date of separation.

Burgess v. Burgess, _S.E.2d_ (N.C. App., July 20, 2010).

Parties owned an incorporated residential contracting company that was created during the marriage. Each party owned 50% of the shares of the corporation. When the parties separated, wife filed action for equitable distribution. Shortly thereafter, she also filed a shareholder derivative action in superior court requesting an inspection of corporate books, an accounting, damages for husband's breach of fiduciary duty to the corporation and its shareholders, and that husband be divested of his shares as an equitable remedy for the breach of duty. Husband filed a motion to dismiss the derivative suit, arguing that the superior court case could not go forward because the jurisdiction of the district court had been invoked by the filing of the ED claim. The superior court denied husband's motion to dismiss and the court of appeals granted cert to review the decision. The court of appeals upheld the superior court's decision to keep the claims for inspection of books, accounting and breach of fiduciary duty. However, the court reversed the superior court decision to keep the claim requesting that husband be divested of his shares, concluding that the divestiture claim was included within the ED action pending in district court. Decision contains extensive discussion about the nature of each claim and the remedy requested. Ultimately the court concluded that the superior court had exclusive jurisdiction to grant the remedies requested by wife in all but the divestiture claim. According to the court of appeals, the property at issue in the ED case is the corporate shares owned by the parties on the date of separation. As the district court is required to distribute the shares between the parties as part of the ED determination, wife's request to divest husband of his ownership in the corporation will necessarily be addressed in that matter. Since the jurisdiction of district court was invoked first, the superior court matter should be dismissed with regard to that specific claim.

Stipulation in pre-trial order; distribution of marital/divisible debt; tax consequences

- Trial court did not err in interpreting stipulation in pretrial order as requiring an equal distribution except with regard to the payment of certain marital debt following separation.
- Evidence supported trial court's valuation of payments made after separation.

- Consideration of tax consequences is allowed only as a distribution factor. Therefore, trial court did not err in refusing to consider tax consequences of pending sale of marital property when parties had stipulated that an equal distribution was equitable.
- Where both separate funds and marital funds were comingled in money market account during the marriage, entire value on date of separation is presumed marital. The party seeking a separate classification of all or part of the fund has the burden of tracing the separate component.

Stovall v. Stovall, _S.E.2d_ (N.C. App., July 20, 2010).

ED case wherein parties signed a pretrial order providing that an equitable distribution would be equitable. However, the order also included a statement that the judge would determine which debts listed in Schedule I were marital, the balances owed on those debts and “which party should receive credit for the prior payment of said marital debts.” The trial court interpreted the order to require that all marital and divisible property and debt be distributed equally except for the listed debts. With regard to those debts, the court interpreted the pretrial order to allow an unequal distribution if unequal was found to be equitable after a consideration of distribution factors. The court of appeals agreed with the trial court’s interpretation, concluding that the reference to “credit” for postseparation payment of debt meant that the parties intended for the court to consider the payments as a distribution factor, something that only can be done when an unequal distribution is being considered. The court of appeals also held that the trial court acted appropriately within the terms of the pretrial stipulation when it divided the marital corporation equally between the parties except that husband was given a larger share of the equity in the corporation in the amount of the payments he made to reduce the corporate debt, as the corporate debt was one of the debts listed in Schedule I.

The court of appeals rejected defendant’s argument that the evidence did not support the trial court’s valuation of the payment he made on the corporate debt during separation. The court of appeals disagreed, finding that defendant’s testimony as to the amount he paid from his separate funds to ‘maintain’ the corporation was sufficient evidence upon which to base the valuation of the payments. The court also rejected defendant’s argument that the trial court should have considered the tax consequences of the sale of the corporation, as the sale was pending at the time of distribution. The court of appeals held that tax consequences are considered only as a distribution factor. As distribution factors cannot be considered when parties stipulate that equal is equitable, the trial court correctly refused to consider the consequences in this case.

Finally, the court of appeals rejected defendant’s argument that the trial court erred in classifying the total value of a money market account as marital property. Evidence showed that the account was owned and had significant value on the date of marriage. However, funds were removed and added throughout the marriage and there was no evidence offered to trace the source of the value of the fund as it existed on the date of separation. The court of appeals held that that due to the statutory marital property presumption, the entire value of the fund on the date of separation is presumed marital. This presumption means that defendant had the burden of tracing out the value attributable to separate funds. Since defendant did not meet this burden, the entire value was properly classified as marital. [Note: GS 50-20(b)(1) states that all property “acquired during the marriage” is presumed marital. As this opinion states that this fund was acquired before marriage, it is interesting that the court of appeals applied the presumption to the fund. The court does not address this issue.]

Death of a party; gifts between spouses during the marriage

- ED action does not abate upon the death of a spouse. The estate of deceased spouse is substituted as a party and the case proceeds as usual.
- Where wife's name was added during the marriage to investment accounts owned by husband prior to marriage, the accounts were gifts between spouses which are marital property unless a contrary intention is stated in the conveyance.

Langston v. Richardson, executrix of estate of Langston, 696 S.E.2d 867 (N.C. App., 2010).

Parties separated, plaintiff filed for ED and then defendant died. The executrix of the estate was substituted for the deceased spouse and the trial court entered an equitable distribution judgment. Plaintiff argued on appeal that the trial court erred in classifying investment accounts as marital property. Plaintiff's testimony was that he owned the investment accounts before the marriage and that he added defendant's name to the accounts after the marriage because he wanted spouse to be cared for in the event of his death. The court of appeals held that the accounts were presumed marital because they were property acquired by defendant during the marriage and before the date of separation – even though the accounts were opened by plaintiff before the date of marriage. The court also held that adding defendant's name to the account was a gift between spouses and therefore marital unless husband could show a contrary intention stated in the conveyance. As there was no such statement, the court of appeals upheld the marital classification. Dissent on this issue. Dissent characterized the transfer from husband's sole ownership to joint ownership as an exchange of separate property for new property during the marriage. According to the ED statute and case law, property acquired in exchange for separate property remains separate property regardless of title, unless a contrary intention is expressly stated in the conveyance.

The court of appeals also rejected plaintiff's argument that the trial court erred in ordering plaintiff to pay a debt that was classified as defendant's separate debt. The court of appeals held there was no error because the trial court considered his payment as a "major" factor in distribution.