Equitable Distribution in 4 Easy Steps

Issues in the Identification, Classification, Valuation and Distribution of Marital Estates

Identification

- What is identifiable
- What resources can you use to identify assets
- What methods are frequently used to conceal assets

Classification

- Marital
- Separate
- Mixed
- Divisible

Valuation

- What is Fair Market Value
- What is the relevant valuation date
- What happens when evidence of value is insufficient
- What resources to determine value

Distribution

- What is the mandate
- What is the method
- When can a distributive award be paid

Identification

Identification of assets may be the most critical step. It's like casting a net. Think broadly about tangible and intangible assets and liabilities. Move from the obvious to the less than obvious in your analysis. Don't skip ahead to classification by focusing only on what might be subject to equitable distribution. Instead, generate an awareness of each asset and liability that is subject to classification.

Resources that will help you at this step include:

- Personal and corporate tax returns
- Bank account statements
- Credit card statements
- Brokerage account statements
- Retirement account statements
- Loan applications (auto, home, commercial)
- Credit reports
- Estate planning documents
- Employment contracts
- Pay roll statements
- Retirement election forms
- Tax bills
- Deeds and deeds of trust
- The equitable distribution affidavit

Other resources that will help:

- Client generated photos, videos, back ups
- Auctioneers
- Private investigators with computer forensic capability
- CPAs

Assets are concealed in some of the following ways:

- With the assistance of third parties (children, business partners, business entities, parents and friends)
- Through the deferral of income
- Through the misuse of credit cards and debit cards

Assets sometimes missed include:

- Survivor benefits
- Tax liabilities
- Tax credits, overpayments, or loss carry forward
- Escrowed funds
- Returns of prepaid premiums
- Air miles and rewards
- Prepayments of credit cards

Classification

Here is a helpful primer on classification Judge Greene was kind enough to share with me. While it is dated (2003), and the statute regarding divisible property has changed (see underline and further discussion), Judge Greene has distilled the concepts:

The Language of Equitable Distribution Classification

By K. Edward Greene

Family lawyers are faced with several key terms when classifying property during equitable distribution. What do the terms mean? Following is a primer on the most common terms.

Marital, separate, divisible and non-statutory: The property or debt must be classified as either marital, separate, divisible or non-statutory. N.C.G.S. Sect. 50-20(a). *Mauser v. Mauser,* 75 N.C. App. 115; 330 S.E.2d. 63 (1985). Yes, there are times when the property or debt will not fit into either statutory definitions and thus, is something else. *See Hay v. Hay*, 148 N.C. App. 649, 559 S.E.2d. 268, 272-273, (2002). I call it, for lack of a better term, non-statutory. It is not subject to distribution. *Id.* It can be considered as a distributional factor under N.C.G.S. Sect. 50-20(c)(1) (the property of a party at the time the division is to become effective). An example: a commission entirely earned (house was listed after date of separation) and received by the real estate agent spouse after the date of separation and before the date of the equitable distribution (ED) trial.

Active and passive increases in value of separate property: Active increases are those increases in the value of separate property occurring during the marriage and *before the date of separation*, caused by the effort of either or both spouses, e.g., the husband paints his barn. *Wade v. Wade,* 72 N.C. App. 372, 325 S.E.2d. 260 (1985). These increases are marital. Passive increases are those increases in the value of separate property occurring during the marriage and before the date of separation, caused by something other than the efforts of either or both spouses, e.g., inflation. *Id.* These increases are separate. There is a presumption any increase in the value of separate property occurring during the marriage and before the date of separation is marital. *O'Brien v. O'Brien,* 131 N.C. App. 411; 508 S.E.2d. 300, 306 (1998), and *Conway v. Conway*, 131 N.C. App. 609, 508 S.E.2d. 812, 817 (1998). The burden thus, shifts to the party claiming the increase to be passive to make that showing. There is no such thing as an active or passive increase in the pre-separation value of marital property or in the post-separation value of separate property. Any *post-separation* increase in the value of separate property is the property of the spouse owning the separate property and thus, is either his non-statutory property or his

separate property (under a source of funds theory) and properly treated as a section 50-20(c)(1) distributional factor.

Active and passive increases (decreases) in value of marital property: Active increases (decreases) are those increases (decreases) in the value of marital property occurring *after the date of separation* and before the ED trial, caused by some post-separation action or activity of a spouse. N.C.G.S. Sect. 50-20(b)(4)a. This increase (decrease) is not divisible property, but is a distributional factor under N.C.G.S. Sect. 50-20(c)(11a) or (12). Passive increases (decreases) are those increases (decreases) in the value of marital property occurring after the date of separation and before the date of the ED trial, and caused by something other than a post-separation action or activity of a spouse, e.g., inflation. N.C.G.S. Sect. 50-20(b)(4)a and c. This increase (decrease) is divisible property. As neither party has the benefit of a presumption with respect to post-separation events/activities, the party claiming the increase (decrease) to be divisible has the burden of proof. If that burden is not met, i.e., no proof the increase was passive, the increase will be treated as a distributional factor. This is tantamount to saying there is a presumption the post-separation increases (decreases) in marital property are active.

Active and passive income from marital property: Passive income from marital property received *after the date of separation* and before the ED trial is divisible property, e.g., dividends from marital stock. N.C.G.S. Sect. 50-20(b)(4)c. Income received from marital property after the date of separation and before the ED trial resulting from the post-separation efforts of a spouse (active income), e.g., increase in value of marital property stock portfolio occurring as a result of the management of account by the husband, is not divisible, not marital and not separate. N.C.G.S. Sect. 50-20(b)(4)a; Sect. 50-20(b)(1); and Sect. 50-20(b)(2); *see also Hay supra.* It is this spouse's non-statutory property and is properly treated as a N.C.G.S. Sect. 50-20(c) (11a) distributional factor.

Transmutation: This occurs when something happens to alter or change the classification of property during the course of the marriage. Marital property is rarely transmuted into separate property, although it can occur, e.g., spouse (who has right to manage marital funds) uses marital funds to purchase a gift to give to his wife and makes clear his intention that the gift is to be his wife's separate property. Most often our concern is with whether separate property is transmuted into marital property. An example: separate funds are commingled with marital property, e.g., placed in a joint checking account, during the marriage and before the date of separation. Has the character of the separate funds been altered? Yes, a transmutation of the separate funds into marital funds has occurred unless the party claiming a portion of the funds to be his separate property is able to trace those separate funds into their current form. *Fountain v. Fountain,* 148 N.C. App. 329; 559

S.E.2d. 25, 29 (2002). In essence, the commingling of separate and marital assets, occurring during the marriage and before the date of separation, raises a rebuttable presumption that all the assets are marital.

Marital property presumption: Although the ED statute speaks in terms of a marital property presumption, N.C.G.S. Sect. 50-20(b)(1) it does not mean all property owned by one or both of the spouses is presumed marital. To be entitled to the presumption, a spouse claiming a property is marital is required to prove it was acquired by one or both of the spouses during the course of the marriage, before the date of the separation and presently owned. *Ciobanu v. Ciobanu*, 104 N.C. App. 461; 409 S.E.2d. 749 (1991). If this fact is shown and there is no contrary evidence, the property must be classified as marital. If the other spouse, however, is able to show the same property was acquired by gift or bequest or in exchange for his separate property, the asset must be classified as his separate property. *Id.* The failure in the burden of proof by the party claiming the asset to be marital, however, does not mandate its classification as separate. The party claiming the asset to be her separate property has the burden of showing the asset is her separate property, which can be met by showing it was acquired by her before the marriage. If neither party meets their burden, the property passes outside ED and thus, the party having title retains ownership. *Grasty v. Grasty,* 125 N.C. 736; 482 S.E.2d. 752 (1997).

Marital gift presumption: Sometimes known as the McLean presumption. A titling of separate real property in the entireties raises a rebuttable presumption the grantor intended a gift of his separate properties to the marital estate. *McLean v. McLean,* 323 N.C. 543, 552, 374 S.E.2d 376, 382 (1988). To rebut the presumption there must be clear and convincing evidence no gift was intended. *Id.* If the presumption is rebutted, the property retains its separate property classification under the exchange provision of section 50-20(b)(2). If the presumption cannot be rebutted, the property must be classified as marital. If not rebutted, the grantor spouse is entitled, however, to have his separate property contribution to the marital estate considered as a distributional factor. *Davis v. Sineath,* 129 N.C. App. 353; 498 S.E.2d. 629 (1998). The McLean presumption does not apply to personal property. *Friend-Novorska v. Novorska,* 131 N.C. App. 508; 507 S.E.2d. 900, 902 (1998).

Marital debt: Debt, like assets, must be classified, valued and distributed. *Byrd v. Owens,* 86 N.C. App. 418; 358 S.E.2d. 102 (1987). Debt is marital if acquired by one or both spouses during the marriage and *before the date of separation*, presently owed, and acquired for the benefit of the marital estate. *Geer v. Geer,* 84 N.C. App. 457; 353 S.E.2d. 427, 429; *Huguelet v. Huguelet,* 113 N.C. App. 583; 439 S.E.2d. 208, 210 (1994). As with assets, how the debt is titled (which spouse owes the

debt) is not determinative. The biggest controversy here is whether the debt was for the benefit of the marital estate. *Id.* An example: dental bill incurred by one spouse and owing at time of separation has been held not to be marital. *Becker v. Becker,* 127 N.C. App. 409; 489 S.E.2d. 909 (1997). Another example: credit used to purchase clothing for a spouse is generally considered marital. There is no presumption that a debt accumulated during the marriage and before separation is for the benefit of the marital estate. Thus, the burden is on the party claiming the debt to be marital to prove it is presently owed by one or both of the parties, was incurred during the marriage and before the date of separation and was for the benefit of the marital estate. *Riggs v. Riggs,* 124 N.C. App. 647; 478 S.E.2d. 211, 214 (1996); and *Miller v. Miller,* 97 N.C. App. 77; 387 S.E.2d. 181, 183 (1987). Beware: (1) if the debt is in the name of both spouses, is classified as marital and distributed to the husband and the husband does not pay the debt, the creditor (who is not a party to the ED action) can proceed with collection against either or both parties; (2) if the joint debt is classified as marital and distributed to the wife to pay and the wife petitions for a discharge in bankruptcy and that petition is granted, her obligations to the creditor and to the husband under ED can be discharged, thus, eliminating any claim he has against the wife for failure to abide by the ED order.

Divisible debt: Increases in marital debt and any finance charges, i.e., interest, related to the marital debt arising *after the date of separation* and before the date of the ED trial is divisible debt. N.C.G.S. Sect. 50-20(b)(4)d. Also, any post-separation (pre ED trial) payments made by a spouse on a marital debt is divisible property. *Id.* The discretion heretofore lodged in the trial court to treat these post-separation payments as a distributional factor or provide a direct credit to the spouse making the payments *(see Hay supra)* is eliminated. If the payments are made pursuant to a post-separation order, can these payments be classified as divisible in light of N.C.G.S. Sect. 50-20(f) which states that ED should be made "without regard" to support payments arising out of the marriage? The issue has not been decided by the courts. It appears, however, that N.C.G.S. Sect. 50-20(f) merely prohibits post-separation/alimony payments (arising from the marriage at issue) from being considered as a distributional factor. It does not attempt to prevent the proper classification of property or debt. New debt acquired after the date of separation and related to marital property, e.g., repairs to marital home, does not appear to be a divisible debt and could be treated as a distributional factor or the trial court could provide a credit to the party making the payment, as was done in *Hay*. A good argument can be made that post-separation payment of taxes and casualty insurance on marital property is marital debt to the extent the taxes and/or insurance premium accrued before the date of separation.

Acquired: Property is acquired when legal title comes into the husband and/or wife. Property is also acquired when some third party has legal title but is holding the property in trust (express, resulting or constructive) for the benefit of the husband and/or wife. *Upchurch I (Upchurch v. Upchurch, 122 N.C. App. 172; 468 S.E.2d. 61 (1996); and Upchurch II (Upchurch v. Upchurch, 128 N.C. App. 461; 495 S.E.2d. 738, (1998)).* If a spouse claims property owned by some third party is a marital asset, that spouse has the burden of showing the existence of the trust and the third party must be joined as a party to the ED action. *Id.* This third party is a necessary party within the meaning of Rule 19 of the Rules of Civil Procedure. Although the issue of the existence of a trust is normally a question for the jury, in the context of the ED action there is no right to a jury trial. *Kiser v. Kiser*, 325 N.C. 502; 385 S.E.2d. 487 (1989).

Source of funds: The general principle provides that if the source of the funds used to purchase the property was marital, the property acquired with those funds is also marital. This is also known as tracing. It is an easy concept if the exchange occurs during the marriage and before the date of separation. What if marital funds, existing at the date of separation, are used to purchase property after the date of separation? Is this new asset marital, separate, divisible or non-statutory? By definition it is not marital, separate or divisible. Nonetheless, the source of funds theory has been used in the past to qualify the post-separation exchange asset as marital*. Freeman v. Freeman,* 107 N.C. App. 644, 656; 421 SE2d. 623 (1992); *Mauser v. Mauser*, 75 N.C. App. 115, 118; 330 S.E.2d. 63 (1985). The same principle would appear to justify the classification of fire insurance proceeds, received after the date of separation, where the fire policy insured the marital home which burned either before or after the date of separation. *See Locklear v. Locklear*, 92 N.C. App. 299; 374 SE2d. 406 (1988). Did the adoption of the divisible property statute, reflecting an effort to deal with post-separation events, signal an end to use of source of funds as a methodology for classifying post-separation exchanges? It can be argued it does, but I don't think so. That statute does not even address post-separation exchanges of marital property, suggesting the legislature was aware of our case law on the source of funds theory and elected to leave it in place. Furthermore, what the Court of Appeals had to say before the divisible property statute, seems to still apply: without the source of funds theory, there would be "an incentive for a spouse to convert marital assets titled in his or her name as soon as the parties separated, thereby undermining the very raison d'entre of the (ED) Act - to alleviate the inequities caused by the title theory approach to the distribution of marital property." *Mauser*, 75 N.C. App. at 119. The lesson: property acquired in fact after the date of separation may indeed be properly classified as marital property because in theory it was acquired before the date of separation.

In 2013, the General Assembly amended N.C. Gen Stat. 50-20, including an amendment to the definition of divisible property, as follows:

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  - **(4)** "Divisible property" means all real and personal property as set forth below:
    - **a.** All appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property.
    - **b.** All property, property rights, or any portion thereof received after the date of separation but before the date of distribution that was acquired as a result of the efforts of either spouse during the marriage and before the date of separation, including, but not limited to, commissions, bonuses, and contractual rights.
    - **c.** Passive income from marital property received after the date of separation, including, but not limited to, interest and dividends.
    - **d.** ~~Increases~~ Passive increases and passive decreases in marital debt and financing charges and interest related to marital debt."

(Previous) **SECTION 2.** This act becomes effective October 1, 2013.

The active reduction of marital debt post date of separation is not divisible property. Rather, it is again within the Court's discretion to reimburse a party for active reduction of debt post-date of separation:

> 3. Post-separation Payments
> Wife argues that the trial court erred in finding certain post-separation payments to be divisible property, pointing to the 2013 amendment to the definition of "divisible" property in N.C. Gen. Stat. § 50-20. Specifically, ***HN15*** N.C. Gen. Stat. § 50-20(b)(4) defines divisible property to include, in part, "[p]assive increases and passive decreases in marital debt and financing charges and interest related to marital debt." *See* N.C. Gen. Stat. § 50-20(b)(4)(d) (2014). We hold that this statutory language [*291] excludes from the definition of divisible property *non-passive* increases and decreases in marital debt and *non-passive* increases and decreases in financing charges and interest related to marital debt which occurred on or after 1 October 2013, the effective date of the 2013 amendment. *See Cooke v. Cooke*, 185 N.C. App. 101, 108, 647 S.E.2d 662, 667 (2007) (holding that amendment to definition of divisible property in N.C. Gen. Stat. § 50-20(b)(4)(d) applies only to post-separation payments toward marital debt which occurred *after* the effective date of the amendment); *Warren v. Warren*, 175 N.C. App. 509, 517, 623 S.E.2d 800, 805 (2006) (same).
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> Lund v. Lund, 244 N.C. App. 279, 290-291, 779 S.E.2d 175, 183, 2015 N.C. App. LEXIS 985, *19

> First, Wife contends that the trial court incorrectly classified interest payments made by Husband on the Home Depot account and on the Discover Card as divisible property. We note that the order does not state *when* Husband made these payments. In any event, we agree with Wife that any payments made by Husband *after* 1 October 2013 should not have been classified as divisible, as they constituted *active* decreases in interest related to marital debt. *However, like in Cooke, the error "does not necessitate reversal or remand . . . [as] the trial court had authority to reimburse [Husband] for [his] post-separation [interest] payments[.]" 185 N.C. App. at 108, 647 S.E.2d at 667.*
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> Lund v. Lund, 244 N.C. App. 279, 291, 779 S.E.2d 175, 183, 2015 N.C. App. LEXIS 985, *19 Emphasis added

Classification of separate property is a step that can be taken at any point in an equitable distribution proceeding. You can take assets off the table for division if they are classified as separate. You do not have to wait until equitable distribution trial to achieve the classification of a separate asset:

> **(i1)** Unless good cause is shown that there should not be an interim distribution, the court may, at any time after an action for equitable distribution has been filed and prior to the final judgment of equitable distribution, enter orders declaring what is separate property and may also enter orders dividing part of the marital property, divisible property or debt, or marital debt between the parties. The partial distribution may provide for a distributive award and may also provide for a distribution of marital property, marital debt, divisible property, or divisible debt. Any such orders entered shall be taken into consideration at trial and proper credit given.
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> N.C. Gen. Stat. § 50-20

Valuation

The equitable distribution statute speaks in terms of using the "net value of marital property". N.C.G.S. 50-21(b) and Fountain suggest that a reasonable approximation of value on date of separation is sufficient, but taking a casual approach to valuation is not advisable.

The trial court has an obligation to make specific findings regarding the value of any property classified as marital. If the Court does not find valuation evidence credible, however, the asset may not be subject to distribution:

> This Court has repeatedly held that ***HN1*** the trial court has an obligation [***3] to "make specific findings regarding the value" of any property classified as marital, including any business owned by one of the parties to a marriage. *Poore v. Poore*, 75 N.C. App. 414, 422, 331 S.E.2d 266, 272 (dental practice), *disc. rev. denied*, 314 N.C. 543, 335 S.E.2d 316 (1985); *see e.g., Draughon v. Draughon*, 82 N.C. App.

738, 741, 347 S.E.2d 871, 873 (1986) (landscaping business), *disc. rev. denied*, [*739] 319 N.C. 103, 353 S.E.2d 107 (1987); *Byrd v. Owens*, 86 N.C. App. 418, 421, 358 S.E.2d 102, 105 (1987) (computer distributing business). This obligation, however, exists only when there is credible evidence supporting the value of the asset. *Albritton v. Albritton*, 109 N.C. App. 36, 40-41, 426 S.E.2d 80, 83-84 (1993) (trial court did not err in failing to place a value on pension where no evidence presented as to value of pension); *Byrd*, 86 N.C. App. at 424, 358 S.E.2d at 106 (personal guarantees must be valued "if the defendant presents sufficient evidence as to their value"); *Miller v. Miller*, 97 N.C. App. 77, 80, 387 S.E.2d 181, 184 (1990) (requirement that court value property "exists only when evidence is presented to the trial court which supports [***4] the claimed . . . valuation"); 1 Michael Asimow, et al., *Valuation and Distribution of Marital Property* § 19.02[2], at 14-16 (1996) ("it is the responsibility of the parties to present sufficient evidence regarding valuation").

HN2 The credibility of the evidence in an equitable distribution trial is for the trial court. *Hunt v. Hunt,* 85 N.C. App. 484, 491, 355 S.E.2d 519, 523 (1987) (argument that trial court "erred in not giving sufficient weight to the testimony of" expert rejected on grounds that credibility of witness was for the trial court). The trial court, as the finder of fact in an equitable distribution case, *Kiser v. Kiser*, 325 N.C. 502, 511, 385 S.E.2d 487, 492 (1989) (no right to jury trial in equitable distribution action), has "the right to believe all that a witness testified to, or to believe nothing that a witness testified to, or to believe part of the testimony and to disbelieve part of it." *Brown v. Brown*, 264 N.C. 485, 488, 141 S.E.2d 875, 877 (1965); *Fox v. Fox*, 114 N.C. App. 125, 134, 441 S.E.2d 613, 619 (1994) (trial court judge is "sole arbiter of credibility and may reject the testimony of any witness in whole or in part").

In this [***5] case the defendant offered evidence as to the value of Grasty Service and the trial court found it to be "wholly incredible and without reasonable basis." Because the defendant failed to present credible evidence as to the value of Grasty Service, the trial court did not err in failing to value that asset.

Grasty v. Grasty, 125 N.C. App. 736, 738-739, 482 S.E.2d 752, 754, 1997 N.C. App. LEXIS 235, *2-5

Even assets which are not marketable may have a net value. In Hamby, the Court of Appeals affirmed the trial court's reliance on the capitalization of excess earnings to determine value of a Nationwide Insurance Agency:

> We agree with the trial court and Mr. Whitt, in that even though Mr. **Hamby** cannot sell it, the agency still has value as to Mr. **Hamby**above and beyond a salary or the net worth of the agency's fixed assets which could be sold.
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> Hamby v. Hamby, 143 N.C. App. 635, 640, 547 S.E.2d 110, 113, 2001 N.C. App. LEXIS 337, *7

In Bishop, the Court of Appeals affirmed the use of a 5 step process for valuing a defined benefit plan:

> The method for valuing a pension depends on whether the pension is a defined benefit plan or a defined contribution plan. These are the two most common of the funded pension programs. *Troyan* § 45.06. A defined contribution plan is a pension "plan which provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants [***8] which may be allocated to such participant's account." 26 U.S.C.A. § 414(i) (Supp. 1993). A defined benefit plan is defined by the Internal Revenue Code as "any plan which is not a defined contribution plan." 26 U.S.C.A. § 414(j). The benefit under such a plan is generally determined "without reference to contributions and is based on factors such as years of service and compensation received." *Seifert v. Seifert*, 82 N.C. App. 329, 333, 346 S.E.2d 504, 506 (1986), *aff'd*, 319 N.C. 367, 354 S.E.2d 506 (1987). Valuing a defined contribution plan merely requires determining the value of the employee-spouse's account in existence on the date of separation. *Troyan* § 45.06[3]. Valuing a defined benefit plan on the other hand is "fraught with uncertainties." Lawrence J. Golden, *Equitable Distribution of Property* § 7.13, at 228 (1983) (hereinafter *Golden*).
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> Bishop v. Bishop, 113 N.C. App. 725, 730, 440 S.E.2d 591, 595, 1994 N.C. App. LEXIS 221, *7-8

In valuing retirement plans, N.C. Gen. Stat. §50-20.1 must also be considered. This statute provides that plans, *including defined contribution plans*, are to be divided by coverture fraction. Following Watkins, In Kabasan, the Court of Appeals has said:

> Defendant argues that the application of the coverture fraction to the financial assets at issue in this case did not "comply" with *Watkins*. First of all, the value [**22] of the Vanguard Trust was determined by use of the "tracing" method for which defendant argues, and not by application of the coverture fraction approach. With regard to the valuation of the remaining financial assets at issue, it must be noted that this Court's opinion in *Watkins* emphasized that "neither N.C. Gen. Stat. § 50-20.1 nor our holding in *Robertson requires* that a trial court apply the coverture ratio to determine the marital portion of an IRA, except to the extent that the IRA is funded through a deferred compensation plan or is otherwise brought within the purview of N.C. Gen. Stat. § 50-20.1." *Id.* at 552, 746 S.E.2d at 397. This Court did not hold that in such a situation the trial court was barred from applying the coverture fraction, if appropriate. Nor did the opinion announce some other mandatory practice restricting the discretion traditionally afforded to a trial court.

> Kabasan v. Kabasan, 810 S.E.2d 691, 701, 2018 N.C. App. LEXIS 62, *21-22, 2018 WL 414074

Proposed amendments to N.C. Gen. Stat. §50-20.1 would cure confusion created by use of coverture fraction in the valuation of defined contribution plans.

Distribution

In the final step of the process, the marital estate is distributed. The equitable distribution statute includes a presumption that an equal division is equitable, and that an in-kind division of assets is equitable. Assets can be ordered sold. A distributive award is ordered under limited circumstances.

On the presumption that equal is equitable:

> The General Assembly has established a presumption, however, that an equal distribution of the marital and divisible property is equitable. The presumption arises from the underlying philosophy of equitable distribution, that marriage is a partnership to which each partner makes equally important contributions. Because the law views the spouses' contributions as equal, their ownership of the divisible property, unless proven otherwise, should be equal. 3 Lee's North Carolina Family Law § 12.72 (2018)

On the presumption of in-kind distribution:

> Subject to the presumption of subsection (c) of this section that an equal division is equitable, it shall be presumed in every action that an in-kind distribution of marital or divisible property is equitable. This presumption may be rebutted by the greater weight of the evidence, or by evidence that the property is a closely held business entity or is otherwise not susceptible of division in-kind. In any action in which the presumption is rebutted, the court in lieu of in-kind distribution shall provide for a distributive award in order to achieve equity between the parties. The court may provide for a distributive award to facilitate, effectuate or supplement a distribution of marital or divisible property. The court may provide that any distributive award payable over a period of time be secured by a lien on specific property. N.C. Gen. Stat. § 50-20

On the authority to order a sale:

> Subject to the presumption of in-kind divisions, the court also has the authority to order the sale of assets. The court may order one or both parties to sell the assets and may invoke Article 29A on Judicial Sales for this purpose. For the parties' real estate, the court may also order a sale through a licensed real estate agent. The Court of Appeals has remanded a number of cases involving orders of sales, but the error was usually the failure to value, not the lack of authority to order the sale. In one case, the Court of Appeals reversed for an abuse of discretion not for ordering a sale, but for not allowing the husband to purchase the wife's interest, an alternative that would

have saved a number of costs associated with the sale. 3 Lee's North Carolina Family Law § 12.96 (2018)

On requisite findings to support an unequal division:

When a party presents evidence which would allow the trial court to determine that an equal distribution of the marital assets would be inequitable, [***7] the trial court must then consider all of the distributional factors listed in G.S. 50-20(c), *Smith v. Smith*, 314 N.C. 80, 331 S.E. 2d 682 (1985), and must make sufficient findings as to each statutory factor on which evidence was offered.
Embler v. Embler, 159 N.C. App. 186, 189, 582 S.E.2d 628, 631, 2003 N.C. App. LEXIS 1421, *6-7

On the ability of a Court to make a distributive award:

Defendant first argues that the trial court erred in ordering him to pay plaintiff a distributive award of $ 24,876.00 without making any finding whether he had sufficient liquid assets to pay the award. We agree.

This case is analogous to *Shaw v. Shaw*, 117 N.C. App. 552, 451 S.E.2d 648 (1995). In *Shaw*, the trial court had ordered the defendant to pay the plaintiff an $ 8,360.72 distributive award, but did not specify a source of funds for that payment. The evidence suggested that the only asset from which defendant could pay the [***4] distributive award was his thrift plan; yet the evidence also established that any withdrawal from that plan would result in harsh tax consequences. This Court remanded the case to the trial court for a determination whether the defendant had assets, other than the thrift plan, from which he could make the distributive award payment. Shaw, 117 N.C. App. at 555, 451 S.E.2d at 650. If not, then the trial court was required to either "(1) provide for some other means by which the defendant [could] pay $ 8,360.72 to the plaintiff; or (2) determine the consequences of withdrawing that amount from the thrift plan and adjust the award from defendant to plaintiff to offset the consequences." *Id. See also* N.C. Gen. Stat. § 50-20(c)(9), (11) (in determining whether an equal division of property is equitable, the court must consider the liquid or nonliquid character of all marital property and the tax consequences to each party).
While Mr. Embler's assets are greater than the defendant's in *Shaw*, the evidence suggests that those assets are still non-liquid in nature. Although defendant may in fact be able to pay the distributive award, defendant's evidence [***5] is sufficient to raise the question of where defendant will obtain the funds to fulfill this obligation. As in *Shaw*, the court below ordered defendant to pay the distributive award without pointing to a source of funds from which he could do so even though defendant had no obvious liquid assets. If defendant is ordered to pay the distributive award from a non-liquid asset or by obtaining a loan, the equitable distribution award must be recalculated [*189] to take into account any adverse financial ramifications such as adverse tax consequences. *Shaw* requires that we remand for further findings as to whether defendant has assets, other than non-liquid assets, from which he can make the distributive

> award payment. If defendant has insufficient liquid assets, then the trial court must (1) determine the means by which defendant is to pay the amount; and (2) adjust the award from defendant to [**631] plaintiff to offset any adverse financial consequences of using the non-liquid assets. Embler v. Embler, 159 N.C. App. 186, 188-189, 582 S.E.2d 628, 630-631, 2003 N.C. App. LEXIS 1421, *3-5

The Court must have jurisdiction over a third-party entity to order its distribution:

> "When a person is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence, such [***6] person is a necessary party to the action." *Strickland v. Hughes*, 273 N.C. 481, 485, 160 S.E.2d 313, 316 (1968); *see* N.C.G.S. § 1A-1, Rule 19(b) (1990). It thus follows that when a third party holds legal title to [**64] property which is claimed to be marital property, that third party is a necessary party to the equitable distribution proceeding, with their participation limited to the issue of the ownership of that property. *Ravenscroft*, 585 S.W.2d at 274
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> Upchurch v. Upchurch, 122 N.C. App. 172, 176, 468 S.E.2d 61, 63-64, 1996 N.C. App. LEXIS 216, *5-6