Part 1.
Equitable Distribution Overview and Procedure

I. Introduction and Overview

A. Background.

1. Before 1981, North Carolina was a common law "title" jurisdiction with regard to property distribution after divorce. Property was allocated after divorce to the party holding title thereto, a disposition that "tended to reward the spouse directly responsible for its acquisition, while overlooking the contribution of the homemaking spouse." [*White v. White,* 312 N.C. 770, 774, 324 S.E.2d 829 (1985).]

2. "With the advent of no-fault divorce, dependent spouses lost the "bargaining power" of refusing to consent to a divorce…. The combination of no-fault divorce and a "title only" rule for property distribution sometimes led to unconscionable results. *See, e.g., Leatherman v. Leatherman*, 297 N.C. 618, 256 S.E.2d 793 (1979) (wife worked in home and in husband's closely held corporation for many years but could receive only one-half the marital home upon divorce under prevailing legal theories). Pressure mounted for North Carolina to follow the lead of other states in adopting statutes based on community property or equitable distribution principles…. The General Assembly responded in 1981 by enacting 'An Act for Equitable Distribution of Marital Property,' codified as N.C.G.S. §§ 50-20, -21." [*McLean v. McLean*, 323 N.C. 543, 549, 374 S.E.2d 376 (1988).]

B. Social policy considerations.

1. "Equitable distribution reflects the idea that marriage is a partnership enterprise to which both spouses make vital contributions and which entitles the homemaker spouse to a share of the property acquired during the relationship." [*White v. White*, 312 N.C. 770, 775, 324 S.E.2d 829 (1985).]

2. "Our equitable distribution statute, G.S. 50-20, was enacted in recognition of marriage as a partnership, economic and otherwise, to which both parties contribute either directly or indirectly. By enacting G.S. 50-20, our Legislature granted courts the power to consider factors other than legal title in distributing the marital assets upon the dissolution of the marriage thereby permitting courts to make an equitable distribution which effects a return to each party of that which he or she contributed to the marriage. As we interpret it, the policy behind G.S. 50-20 is basically one of repayment of contribution." [*Hinton v. Hinton*, 70 N.C.App. 665, 668-69, 321 S.E.2d 161 (1984).]

3. "In other words, '[t]he goal of equitable distribution is to allocate to divorcing spouses a fair share of the assets accumulated by the marital partnership.' The heart of the theory is that 'both spouses contribute to the economic circumstances of a marriage, whether directly by employment or indirectly by providing homemaker services.' " [*Smith v. Smith*, 314 N.C. 80, 86, 331 S.E.2d 682 (1985) (citations omitted).]

C. Constitutionality.

1. “We believe G.S. 50-20 sets forth reasonably clear guidelines and definitions for courts to interpret and administer it uniformly and in accordance with the legislative intent. The United States Supreme Court has recognized that there are certain areas where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision. We feel the distribution of marital property upon dissolution of a marriage is one such area…. We hold that North Carolina’s equitable distribution statute, G.S. 50-20, is not unconstitutionally vague.” [*Ellis v. Ellis*, 68 N.C.App. 634, 636, 315 S.E.2d 526 (1984) (citation omitted).]

2. The equitable distribution of property acquired **before** the effective date of the Equitable Distribution Act violates neither equal protection nor due process rights under the North Carolina or United States Constitutions. [*Armstrong v. Armstrong*, 322 N.C. 396, 368 S.E.2d 595 (1988).]

3. Retroactive application – deprivation of vested interest in property. In *Wilson v. Wilson*, 73 N.C.App. 96, 325 S.E.2d 668, 314 N.C. 121, 332 S.E.2d 490 (1985), the defendant filed her claim for equitable distribution before the 1983 amendment of the statutory definition of marital property. Before amendment, the statute referred to property acquired “during the course of the marriage.” The 1983 amendment added the words “and before the date of separation of the parties.” The amendment was applicable to actions pending on August 1, 1983.

   Application of the amended statute was upheld despite defendant’s argument that the amendment was unconstitutional because it retroactively excluded certain property from being marital property and further that she had vested rights pursuant to G.S. § 50-20(k) to particular marital property acquired after the date of separation. The court of appeals held that the statute does not “create any vested rights in particular marital property; it create[s] a right to the equitable distribution of that property, whatever a court should determine that property is.” [*Wilson v. Wilson*, 73 N.C.App. 96, 99, 325 S.E.2d 668, *review denied*, 314 N.C. 121, 332 S.E.2d 490 (1985).]

D. Right to equitable distribution.

1. G.S. § 50-20(k) provides that “[t]he rights of the parties to an equitable distribution of marital property and divisible property are a species of common ownership, the rights of the respective parties vesting at the time of the parties’ separation.”

2. The vested right of equitable distribution does not create a property right in particular marital property, nor does the fact of separation create a lien on specific marital property in favor of the spouse. Rather, it only creates a right to an equitable distribution of that property, whatever the court should determine that property to be. [*Perlow v. Perlow*, 128 B.R. 412 (E.D.N.C. 1991); *Wilson v. Wilson*, 73 N.C.App. 96, 99, 325 S.E.2d 668, *review denied*, 314 N.C. 121, 332 S.E.2d 490 (1985).]

II. Tasks of a Trial Judge

A. Generally.

1. Upon application of a party, the court shall determine what is the marital property and divisible property, and shall provide for an equitable distribution of both between the parties in accordance with the provisions of this section. [G.S. § 50-20(a)]

2. In making an equitable distribution of property, the trial court follows a three-step process whereby it:

   a) Determines which property is marital and divisible property;

   b) Calculates the net value of the property; and

   c) Distributes the property in an equitable manner. [*Brackney v. Brackney,* __ N.C.App. __, 682 S.E.2d 401 (2009); *Larkin v. Larkin*, 165 N.C.App. 390, 598 S.E.2d 651 (2004), *aff'd per curiam as modified*, 359 N.C. 316, 608 S.E.2d 754 (2005); *Albritton v. Albritton*, 109 N.C.App. 36, 426 S.E.2d 80 (1993).]

   Specific duties for each of the three steps are set out below.

3. The trial court does not fulfill its duties if it:

   a) Simply divides equally between the parties each asset listed in the equitable distribution affidavits without classifying and valuing each asset and finding facts to support the classification, valuation and distribution. [*Stanley v. Stanley*, 118 N.C.App. 311, 454 S.E.2d 701 (1995).]

   b) Merely appoints commissioners to sell property and divide the net proceeds without first classifying and valuing the property. [*Thomas v. Thomas*, 102 N.C.App. 127, 401 S.E.2d 367 (1991).]

B. With respect to classification, the trial judge must:

1. Classify property according to the statutory classifications in G.S. § 50-20 as either marital, separate, or divisible property.

2. Classify debt as either marital, separate or divisible.

3. Support its classification of property by written findings of fact. [*Hunt v. Hunt*, 112 N.C.App. 722, 436 S.E.2d 856 (1993).]

For more on the tasks of a trial judge with respect to classification, *see Classification*, Part 2 of this Chapter.

C. With respect to valuation, the trial judge must:

1. Value marital and divisible property [G.S. §§ 50-20(c); 50-21(b)] and marital and divisible debt. [*Byrd v. Owens*, 86 N.C.App. 418, 358 S.E.2d 102 (1987); G.S. § 50-21(b).]

2. Value property as of the correct date [marital property as of the date of separation pursuant to G.S. § 50-21(b); marital debt as of the date of separation pursuant to *Mrozek v. Mrozek*, 129 N.C.App. 43, 496 S.E.2d 836 (1998); divisible property and divisible debt as of the date of distribution pursuant to G.S. § 50-21(b).]

3. Identify the valuation methods used, except when valuing personal effects and household property.

4. Support its valuation with findings.

For more on the tasks of a trial judge with respect to valuation, *see Valuation,* Part 3 of this Chapter.

D. With respect to distribution, the trial judge must:

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

2. Distribute marital and divisible property equally unless he or she determines that an equal division is not equitable. [G.S. § 50-20(c)]

3. If he or she determines that an equal division is not equitable, the trial judge must divide the marital and divisible property equitably. [G.S. § 50-20(c)]

4. Make findings of fact sufficient to address the distributional factors and to support the division ordered. [*Khajanchi v. Khanjanchi*, 140 N.C.App. 552, 537 S.E.2d 845 (2000).]

For more on the tasks of a trial judge with respect to distribution, *see Distribution*, Part 4 of this Chapter.

E. When parties fail to present sufficient evidence.

1. The requirements that the trial court (1) classify and value all property of the parties, both separate and marital, (2) consider the separate property in making a distribution of the marital property, and (3) distribute the marital property, necessarily exist only when evidence is presented to the trial court that supports the claimed classification, valuation and distribution. [*Miller v. Miller*, 97 N.C.App. 77, 387 S.E.2d 181 (1990) (refusing to remand for the taking of new evidence).]

2. Trial court's failure to value the husband's pension plan was not prejudicial error because the party claiming an interest in the pension failed to present evidence of value. [*Albritton v. Albritton*, 109 N.C.App. 36, 426 S.E.2d 80 (1993).]

3. Trial court did not err by not considering postseparation appreciation of marital stock as a distribution factor when wife failed to produce evidence of the appreciation or argue it as a distribution factor. [*White v. Davis*, 163 N.C.App. 21, 592 S.E.2d 265, *review denied,* 358 N.C. 739, 603 S.E.2d 127 (2004).]

4. No error when trial court did not consider husband's guaranty of corporate debt when husband failed to meet his evidentiary burden. [*Fox v. Fox*, 114 N.C.App. 125, 441 S.E.2d 613 (1994).]

5. Trial court is not required to consider tax consequences unless the parties offer evidence about them. [*Wall v. Wall*, 140 N.C.App. 303, 536 S.E.2d 647 (2000).] For the tax consequences to either party as a distribution factor, *see Distribution*, Part 4 of this Chapter, section V.K at page 163.

6. Party appealing cannot meet his burden to show error by relying on his own failure to provide evidence from which the trial court could have made a more definitive ruling. [*Khajanchi v. Khanjanchi*, 140 N.C.App. 552, 537 S.E.2d 845 (2000).]

7. If the party with the burden of proof fails to present credible evidence as to the value of an asset, and the trial court, in its discretion, does not appoint an expert and does not value the asset, it is not subject to distribution under the Act. [*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).]

F. Discretion of the trial judge.

1. Equitable distribution, as the term suggests, is not distribution according to some fixed schedule or formula; it requires the exercise of judgment and discretion according to the circumstances involved. [*Appelbe v. Appelbe*, 76 N.C.App. 391, 333 S.E.2d 312 (1985).]

2. Areas in which the trial court has discretion include:

a) Determining that an equal division is not equitable. [*Holterman v. Holterman*, 127 N.C.App. 109, 488 S.E.2d 265, *review denied*, 347 N.C. 267, 493 S.E.2d 455 (1997).]

b) Dividing the marital estate equally or unequally. [*Jones v. Jones*, 121 N.C.App. 523, 466 S.E.2d 342, *review denied*, 343 N.C. 307, 471 S.E.2d 72 (1996); *Leighow v. Leighow*, 120 N.C.App. 619, 463 S.E.2d 290 (1995).]

c) Dividing the estate equally despite the presence of distributional factors. [*Freeman v. Freeman*, 107 N.C.App. 644, 421 S.E.2d 623 (1992).]

d) Evaluating and applying statutory factors. [*Jones v. Jones*, 121 N.C.App. 523, 466 S.E.2d 342, *review denied*, 343 N.C. 307, 471 S.E.2d 72 (1996); *Leighow v. Leighow*, 120 N.C.App. 619, 463 S.E.2d 290 (1995).]

e) Assigning the weight to each distributional factor or deciding to give no weight to a particular factor. [*Khajanchi v. Khanjanchi*, 140 N.C.App. 552, 537 S.E.2d 845 (2000); *Becker v. Becker*, 127 N.C.App. 409, 489 S.E.2d 909 (1997).]

f) Allocating specific property to the parties. [*Khajanchi v. Khajanchi*, 140 N.C.App. 552, 537 S.E.2d 845 (2000); *Harris v. Harris*, 84 N.C.App. 353, 352 S.E.2d 869 (1987); *Andrews v. Andrews*, 79 N.C.App. 228, 338 S.E.2d 809, *review denied*, 316 N.C. 730, 345 S.E.2d 385 (1986), *disapproved of on other grounds by Armstrong v. Armstrong*, 322 N.C. 396, 368 S.E.2d 595 (1988).]

g) The manner in which it distributes or apportions marital debts. [*Khajanchi v. Khanjanchi*, 140 N.C.App. 552, 537 S.E.2d 845 (2000).]

h) Balancing the allocation of debts to one party by distributing additional assets to that party. [*Khajanchi v. Khanjanchi*, 140 N.C.App. 552, 537 S.E.2d 845 (2000).]

i) Treating one spouse's postseparation debt payments as a distributional factor. [*Khajanchi v. Khanjanchi*, 140 N.C.App. 552, 537 S.E.2d 845 (2000).]

j) The structure and timing of a distributive award. [*Smith v. Smith*, 111 N.C.App. 460, 433 S.E.2d 196 (1993), *rev'd in part on other grounds,* 336 N.C. 575, 444 S.E.2d 420 (1994).]

k) Whether to order interest on a distributive award. [*Mrozek v. Mrozek*, 129 N.C.App. 43, 496 S.E.2d 836 (1998).]

l) Whether to impose sanctions under G.S. § 50-21(e) for willful delay or attempted delay and which sanctions to impose. [*Crutchfield v. Crutchfield*, 132 N.C.App. 193, 511 S.E.2d 31 (1999).]

III. Procedure

A. Jurisdiction.

1. Subject matter jurisdiction. The district court division is the proper division without regard to the amount in controversy for the trial of actions for the equitable distribution of property. [G.S. § 7A-244]

a) Pursuant to G.S. § 7A-244, the superior court lacked jurisdiction to hear a declaratory judgment action brought by an entity closely related to the husband to determine its ownership in an asset that was arguably marital property, when wife's ED action was pending in district court. [*Hudson Int'l v. Hudson*, 145 N.C.App. 631, 550 S.E.2d 571 (2001).]

b) Trial court lacked subject matter jurisdiction and had no authority to enter an equitable distribution order when record did not show that a summons was ever issued or that the complaint and summons were served on the defendant. [*Broyhill v. Broyhill*, __ N.C.App. __, 673 S.E.2d 169 (2009) **(unpublished**); *but cf. In re K.J.L.*, 363 N.C. 343, 677 S.E.2d 835 (2009) (failure to issue a valid summons does not affect a trial court's subject matter jurisdiction).]

2. Personal (in personam) jurisdiction. Unlike a simple divorce action in which the court exercises jurisdiction over a **status**, in an ED action the court is exercising jurisdiction over **property interests**. [*Carroll v. Carroll*, 88 N.C.App. 453, 363 S.E.2d 872 (1988).]

a) To determine whether a trial court has personal jurisdiction over a foreign defendant requires a two-part test.

(1) There must exist a statutory basis for exercising personal jurisdiction under G.S. § 1-75.4, the long-arm statute.

(2) The exercise of personal jurisdiction must comport with the due process requirements of the Fourteenth Amendment, i.e., that the defendant have "minimum contacts" with the state. [*Tompkins v. Tompkins*, 98 N.C.App. 299, 390 S.E.2d 766 (1990).]

b) When "minimum contacts" inquiry satisfied.

(1) Trial court had personal jurisdiction over nonresident father as to wife's ED claim pursuant to G.S. § 52C-2-201(8) (UIFSA long-arm statute) and G.S. § 1-75.4(2); father had sufficient contacts with North Carolina when he used money from an equity line of credit secured by the North Carolina marital residence and he made frequent visits to the state. [*Butler v. Butler,* 152 N.C.App. 74, 566 S.E.2d 707 (2002).]

(2) Nonresident husband's act of transferring car title to a third party in violation of a North Carolina domestic violence protective order, at which hearing husband had appeared, and fact that couple married and had lived in North Carolina during part of the marriage, provided sufficient minimum contacts for the exercise of personal jurisdiction in wife's ED action. [*Bates v. Jarrett*, 135 N.C.App. 594, 521 S.E.2d 735 (1999).]

(3) Service of process upon a nonresident while present within the State is sufficient to establish in personam jurisdiction. [*Lockert v. Breedlove*, 321 N.C. 66, 361 S.E.2d 581 (1987); *Brookshire v. Brookshire*, 89 N.C.App. 48, 365 S.E.2d 307 (1988).]

(4) Allegations of marital residence and misconduct occurring within the State are sufficient to satisfy minimum contacts inquiry. [*Tompkins v. Tompkins*, 98 N.C.App. 299, 390 S.E.2d 766 (1990).]

c) When minimum contacts not satisfied.

(1) Plaintiff's move to North Carolina during the marriage and purchase of jointly titled real property did not constitute sufficient contacts by the defendant who had only briefly visited the State and who had not participated in or agreed to the purchase of the real property. [*Shamley v. Shamley*, 117 N.C.App. 175, 455 S.E.2d 435 (1994).]

(2) Fact that out-of-state husband may have had an interest in some personal property located in North Carolina was not sufficient to establish personal jurisdiction over husband. [*Carroll v. Carroll*, 88 N.C.App. 453, 363 S.E.2d 872 (1988).]

B. Manner of asserting claim.

1. Pursuant to G.S. § 50-21(a), a claim for equitable distribution may be filed:

a) As a separate civil action;

b) With any other Chapter 50 action [*see Hunt v. Hunt*, 117 N.C.App. 280, 450 S.E.2d 558 (1994) (party properly asserted claim for equitable distribution in a reply to an undenominated counterclaim filed in an action for absolute divorce)]; or

c) As a motion in the cause as provided by G.S. § 50-11(e) or (f).

(1) G.S. § 50-11(e) provides that a defendant in an action for absolute divorce may bring an action or file a motion in the cause for equitable distribution within six months after entry of judgment for absolute divorce if service of process in the divorce action was by publication and defendant failed to appear.

(2) G.S. § 50-11(f) provides that equitable distribution may be sought by action or by motion in the cause in an action for absolute divorce within six months after judgment of divorce is entered if the court entering judgment lacked personal jurisdiction over the absent defendant or lacked jurisdiction over the property subject to equitable distribution. [*Cooper v. Cooper*, 90 N.C.App. 665, 369 S.E.2d 630 (1988) (South Carolina court that granted divorce never acquired jurisdiction over marital property so that husband could bring action within six months for equitable distribution).]

2. *But see Santana v. Santana,* 171 N.C.App. 432, 614 S.E.2d 438 (2005), where the court of appeals found that a claim for ED asserted by motion was filed before entry of a divorce judgment, thus making it timely; court did not discuss the propriety of asserting an ED claim by motion but the holding implies that the motion was appropriate.

3. Oral motion is not sufficient to assert a claim for equitable distribution. [*Webb v. Webb,* 188 N.C.App. 621, 656 S.E.2d 334 (2008) (wife's oral motion for ED before trial court granted divorce was insufficient to assert her claim).]

C. Necessary parties.

1. G.S. § 1A-1, Rules 19 and 20 provide for necessary and permissive joinder of parties. For an overview of those rules, *see* Bench Book, Vol. 2, *Parties,* Chapter 27.

2. 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 person is a necessary party to the action. [*Upchurch v. Upchurch*, 122 N.C.App. 172, 468 S.E.2d 61, *review denied*, 343 N.C. 517, 472 S.E.2d 26 (1996), *citing Strickland v. Hughes,* 273 N.C. 481, 160 S.E.2d 313 (1968) (finding that a third party who held legal title to property [bonds and notes] claimed to be marital property was a necessary party to an

equitable distribution proceeding, with his participation limited to issue of ownership of that property); *see also Daetwyler v. Daetwyler,* 130 N.C.App. 246, 502 S.E.2d 662 (1998), *aff'd per curiam,* 350 N.C. 375, 514 S.E.2d 89 (1999) (finding that husband's mother and sister were necessary parties in an ED action because those three family members held certificates of deposits claimed as marital property as joint tenants).]

3. For necessary parties when property of a deceased spouse is involved, see III.H.2 of this Part, page 28.

D. No right to a jury trial.

1. Only reference to jury trial rights in the equitable distribution statutes is found in G.S. § 50-21(c), which provides that nothing in G.S. 50-20 or this section restricts or extends the right to trial by jury as provided by the Constitution of North Carolina. This language does not create a statutory right to trial by jury in an equitable distribution proceeding. [*Kiser v. Kiser,* 325 N.C. 502, 385 S.E.2d 487 (1989); *McCall v. McCall,* 138 N.C.App. 706, 531 S.E.2d 894 (2000).]

2. Nor is there a constitutional right to trial by jury in a proceeding for equitable distribution. [*Kiser v. Kiser*, 325 N.C. 502, 385 S.E.2d 487 (1989); *McCall v. McCall*, 138 N.C.App. 706, 531 S.E.2d 894 (2000).]

3. Thus, cases have found no jury trial of the following issues of fact:

a) The valuation and acquisition of certain property, intent to make a gift to the marital estate, and alleged dissipation of marital assets [*Kiser v. Kiser,* 325 N.C. 502, 385 S.E.2d 487 (1989)];

b) The date of separation for ED purposes, even though a jury decides date of separation in a divorce proceeding [*McCall v. McCall,* 138 N.C.App. 706, 531 S.E.2d 894 (2000)]; and

c) What was marital property and what was an equitable distribution of the marital property. [*Phillips v. Phillips,* 73 N.C.App. 68, 326 S.E.2d 57 (1985).]

4. Nor does a third party to an equitable distribution proceeding have the right to a jury trial on a claim seeking imposition of a constructive trust. [*Sharp v. Sharp*, 351 N.C. 37, 519 S.E.2d 523 (1999) (husband's partners, partnership and corporation in which husband had an interest not entitled to a jury trial in action brought by wife seeking, among other things, to impose a constructive trust).]

5. A trial judge has discretion, however, to use an advisory jury to try issues of pure fact. [N.C. R. CIV. P. 39(c)]

a) Net value of an item of marital property may be appropriate issue for determination by an advisory jury. [*Phillips v. Phillips,* 73 N.C.App. 68, 326 S.E.2d 57 (1985) (court doubtful, given the equitable nature of the proceeding, whether any issue other than value properly determined by a jury, even an advisory one).]

b) What is marital property and what is an equitable distribution of the marital property are not pure questions of fact that may be decided by an advisory jury. [*Phillips v. Phillips*, 73 N.C.App. 68, 326 S.E.2d 57 (1985).]

6. While no appellate court has directly addressed the issue, it appears that the trial court may also appoint a referee pursuant to N.C. R. CIV. P. 53, to identify and value marital property. *See* section III.I of this Part, page 33, for more on the use of the reference procedure.

E. No right to an attorney.

1. There is no liberty interest at stake in an equitable distribution trial so there is no constitutional right to counsel. [*McIntosh v. McIntosh*, 184 N.C.App. 697, 646 S.E.2d 820 (2007) (noting the numerous and lengthy delays in the case and the trial court's notice to wife to hire an attorney and be ready for trial at a certain date, wife's motion for continuance to hire an attorney properly denied).]

F. Relationship of ED to entry of divorce judgment.

1. Judgment for equitable distribution may be entered **before or after** entry of an absolute divorce [1995 N.C. Sess. Laws 245 (amending G.S. § 50-21(a))] so long as:

a) The right to ED is asserted before judgment of absolute divorce [G.S. § 50-11(e); *see* sections F.4-6 below]; and

b) There is no bar to ED (*see* section VI of this Part, page 53, on agreements in bar of ED.) [Pursuant to 2001 N.C. Sess. Laws 364 (amending G.S. § 50-21(a)), an ED claim may be filed **and adjudicated** at any time after a husband and wife begin to live separate and apart.]

2. A judgment of absolute divorce destroys the right of a spouse to equitable distribution unless the right is asserted prior to judgment of absolute divorce, except as noted below in section F.8 of this Part, page 24. [G.S. § 50-11(e)]

a) For purposes of G.S. § 50-11(e), a judgment of divorce does not become final until it is entered. A judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court as provided in G.S. § 1A-1, Rule 58. [*Santana v. Santana*, 171 N.C.App. 432, 614 S.E.2d 438 (2005) (finding that an ED motion filed on August 18 was timely when the trial judge orally pronounced and rendered an absolute divorce in open court on 11 August, signed the order on 18 August, and the order was filed on 19 August).]

3. The statute does not define the manner of asserting an ED claim. [*Rabon v. Rabon*, 102 N.C.App. 452, 402 S.E.2d 461 (1991).]

a) An oral motion is not sufficient to assert a claim for equitable distribution. [*Webb v. Webb*, 188 N.C.Ap. 621, 656 S.E.2d 334 (2008); *but see Stone v. Stone,* 96 N.C.App. 633, 386 S.E.2d 602 (1989), *review denied,* 326 N.C. 805, 393 S.E.2d 906 (1990) (in an appeal from a proceeding in which a party had apparently orally requested ED, the appellate court noted that "the better practice would be for members of the Bar to actually file and assert claims for equitable distribution, and for the courts to require that pleadings asserting such claims be filed before the judgment of divorce is granted").]

b) Even where the ED claim is in writing, the language must be sufficient to put the opposing party on notice that the claim asserted is for equitable distribution. A husband's pro se answer, in which he objected to divorce "unless all property claims between the parties are settled judicially or extrajudicially," and asserted a claim to an interest in a specific piece of property, or to proceeds generated from his interest in the property, was not sufficient to put plaintiff on notice that husband was asserting a claim for equitable distribution. [*Goodwin v. Zeydel, 9*6 N.C.App. 670, 387 S.E.2d 57 (1990).]

4. Whether a party has "asserted" his or her right to equitable distribution before divorce has been a matter of some litigation.

a) Following allegations were not sufficient to assert a claim for ED:

(1) A spouse's pleading asserting an interest in a specific piece of property, or to proceeds generated from his interest in the property, is insufficient to state a claim for equitable distribution. [*Goodwin v. Zeydel*, 96 N.C.App. 670, 387 S.E.2d 57 (1990).]

(2) A spouse's request to remain in the residence in which she and her child resided, to possess and use the personal property in that residence, and to possess and use a particular automobile, does not establish a valid equitable distribution claim. [*Stirewalt v. Stirewalt*, 114 N.C.App. 107, 440 S.E.2d 854 (1994).]

b) Following allegations sufficient to assert a claim for ED:

(1) A counterclaim asserting that wife "hereby requests and reserves the right for equitable distribution" coupled with a request in the prayer that "defendant be granted the request to reserve the right for equitable distribution" sufficient. [*Coleman v. Coleman,* 182 N.C.App. 25, 641 S.E.2d 332 (2007) (party not required to request ED of the parties' marital assets or property).]

(2) Defendant's pro se answer requesting the court to enter an order distributing the parties' assets in an equitable manner is sufficient to state a claim for equitable distribution. [*Hunt v. Hunt*, 117 N.C.App. 280, 450 S.E.2d 558 (1994) (language deemed an undenominated counterclaim for equitable distribution).]

(3) Where husband in his answer joined in the wife's prayer for equitable distribution, husband's answer construed as a counterclaim for equitable distribution. [*Rabon v. Rabon,* 102 N.C.App. 452, 402 S.E.2d 461 (1991); *see also Rhue v. Pace,* 165 N.C.App. 423, 598 S.E.2d 662 (2004) (where wife's complaint requested ED and husband's answer requested that issue be

preserved for later resolution, husband's answer was a counterclaim for ED that prevented wife from taking a voluntary dismissal of ED claim without husband's consent).]

5. If a party has not "asserted" his or her right to ED before judgment of absolute divorce, appellate decisions limit a trial court's ability to relieve a party from the effects of the failure to assert a timely ED claim.

a) Court had no subject matter jurisdiction to enter an ED order when neither party had made a timely request for ED before divorce. [*Lockamy v. Lockamy,* 111 N.C.App. 260, 432 S.E.2d 176 (1993) (omission cannot be cured by consent, waiver, or estoppel).] [*Compare Gilbert v. Gilbert*, 111 N.C.App. 233, 431 S.E.2d 805 (1993) (court found that husband was equitably estopped from trying to bar wife's ED claim, even though she had not asserted an ED claim before judgment of absolute divorce).]

b) The trial court's specific reservation of the issue of equitable distribution in the divorce order only preserves a claim that has been asserted and not dismissed before judgment of absolute divorce.

(1) When a properly asserted ED claim is pending at the time the divorce judgment is entered, the trial court's reservation of the matter reserves the issue of ED for disposition at a later time. [*Stone v. Stone,* 96 N.C.App. 633, 386 S.E.2d 602 (1989), *review denied*, 326 N.C. 805, 393 S.E.2d 906 (1990) (error for a district court judge in a later hearing to dismiss the ED claim of one party pursuant to the motion of the other party); *see also Lutz v. Lutz,* 101 N.C.App. 298, 399 S.E.2d 385, *review denied*, 328 N.C. 732, 404 S.E.2d 871 (1991) (construing *Stone* decision).]

(2) If neither party has asserted a claim for ED before divorce, the trial court's reservation of the issue of ED in the divorce order does not authorize ED at a later time. [*Stirewalt v. Stirewalt*, 114 N.C.App 107, 440 S.E.2d 854 (1994); *Lockamy v. Lockamy,* 111 N.C.App. 260, 432 S.E.2d 176 (1993).]

(3) If only one party has asserted a claim for ED before divorce, the trial court's reservation of the issue reserves only that claim. If that party voluntarily dismisses the ED claim after entry of the divorce decree, there can be no ED. [*Lutz v. Lutz,* 101 N.C.App. 298, 399 S.E.2d 385, *review denied*, 328 N.C. 732, 404 S.E.2d 871 (1991).]

(4) If a party has voluntarily dismissed an equitable distribution claim before judgment of absolute divorce, the ED claim is not preserved and the dismissing party cannot file a new action within one year under G.S. § 1A-1, Rule 41. [*Rhue v. Pace,* 165 N.C.App. 423, 598 S.E.2d 662 (2004) (order granting absolute divorce reserved ED claim for later resolution but wife had dismissed her claim prior to judgment of absolute divorce; her later

assertion of an ED claim was a new claim forbidden by G.S. § 50-11(e).]

6. In certain circumstances, Rule 60(b) may be available to set aside a divorce judgment so as to allow the assertion of an ED claim.

a) A counterclaim for equitable distribution can constitute a meritorious defense to a complaint for absolute divorce, which with evidence of mistake, inadvertence, surprise or excusable neglect, can provide the grounds for the court to set aside the divorce judgment under Rule 60(b). [*Baker v. Baker,* 115 N.C.App. 337, 444 S.E.2d 478 (1994).]

b) But a party cannot, under Rule 60(b), set aside the effects of a divorce judgment, one of which is to bar a claim for ED not asserted before entry of the divorce judgment, without setting aside the divorce judgment itself. [*Howell v. Howell*, 321 N.C. 87, 361 S.E.2d 585 (1987).]

c) For more on N.C. R. CIV. P. 60(b), *see* III.M.2 of this Part, page 38.

7. In certain circumstances, the doctrine of equitable estoppel may be available to allow a party to assert a claim for ED that would otherwise be barred as not timely.

a) Cases finding party entitled to assert equitable estoppel:

(1) Where wife did not assert an ED claim but joined in defendant's counterclaim for equitable distribution, principles of equitable estoppel precluded defendant from defeating wife's right to equitable distribution by voluntarily dismissing his counterclaim. [*Hunt v. Hunt,* 117 N.C.App. 280, 450 S.E.2d 558 (1994).]

(2) Even though wife had not timely asserted a claim for equitable distribution, the husband's assertion in his divorce complaint that ED would not be necessary because parties would decide distribution by agreement, estopped husband from objecting to wife's claim for ED filed after divorce. [*Gilbert v. Gilbert*, 111 N.C.App. 233, 431 S.E.2d 805 (1993).]

(3) If on remand trial court determines that wife did not make a claim for ED before divorce because of husband's misrepresentations, husband should be equitably estopped from objecting to wife's claim for ED filed after divorce. [*Haroff v. Haroff*, 100 N.C.App. 686, 398 S.E.2d 340 (1990), *review denied,* 328 N.C. 330, 402 S.E.2d 833 (1991).]

b) Cases finding a party not entitled to assert equitable estoppel:

(1) Where plaintiff wife had not joined in husband's request for ED and was partially to blame for long delays and confusion in the case, she was not entitled to assert that husband was equitably

estopped from denying existence of an ED claim. [*Atkinson v. Atkinson*, 350 N.C. 590, 516 S.E.2d 381 (1999).]

(2) Wife may not assert that husband is equitably estopped from pleading G.S. § 50-11(e) in bar of her claim for ED when the husband's alleged wrongful conduct took place after entry of the divorce decree. [*Lutz v. Lutz,* 101 N.C.App. 298, 399 S.E.2d 385, *review denied*, 328 N.C. 732, 404 S.E.2d 871 (1991).]

8. Exceptions to rule that ED claim must be asserted before entry of divorce decree:

a) An ED claim filed after entry of divorce may go to judgment if service of process on defendant was by publication, defendant did not appear in the divorce action, and defendant filed an action or a motion in the cause for ED within six months after entry of the divorce judgment. [G.S. § 50-11(e)]

b) An ED claim filed after entry of divorce may go to judgment if the court entering the divorce judgment lacked jurisdiction over the defendant or over the property, and the defendant filed an action or a motion in the cause for ED within six months after entry of the divorce judgment. [G.S. § 50-11(f)]

c) An ED claim dismissed and refiled pursuant to Rule 41(a).

(1) An ED claim that was properly asserted but voluntarily dismissed without prejudice pursuant to Rule 41(a)(1) **before** judgment of absolute divorce may not be refiled within the one year period covered by the Rule. [*Rhue v. Pace,* 165 N.C.App. 423, 598 S.E.2d 662 (2004) (wife's assertion of an ED claim after entry of divorce judgment was a new claim forbidden by G.S. § 50-11(e).]

(2) An ED claim that was properly asserted before judgment of absolute divorce and voluntarily dismissed without prejudice pursuant to Rule 41(a)(1) **after** judgment of absolute divorce may be refiled within the one year period covered by the Rule. [*Stegall v. Stegall*, 336 N.C. 473, 444 S.E.2d 177 (1994).]

(3) An ED claim that was properly asserted before judgment of absolute divorce and voluntarily dismissed without prejudice pursuant to Rule 41(a)(1) after judgment of absolute divorce and not refiled within the one year period covered by the Rule is lost. [*Sparks v. Peacock*, 129 N.C.App. 640, 500 S.E.2d 116 (1998).]

9. A judgment of absolute divorce obtained in another state bars ED unless the court lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property **and** an action or motion in the cause is filed within six months of judgment of divorce. [G.S. § 50-11(f)]

a) In *Cooper v. Cooper*, 90 N.C.App. 665, 369 S.E.2d 630 (1988), South Carolina lacked jurisdiction to distribute the parties' property in a divorce action in that state. Husband could proceed in a subsequent ED action filed in North Carolina in apt time.

b) In *Atassi v. Atassi*, 117 N.C.App. 506, 451 S.E.2d 371, *review denied*, 340 N.C. 109, 456 S.E.2d 310 (1995), the court considered the effect of a divorce obtained in a foreign country and determined that it would not be valid in North Carolina if the party obtaining the divorce was domiciled in North Carolina at the time of divorce.

G. Relationship of ED to common-law property rights.

1. When ED not sought.

a) Where ED is not sought under G.S. § 50-20, an ex-spouse (now tenant in common of property formerly held by entirety during marriage) may bring an action for waste, ejectment, accounting, or partition. [*Hagler v. Hagler*, 319 N.C. 287, 354 S.E.2d 228 (1987).]

b) Where parties are procedurally barred from bringing an ED action, former husband may maintain an action in superior court for contribution from wife on promissory notes paid by him. [*Sparks v. Peacock*, 129 N.C.App. 640, 500 S.E.2d 116 (1998) (superior court not precluded from exercising jurisdiction merely because the parties are former spouses).]

c) When parties agreed after separation for husband to make payments on a vehicle in consideration of wife's relinquishment of any interest, upon husband's default, wife was entitled to maintain a breach of contract action. [*Harrington v. Harrington*, 110 N.C.App. 782, 431 S.E.2d 240 (1993).]

2. When ED action pending.

a) When an ED action is pending, neither spouse can maintain an action for partition of marital property. [*Garrison v. Garrison*, 90 N.C.App. 670, 369 S.E.2d 628 (1988).]

b) When an ED action is pending, the superior court does not have jurisdiction over a declaratory judgment action maintained by an entity closely related to a party concerning an asset that may be marital property. [*Hudson Int'l v. Hudson*, 145 N.C.App. 631, 550 S.E.2d 571 (2001).]

c) When an ED action is pending, the superior court does not have jurisdiction over an action filed by the husband seeking recovery on notes executed by the wife in favor of the husband during the marriage. [*Hudson v. Hudson*, 135 N.C.App. 97, 518 S.E.2d 811 (1999) (claim for recovery on notes was a compulsory counterclaim to the wife's fraud claim asserted in the ED action).]

d) When an ED action is pending, wife cannot circumvent classification of postseparation appreciation of stock in a family owned corporation as separate property by seeking equitable relief under G.S. §

55-14-30, which provides for judicial dissolution of a corporation. [*Edwards v. Edwards*, 110 N.C.App. 1, 428 S.E.2d 834, *review denied*, 335 N.C. 172, 436 S.E.2d 374 (1993).]

e) But if the pending ED action does not redress the injury complained of, an action to establish a constructive trust may not be barred. [*Lamb v. Lamb*, 92 N.C.App. 680, 375 S.E.2d 685 (1989) (since ED Act does not provide a remedy for the wrongful conversion of separate property, error for trial court to dismiss action to impose a constructive trust on certain money before money classified as either marital or separate property).]

3. When ED action is final. When a final property division under G.S. § 50-20 has been made, a party's common-law right to an accounting of rents and benefits from former entirety property is extinguished. [*Beam v. Beam*, 325 N.C. 428, 383 S.E.2d 656 (1989) (per curiam) (*rev'd* for reasons stated in dissent of Greene, J., in 92 N.C.App. 509, 374 S.E.2d 636 (1988)).]

4. There is no common law action of "intentional marital destruction" based upon one spouse's bad faith in bringing about an end to the marital relationship in order to benefit from equitable distribution. [*Smith v. Smith*, 113 N.C.App. 410, 438 S.E.2d 457, *review denied*, 336 N.C. 74, 445 S.E.2d 37 (1994).]

H. Effect of death of a spouse on an ED claim.

1. Generally.

a) Before 2001, whether an ED claim survived the death of a spouse depended upon the status of the parties' divorce.

(1) An ED action abated if death occured **before** a judgment of divorce was entered [*Brown v. Brown*, 353 N.C. 220, 539 S.E.2d 621 (2000); *accord Trogdon v. Trogdon*, 97 N.C.App. 330, 388 S.E.2d 212, *review denied*, 326 N.C. 487, 392 S.E.2d 102 (1990)]; but

(2) The ED action survived if death occurred **after** a judgment of divorce was entered. [*Tucker v. Miller*, 113 N.C.App. 785, 440 S.E.2d 315 (1994).]

b) For actions pending or filed on or after August 10, 2001, but before June 12, 2003, a claim for equitable distribution could be **filed and adjudicated** at any time after a husband and wife began to live separate and apart [G.S. § 50-21(a), amended by 2001 N.C. Sess. Laws 364] and the death of a party did not abate a pending action for ED. [G.S. § 50-20(l)]

(1) G.S. § 50-20(l), added by 2001 N.C. Sess. Laws 364, § 2, applies to actions pending or filed on or after August 10, 2001, even though the death of a party occurred before the effective date of the amendment. [*Bowen v. Mabry*, 154 N.C.App. 734, 572 S.E.2d 809 (2002), *review allowed, cert. dismissed*, 357 N.C. 249,

582 S.E.2d 27, *dismissed as improvidently granted*, 597 S.E.2d 671 (2003) (reversing trial court's determination that husband's ED action had abated on his death in Feb. 2001, making G.S. § 50-20(l) not applicable).]

(2) An ED award to a surviving spouse entered **after** the death of her spouse was not a claim against the estate of the deceased spouse but was property of the surviving spouse that must be given to the surviving spouse before the deceased spouse's estate could be administered. [*Painter–Jamieson v. Painter*, 163 N.C.App. 527, 594 S.E.2d 217 (2004).] **NOTE:** Amendments to G.S. § 50-20(l) pursuant to 2003 N.C. Sess. Laws 168 would change the result in this case for awards on or after June 12, 2003 (if applicable to pending claims) or otherwise to ED claims filed on or after June 12, 2003. See section H.2 below.

c) Effective June 12, 2003, an ED claim, whether filed or not, survives the death of a spouse so long as the parties are living separate and apart at the time of death. [G.S. § 50-20(l)(1), amended by 2003 N.C. Sess. Laws 168]

(1) An ED claim is extinguished by operation of G.S. § 50-20(l)(1) if, at the time of a spouse's death, the husband and wife have resumed marital relations. [*Casella v. Estate of Casella*, __ N.C.App. __, 682 S.E.2d 455 (2009).]

(2) 'Resumption of marital relations' is defined as the voluntary renewal of the husband and wife relationship, as shown by the totality of the circumstances. Isolated incidents of sexual intercourse between the parties shall not constitute resumption of marital relations. [G.S. § 52-10.2]

(3) There may be a resumption of marital relations even though it lasts only a short time. [*See Casella v. Estate of Casella*, __ N.C.App. __, 682 S.E.2d 455 (2009) (finding that parties reconciled for three week period before husband's death).]

(4) The relevant time frame to determine reconciliation is the period after which a party contends that the parties have reconciled and the evidence presented should speak to the period following the date of alleged reconciliation. [*Casella v. Estate of Casella*, __ N.C.App. __, 682 S.E.2d 455 (2009).]

(5) Whether parties have reconciled is determined by one of two methods:

(a) Evidence is undisputed and there is substantial objective indicia that the parties held themselves out as husband and wife. When evidence is produced, the trial court may find reconciliation as a matter of law and does not need to consider the subjective intent of the parties.

(b) Evidence is in dispute so that the trial court must consider the subjective intent of the parties. [*Casella v. Estate of Casella*, __ N.C.App. __, 682 S.E.2d 455 (2009).]

(6) A party may argue the two methods in the alternative. Doing so promotes judicial economy since the appellate court would not have to remand the matter for application of the second method if it finds that the first method did not establish reconciliation. [*Casella v. Estate of Casella,* __ N.C.App. __, 682 S.E.2d 455 (2009).]

(7) Trial court properly determined that the facts were not in dispute and that objective evidence established that the parties had reconciled as a matter of law, warranting dismissal of an equitable distribution claim by estate of husband. [*Casella v. Estate of Casella*, __ N.C.App. __, 682 S.E.2d 455 (2009) (undisputed evidence established that the parties slept in the same bed, that wife assumed responsibility for the intimate care of the husband, that both parties indicated to others that they had reconciled and held themselves out to the public in a manner that suggested that they were husband and wife, and others interacted with the plaintiff as if she were defendant's wife, and that a substantial amount of property passed to wife outside of husband's will).]

2. Effect of death.

a) No ED action pending upon death of a spouse: surviving spouse vs. decedent's estate.

(1) *Surviving spouse has two options for asserting a claim.* If the spouses lived separate and apart before death, the surviving spouse may assert an ED claim either:

(a) By filing an ED action in accordance with G.S. § 50-20 in district court against the decedent's personal representative [G.S. § 28A-19-19(c)]; or

(b) By filing a claim with the personal representative as provided in G.S. § 28A-19-1.

(2) ED action filed.

(a) *Claim must be timely.* The surviving spouse's ED action must be filed before the deadline for creditors to file claims with the personal representative. [G.S. § 28A-19-3]

(b) *Commencement of the action deemed presentation of the claim.* Commencement of the action against the personal representative for the deceased spouse constitutes presentation of a claim against the estate of the deceased spouse. [G.S. § 28A-19-1(b)]

(c) *Written settlement allowed.* The personal representative of the estate of the deceased spouse and the surviving spouse may enter into a written agreement providing for distribution of marital or divisible property. [G.S. § 28A-19-19(b)]

(d) Necessary parties.

(i) The personal representative must be made a defendant.

(ii) If real property of the deceased spouse is involved in the equitable distribution action, the heirs or devisees of the deceased party must be named as defendants in the ED action. [*Swindell v. Lewis*, 82 N.C.App. 423, 346 S.E.2d 237 (1986) (recognizing that because title to decedent's real property vested in decedent's heirs upon decedent's death, heirs were necessary parties because trial court could divest the heirs of their interest in the property by distributing it to the surviving spouse); *but see Tucker v. Miller*, 113 N.C.App. 785, 440 S.E.2d 315 (1994) (where court proceeded with ED without joining the heirs or devisees of the deceased spouse).]

(iii) G.S. § 50-20(h) appears to limit a trial court's authority to distribute real property after title to the property has vested in third parties, if a lis pendens was not filed before title passed.

(a) G.S. § 50-20(h) provides in part that "[a]ny person… whose interest is obtained by descent, prior to the filing of the lis pendens [by a spouse claiming an interest in that property in an equitable distribution proceeding], shall take the real property free of any claim resulting from the equitable distribution proceeding."

(3) Claim filed with the personal representative.

(a) *Claim must be timely*. The surviving spouse's ED claim must be filed with the estate within the time specified in the personal representative's notice to creditors or it is barred. [G.S. § 28A-19-3]

(b) *Personal representative may reject a claim.*

(i) The PR may reject the claim by giving written notice of rejection to the surviving spouse. [G.S. § 28A-19-16]

(ii) If the personal representative rejects the claim, the surviving spouse must file an action for ED in district court within three months after notice or be barred from filing such action. [G.S. § 28A-19-16]

(c) *Personal representative may refer a claim*. If the PR doubts the justness of the surviving spouse's claim for ED, the PR and surviving spouse may agree in writing to refer the matter to one or more disinterested persons, which agreement and any award thereon must be filed in the clerk's office. [G.S. § 28A-19-15]

(d) *Personal representative may settle a claim against the estate.* The personal representative of the estate of the deceased spouse and the surviving spouse may enter into a written agreement providing for distribution of marital or divisible property. [G.S. § 28A-19-19(b)]

b) No ED action pending upon death of a spouse: decedent's estate vs. surviving spouse.

(1) If no action is pending, the personal representative of the estate of a deceased spouse must file an action for equitable distribution in district court against the surviving spouse within one year of death or be forever barred. [G.S. § 50-20(l)(3)]

c) ED action pending upon death: surviving spouse vs. decedent.

(1) Substitution of PR.

(a) *PR must be substituted for deceased spouse; then action may continue against the substituted party.* If an ED action is pending at the time of the spouse's death, the action may continue with the personal representative of the deceased spouse substituted as a party to the action. [G.S. § 28A-18-1(a); G.S. § 1A-1, Rule 25(a)]

(b) *If no substitution, court should not enter orders in the ED proceeding.* Orders entered after a party's death but before substitution of the personal representative are of no effect. [*See Purvis v. Moses Cones Mem'l Hosp.*, 175 N.C.App. 474, 624 S.E.2d 380 (2006) (summary judgment order dismissing malpractice action against doctor was of no effect and had to be vacated when doctor died during pendency of malpractice suit and executrix for doctor's estate had never been made a party to the action).]

(c) *Motion to substitute must be within certain time limits.* If an ED action is pending at the time of the spouse's death, a motion to substitute the personal representative of the estate of the deceased spouse into the ED action must be made within the time specified in the PR's notice to creditors set out in G.S. § 28A-19-3. [G.S. § 1A-1, Rule 25(a)] [For an overview of G.S. § 28A-19-3, *see Pierce v. Johnson,* 154 N.C.App. 34, 571 S.E.2d 661 (2002).]

(d) *Substitution deemed presentation of the claim.* Substitution of the personal representative for the deceased spouse is deemed presentation of the ED claim against the estate of the deceased spouse. [G.S. § 28A-19-1(c)]

(2) Necessary parties.

(a) If real property of the deceased spouse is involved in the equitable distribution action, the heirs or devisees of the deceased spouse must be named as defendants in the ED action. [*Swindell v. Lewis,* 82 N.C.App. 423, 346 S.E.2d 237 (1986) (recognizing that because title to decedent's real property vested in decedent's heirs upon decedent's death, heirs were necessary parties because trial court could divest the heirs of their interest in the property by distributing it to the surviving spouse); *but see Tucker v. Miller,* 113 N.C.App. 785, 440 S.E.2d 315 (1994) (where court proceeded with ED without joining the heirs or devisees of the deceased spouse).]

(b) G.S. § 50-20(h) appears to limit a trial court's authority to distribute real property after title to the property has vested in third parties by descent, if a lis pendens was not filed before title passed.

(i) G.S. § 50-20(h) provides in part that "[a]ny person… whose interest is obtained by descent, prior to the filing of the lis pendens [by a spouse claiming an interest in that property in an equitable distribution proceeding], shall take the real property free of any claim resulting from the equitable distribution proceeding."

(3) *Written settlement allowed.* The personal representative of the estate of the deceased spouse and the surviving spouse may enter into a written agreement providing for distribution of marital or divisible property. [G.S. § 28A-19-19(b)]

d) ED action pending upon death: decedent vs. surviving spouse.

(1) *PR must be substituted for deceased spouse*. If an ED action is pending at the time of the spouse's death, the action may continue with the personal representative of the deceased spouse substituted as a party to the action. [G.S. § 28A-18-1(a); G.S. § 1A-1, Rule 25(a)] The motion to substitute must be filed before the time specified for the presentation of claims by creditors. [G.S. § 1A-1, Rule 25(a); G.S. § 28A-18-1(a)]

(2) *See* sections H.2.c)(1) and (2) of this Part, pages 30-31, for other provisions applicable to substitution and necessary parties.

(3) *Written settlement allowed.* The personal representative of the estate of the deceased spouse and the surviving spouse may enter into a written agreement providing for distribution of marital or divisible property. [G.S. § 28A-19-19(b)]

e) Payment of an ED judgment or a claim against the decedent's estate.

(1) *Certain provisions of Chapter 28 do not apply to ED claims.* The provisions of G.S. § 28A-19-5 (payment of contingent or unliquidated claims by the PR) and G.S. § 28A-19-17 (dealing with the satisfaction of claims other than by payment) do not apply to claims for ED. [G.S. § 28A-19-19(a)]

(2) *Surviving spouse's ED claim is a Chapter 28A claim.* A surviving spouse's claim for ED is treated as a claim against the decedent's estate, subject to the provisions of G.S. Chapter 28A, Article 19. [G.S. § 50-20(l)(2)]

(3) *ED judgment or settlement entered after death is a Chapter 28A claim.* An ED judgment, settlement agreement between the surviving spouse and personal representative, or an award resulting from the referral of a matter pursuant to G.S. § 28A-19-15, entered **after** the death of a spouse or former spouse, is a claim against the estate of the deceased party. [*See* language in G.S. § 50-20(l) speaking to "claims" for ED.]

(4) *Priority of the surviving spouse's claim for ED.* A claim for ED is 7th in order of payment priority with regard to other claims against the estate of a person who died on or after June 12, 2003. [G.S. § 28A-19-6(a)]

(a) The amendment to G.S. § 28A-19-6(a) was effective July 12, 2005, and applicable to estates of persons who died on or after June 12, 2003, unless the personal representative and ED claimant had entered into or performed an agreement pursuant to G.S. § 28A-19-19(b) before July 12, 2005.

(b) Under the amendment, all general debts of and claims against an estate are given a new 8th class priority, which means that ED claims are paid before general debts and claims.

(c) Before the 2005 amendment, ED claims were paid as 7th class claims along with all debts of the estate and paid pro rata with debts of the estate if funds were insufficient to fully satisfy all claims.

3. Death as a distribution factor.

a) In upholding an equal division of the marital assets following the death of one of the parties, the court of appeals assumed that either G.S. § 50-20(c)(1) or (12) would allow the trial court to consider the needs of the parties and that evidence of the wife's death, on its own, was sufficient to show that her estate had no needs. [*Tucker v. Miller*, 113 N.C.App. 785, 440 S.E.2d 315 (1994).]

b) If one spouse dies before entry of an ED order, property passing to the surviving spouse upon the death is a distribution factor. [2001 N.C. Sess. Laws 364 (adding G.S. § 50-20(c)(11b)] *See Distribution*, Part 4 of this Chapter.

4. Effect of death on the status of property.

a) Death of a spouse after separation did not transform property held by the parties as tenants by the entirety on the date of separation into the surviving spouse's separate property. [*Estate of Nelson v. Nelson*, 179 N.C.App. 166, 633 S.E.2d 124 (2006), *aff'd per curiam*, 361 N.C. 346, 643 S.E.2d 587 (2007) (three tracts of real property held by the parties on the date of separation as tenants by the entirety were marital property and were not transformed by husband's death while ED pending into wife's separate property by virtue of her right of survivorship).]

I. Use of reference procedure.

1. The N.C. Rules of Civil Procedure provide for a compulsory reference when the "trial of an issue requires the examination of a long or complicated account…." and "where the taking of an account is necessary for the information of the court before judgment…" [G.S. § 1A-1, Rule 53(a)(2)(a) and (b)] When appointed, a referee is not an agent of the parties but of the court so that any action for damages against the referee is barred by judicial immunity. [*Sharp v. Gulley*, 120 N.C.App. 878, 463 S.E.2d 577 (1995), *review denied*, 342 N.C. 659, 467 S.E.2d 723 (1996).]

2. One panel of the Court of Appeals commented that a "reference may be inappropriate" in ED proceedings. [*Vick v. Vick*, 80 N.C.App. 697, 343 S.E.2d 245, *review denied*, 317 N.C. 341, 346 S.E.2d 149 (1986) (trial court's denial of a motion for compulsory reference affirmed).] However, there is no specific appellate prohibition and the court of appeals has considered more recent cases in which referees have been appointed without further reference to appropriateness.

a) In *Sharp v. Miller*, 121 N.C.App. 616, 468 S.E.2d 799, *review denied*, 343 N.C. 309, 471 S.E.2d 76, *cert. denied*, 519 U.S. 871 (1996), the court of appeals affirmed the dismissal of claims against accountants appointed by a referee, with the consent of the parties, to appraise certain property and testify as expert witnesses as to value.

b) In *Sharp v. Gulley*, 120 N.C.App. 878, 463 S.E.2d 577 (1995), *review denied*, 342 N.C. 659, 467 S.E.2d 723 (1996), the court of appeals affirmed the dismissal on the basis of judicial immunity of an action for damages against a referee appointed by consent of the parties.

c) In *Sharp v. Sharp*, 116 N.C.App. 513, 449 S.E.2d 39, *review denied*, 338 N.C.App. 669, 453 S.E.2d 181 (1994), the trial court appointed a referee pursuant to Rule 53(a)(1) "to hear and determine all of the issues involved in the action." The court of appeals specifically upheld the trial court's order that each party pay one-half of the referee fee of $13,320.

d) In *Brown v. Brown*, 112 N.C.App. 15, 434 S.E.2d 873 (1993), the court of appeals noted, without comment, that the trial judge had appointed a referee pursuant to Rule 53(a)(2)(b) to identify and value marital assets and suggest an equitable distribution.

J. Consideration of alimony and child support.

1. ED is to be determined without regard for child support or alimony. [G.S. § 50-20(f); *Haywood v. Haywood*, 95 N.C.App. 426, 382 S.E.2d 798, *review denied*, 325 N.C. 706, 388 S.E.2d 454 (1989) (court erred by entering order for ED that clearly took into consideration order for temporary alimony).]

2. G.S. § 50-20(f) provides that, upon request of the parties after entry of the ED judgment, the court must consider whether an order for alimony or child support should be vacated or modified pursuant to G.S. §§ 50-16.9 or 50-13.7 (both statutes require a finding of substantial change of circumstances).

3. Alimony. Case law provides that when both alimony and ED are requested, the court should decide the ED claim first. [*Talent v. Talent*, 76 N.C.App. 545, 334 S.E.2d 256 (1985); *McIntosh v. McIntosh*, 74 N.C.App. 554, 328 S.E.2d 600 (1985).]

a) But for actions filed on or after October 1, 1995, G.S. § 50-16.3A(a) provides that a court may hear an alimony claim on the merits before or after entry of an ED judgment.

b) G.S. § 50-16.3A(a) further provides that if alimony is awarded before entry of a judgment for equitable distribution, the issues of amount and of whether a spouse is a dependent or supporting spouse may be reviewed by the court after the conclusion of the equitable distribution claim. (Unlike G.S. § 50-20(f) discussed above, G.S. § 50-16.3A(a) does not appear to require a finding of changed circumstances before an alimony order can be modified following ED.)

4. Modification of child support.

a) After the court enters an order of ED, it may modify a prior order for child support, but must make findings in support of a substantial change in circumstances under G.S. § 50-13.7. [*Dorton v. Dorton,* 77 N.C.App. 667, 336 S.E.2d 415 (1985).]

b) No requirement of finding of substantial change of circumstances if prior order of child support is clearly temporary, pending entry of ED order and a final support order. [*Little v. Little*, 74 N.C.App. 12, 327 S.E.2d 283 (1985).]

c) An earlier order of child support may not be modified in an ED order, but rather must be modified in an order entered after the ED order. [*Dorton v. Dorton*, 77 N.C.App. 667, 336 S.E.2d 415 (1985). However, the court may in an ED order modify a provision of an earlier support order concerning the depository of the child support payment. [*Shoffner v. Shoffner,* 91 N.C.App. 399, 371 S.E.2d 749 (1988).]

K. Dismissal of an ED claim.

1. Dismissal of a claim pursuant to N.C. R. CIV. P. 41(b) for failure to prosecute. Before dismissing a claim for failure to prosecute under Rule 41(b), a trial judge must address three factors:

a) Whether the plaintiff acted in a manner that deliberately or unreasonably delayed the matter;

b) The amount of prejudice, if any, to the defendant; and

c) The reason, if one exists, that sanctions short of dismissal would not suffice. [*Wilder v. Wilder*, 146 N.C.App. 574, 553 S.E.2d 425 (2001) (finding that the trial court erred in dismissing plaintiff's ED claim when it failed to consider whether lesser sanctions were appropriate).]

L. Entry of judgment.

1. An equitable distribution judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. [N.C. R. CIV. P. 58]

2. Whether delay in the entry of judgment is prejudicial is determined on a case-by-case basis as opposed to a bright line rule. [*Britt v. Britt,* 168 N.C.App. 198, 606 S.E.2d 910 (2005).]

a) Cases finding delay not prejudicial.

(1) Wife was not prejudiced by entry of an equitable distribution order sixteen months after the hearing when she did not allege any change in the value of marital or divisible property between the hearing and entry of the ED order, nor did she identify any potential change in circumstances that would impact the ED order. [*Britt v. Britt,* 168 N.C.App. 198, 606 S.E.2d 910 (2005).]

(2) Delay of three months after oral rendition of decision and entry of equitable distribution order, which included 25 pages of findings and conclusions as well as 49 pages of property schedules, was not prejudicial. [*White v. Davis*, 163 N.C. App. 21, 26, 592 S.E.2d 265, *review denied*, 358 N.C. 739, 603 S.E.2d 127 (2004).]

b) Cases finding delay warranted additional consideration by trial court.

(1) Nineteen-month delay between the date of trial and the date of disposition was more than a de minimus delay and required entry of a new distribution order. On remand, parties could offer additional evidence as to any substantial changes in their respective conditions or post-trial changes, if any, in the value of items of marital property. [*Wall v. Wall*, 140 N.C.App. 303, 536 S.E.2d 647 (2000).]

3. Consent judgments.

a) Consent judgments are different from stipulations of the parties.

(1) There can be no entry of a consent judgment unless the terms of the judgment are reduced to writing, signed by the judge and filed with the clerk of court. [N.C. R. CIV. P. 58]

(2) For a stipulation to be effective, it must either be signed by the parties or the requirements of *McIntosh v. McIntosh*, 74 N.C.App. 554, 328 S.E.2d 600 (1985), must be met. For more on stipulations, s*ee* section V of this Part, page 49.

b) Validity of a consent judgment rests on consent of the parties.

(1) Power of the court to sign and enter a consent judgment depends on the unqualified consent of the parties thereto. [*McIntosh v. McIntosh*, 184 N.C.App. 697, 646 S.E.2d 820 (2007); *Tevepaugh v. Tevepaugh*, 135 N.C.App. 489, 521 S.E.2d 117 (1999); *Chance v. Henderson*, 134 N.C.App. 657, 518 S.E.2d 780 (1999); *Milner v. Littlejohn*, 126 N.C.App. 184, 484 S.E.2d 453, *review denied*, 347 N.C. 268, 493 S.E.2d 458 (1997).]

(2) A consent judgment is void if consent of the parties does not exist at the time the court sanctions or approves the agreement and promulgates it as a judgment. [*McIntosh v. McIntosh*, 184 N.C.App. 697, 646 S.E.2d 820 (2007); *Tevepaugh v. Tevepaugh*, 135 N.C.App. 489, 521 S.E.2d 117 (1999); *Chance v. Henderson*, 134 N.C.App. 657, 518 S.E.2d 780 (1999) (consent must still exist at time court is called upon to sign the consent judgment); *Milner v. Littlejohn*, 126 N.C.App. 184, 484 S.E.2d 453, *review denied*, 347 N.C. 268, 493 S.E.2d 458 (1997) (judgment entered based on a tentative agreement had to be set aside where wife filed objections to tentative agreement before judgment was entered).]

c) Consent can be determined from the written agreement. There is no requirement with consent judgments, including consent judgments relating to property, support and custody rights of married persons, that the parties, at the time of the entry of the judgment, actually appear in court and acknowledge to the court their continuing consent to the entry of the consent judgment. [*Tevepaugh v. Tevepaugh*, 135 N.C.App. 489, 521 S.E.2d 117 (1999); *see also Thacker v. Thacker*, 107 N.C.App. 479, 420 S.E.2d 479, *review denied*, 332 N.C. 672, 424 S.E.2d 407 (1992) (if agreement is written and properly executed, court not obligated to independently ascertain the extent to which the parties understood the agreement upon which they placed their signatures).]

d) Notwithstanding her displeasure at having to choose between two unappealing options, settling the case or proceeding pro se, wife's consent in an ED case was valid when she entered agreement in the absence of threat, coercion, intimidation, or duress. [*McIntosh v. McIntosh*, 184 N.C.App. 697, 646 S.E.2d 820 (2007).]

e) For a case using contempt to enforce a consent order entered in an ED proceeding, *see Watson v. Watson*, 187 N.C.App. 55, 652 S.E.2d 310 (2007), *review denied*, 662 S.E.2d 551 (2008).

4. When proceeding must be recorded. Five minute proceedings to enter a consent judgment not a "trial" required to be recorded per G.S. § 7A-198(a) but a hearing on a 60(b)(3) motion to set aside a consent order was a trial that should have been recorded. [*Coppley v. Coppley*, 128 N.C.App. 658, 496 S.E.2d 611, *review denied*, 348 N.C. 281, 502 S.E.2d 846 (1998).]

M. Relief from an ED judgment.

1. Rule 60(a).

a) Rule 60(a) provides a limited mechanism for trial courts to amend erroneous judgments. [*Spencer v. Spencer*, 156 N.C.App. 1, 575 S.E.2d 780 (2003); *Ice v. Ice*, 136 N.C.App. 787, 525 S.E.2d 843 (2000).]

b) Rule 60(a) provides that a judge may correct clerical mistakes in judgments or orders… arising from oversight or omission at any time on the judge's own initiative or on the motion of any party.

c) Trial courts "do not have the power under Rule 60(a) to affect the substantive rights of the parties or correct substantive errors in their decisions." [*Spencer v. Spencer*, 156 N.C.App. 1, 575 S.E.2d 780 (2003), *citing Hinson v. Hinson*, 78 N.C.App. 613, 337 S.E.2d 663 (1985), *review denied*, 316 N.C. 377, 342 S.E.2d 895 (1986).]

d) A change is substantive and outside the boundaries of Rule 60(a) when it alters the effect of the original order. [*Lee v. Lee*, 167 N.C.App. 250, 605 S.E.2d 222 (2004); *Ice v. Ice*, 136 N.C.App. 787, 525 S.E.2d 843 (2000).]

e) Purported errors of law are not an appropriate basis for a Rule 60(a) motion. Errors of law are for appellate courts. [*Ice v. Ice,* 136 N.C.App. 787, 525 S.E.2d 843 (2000).]

f) Relief held proper.

(1) Trial court's amendment of a QDRO to require wife to pay all fees and penalties associated with the lump sum transfer of funds from husband's retirement account was proper under Rule 60(a). [*Lee v. Lee*, 167 N.C.App. 250, 605 S.E.2d 222 (2004) (fact that parties had provided for payment of taxes in two other QDROs distributing their various retirement accounts suggested that failure to do so in QDRO at issue was an "oversight or omission").]

(2) Changing the date at which interest began to accrue on a distributive award to the date of the amended judgment rather than the original judgment was proper under Rule 60(a). [*Ice v. Ice,* 136 N.C.App. 787, 525 S.E.2d 843 (2000) (amended judgment increased amount of distributive award but made no reference to accrual of interest on the award).]

2. Rule 60(b) generally.

a) Rule 60(b) allows a court to "relieve a party ... from a final judgment, order, or proceeding" under certain circumstances. A motion under Rule 60(b) must seek relief from a judgment rather than modification or amendment of a judgment. [*White v. White,* 152 N.C.App. 588, 568 S.E.2d 283 (2002), *aff'd per curiam,* 357 N.C. 153, 579 S.E.2d 248 (2003) (affirming trial court's denial of a Rule 60(b) motion requesting a modification of the prior order).] But courts have modified prior orders pursuant to Rule 60(b). [*See Harris v. Harris*, 162 N.C.App. 511, 591 S.E.2d 560 (2004), *citing Howell v. Howell,* 321 N.C. 87, 361 S.E.2d 585 (1987) (stating that Rule 60(b)(6) empowers the court to set aside or modify a final judgment when necessary to do justice; modification upheld).]

b) Rule 60(b) provides no relief for errors of law. [*Davis v. Davis*, 360 N.C. 518, 631 S.E.2d 114 (2006) (for errors of law party should proceed under G.S. § 1A-1, Rule 59(a)(8) or should file an appeal).]

c) Rule 60(b) is "a grand reservoir of equitable power to do justice in a particular case." [*Sloan v. Sloan,* 151 N.C.App. 399, 566 S.E.2d 97 (2002) (citation omitted).]

d) A Rule 60(b) motion is subject to the requirement that the motion be made "within a reasonable time." The rule specifically provides that motions made under Rule 60(b)(1),(2) and (3) must be made not more than one year after the judgment or order was entered. [N.C. R. CIV. P. 60(b)]

e) A motion to set aside a judgment pursuant to Rule 60(b) is not subject to the 5-day notice requirement in N.C.R. CIV. P. 6(d). [*Sloan v.*

Sloan, 151 N.C.App. 399, 566 S.E.2d 97 (2002) (no error when trial court granted wife's request during a show cause hearing for contempt to have her motion considered as a Rule 60(b) motion, rejecting husband's argument of improper notice).]

f) Although it would be the better practice to do so when ruling on a Rule 60(b) motion, the trial court is not required to make findings of fact unless requested to do so by a party. [N.C. R. CIV. P. 52(a)(2); *Nations v. Nations*, 111 N.C.App. 211, 431 S.E.2d 852 (1993).]

g) Because Rule 60(b) cannot be used as a substitute for appeal, the trial court, after an appeal is dismissed, "may deny a Rule 60(b) motion for relief that is based on a ground that was open to the movant on the appeal." [*Nations v. Nations*, 111 N.C.App. 211, 431 S.E.2d 852 (1993); *see also Surles v. Surles*, 154 N.C.App. 170, 571 S.E.2d 676 (2002) (when an appeal was not taken, a party is limited to arguing that the trial court abused its discretion in denying a Rule 60(b) motion and may argue that the underlying judgment is erroneous only to the extent the error demonstrates an abuse of discretion in denying the 60(b) motion).]

h) A trial court's ruling on a Rule 60(b) motion is reviewable only for an abuse of discretion. Abuse of discretion is shown only when the challenged actions are manifestly unsupported by reason. [*Harris v. Harris*, 162 N.C.App. 511, 591 S.E.2d 560 (2004); *see also Sloan v. Sloan*, 151 N.C.App. 399, 566 S.E.2d 97 (2002) (a discretionary ruling should not be disturbed on appeal unless the ruling "probably amounted to a substantial miscarriage of justice" or was "manifestly unsupported by reason").]

3. Rule 60(b)(1).

a) A party may be granted relief from a judgment or order for mistake, inadvertence, surprise, or excusable neglect.

b) Rule 60(b)(1) motions must be filed within one year after the judgment or order was entered. [G.S. § 1A-1, Rule 60(b)(1); *see Sloan v. Sloan*, 151 N.C.App. 399, 566 S.E.2d 97 (2002) (motion under Rule 60(b)(1) not filed within one year was untimely).]

4. Rule 60(b)(6).

a) A party may be granted relief from a judgment or order for any reason justifying relief from the operation of the judgment.

b) The test for whether a judgment, order or proceeding should be modified or set aside under Rule 60(b)(6) is two pronged:

(1) Extraordinary circumstances must exist; and

(2) There must be a showing that justice demands that relief be granted. [*Harris v. Harris*, 162 N.C.App. 511, 591 S.E.2d 560 (2004); *Sloan v. Sloan*, 151 N.C.App. 399, 566 S.E.2d 97 (2002).]

c) A Rule 60(b)(6) motion must be made within a reasonable time, with what constitutes a reasonable time depending on the circumstances of the individual case. [*Sloan v. Sloan*, 151 N.C.App. 399, 566 S.E.2d 97 (2002).]

(1) Ex-wife acted within a reasonable time by filing a motion to set aside judgment just over a year after order was entered. [*Sloan v. Sloan*, 151 N.C.App. 399, 566 S.E.2d 97 (2002).]

(2) A delay of nineteen months between the entry of judgment and a motion to set aside the judgment was found not to be reasonable. [*Hoolapa v. Hoolapa*, 105 N.C.App. 230, 412 S.E.2d 112 (1992).]

d) Relief held proper.

(1) ED order properly set aside under Rule 60(b)(6) when husband failed to inform the court during the ED and alimony trial that he had borrowed against an equity line of credit secured by the marital residence awarded to the wife after parties had paid off equity line, which action violated an injunction ordering the husband not to dispose of or encumber marital assets. [*Sloan v. Sloan*, 151 N.C.App. 399, 566 S.E.2d 97 (2002).]

(2) Order properly modified under Rule 60(b)(6) when QDRO implementing 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 date of separation. [*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).]

e) Relief not proper.

(1) Wife's Rule 60(b)(6) motion for relief from a consent judgment for ED properly denied when wife's failure to hire an attorney did not constitute excusable neglect. [*McIntosh v. McIntosh*, 184 N.C.App. 697, 646 S.E.2d 820 (2007) (proceedings had been going on for over three years, wife had contributed to the delays, wife had been put on notice that she needed to hire an attorney and be prepared for trial at a certain date, and judge entered a well-reasoned nine page order based on her lengthy experience with the case and the parties).]

(2) The trial court did not abuse its discretion when it denied husband's Rule 60(b)(6) motion to revise the lump sum distribution portion of the equitable distribution order; a change in the value of the stock market over the course of 5 years did not amount to an extraordinary or even unforeseeable circumstance. [*Lee v. Lee*, 167 N.C.App. 250, 605 S.E.2d 222 (2004).]

N. Costs and attorney fees.

1. Two statutes authorize a court to tax costs and award attorney fees in an ED action.

a) G.S. § 50-20(i) authorizes a court to tax certain costs and attorney fees against a spouse who has removed or taken possession of the separate property of the other spouse.

(1) When the trial court ordered a husband to return the wife's separate property pursuant to G.S. § 50-20(i), the trial court's award of attorney fees to the wife was proper, even though the trial court later dismissed the ED claim. [*McKissick v. McKissick*, 129 N.C.App. 252, 497 S.E.2d 711 (1998) (preliminary order and award of fees under G.S. § 50-20(i) proper, even though court later found ED claim barred by premarital agreement).]

b) G.S. § 50-21(e) allows a court to order a party to pay reasonable attorney fees as a sanction for willful obstruction or unreasonable delay of an ED proceeding. [*See* section IV.B.4 of this Part, page 46.]

2. When G.S. § 50-20(i) and G.S. § 50-21(e) are not applicable, there is no statutory authority for an award of attorney fees in an ED action and attorney fees are not recoverable. [*Lauterbach v. Weiner,* 174 N.C.App. 201, 620 S.E.2d 317 (2005).]

3. Contempt. A party held in contempt for violating an ED order can be ordered to pay attorney fees, even though there can be no award for fees incurred in obtaining the ED order in the first place. [*Hartsell v. Hartsell,* 99 N.C.App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991); *see* section IX.C of this Part, page 72.]

4. If an ED action is combined with actions in which attorney fees are awarded, such as child support or child custody [G.S. § 50-13.6] or alimony or postseparation support [G.S. § 50-16.4], the findings of fact must reflect that the attorney fees awarded were attributable only to the alimony or child custody and support claims. [*Cunningham v. Cunningham,* 171 N.C.App. 550, 615 S.E.2d 675 (2005), *citing Holder v. Holder,* 87 N.C.App. 578, 361 S.E.2d 891 (1987).]

O. Applicability of Rule 68 (offer of judgment) to ED actions.

1. The court of appeals has not ruled on the applicability of Rule 68 to ED actions. [*See Lauterbach v. Weiner,* 174 N.C.App. 201, 620 S.E.2d 317 (2005) (court of appeals identified the issue but did not resolve it because the Rule 68 offer in that case related only to the distribution of the marital residence and did not propose an offer for the division of the entire marital estate).]

IV. Pretrial Remedies, Procedures, and Protective Measures

A. Pretrial remedies and protective measures.

1. Lis pendens. [G.S. § 50-20(h)]

a) If either party claims that any real property is marital or divisible property, that party may cause a notice of lis pendens to be recorded under Article 11, Chapter 1 of the General Statutes.

b) Any person whose conveyance or encumbrance is recorded or whose interest is obtained by descent prior to the filing of the lis pendens takes the real property free of any claim resulting from the equitable distribution proceeding.

c) The court may cancel the notice of lis pendens upon substitution of a bond with surety in an amount determined by the court to be sufficient provided the court finds that the spouse's claim against the property can be satisfied by money damages.

2. Injunctions. [G.S. § 50-20(i)]

a) A party who seeks ED or who alleges ED will be sought when timely may request injunctive relief pursuant to Rule 65 of the N.C. Rules of Civil Procedure.

b) An injunction may be requested to prevent the disappearance, waste or conversion of property alleged to be marital property, divisible property, or the separate property of the party seeking an injunction.

c) An injunction is available only when injury is actually threatened and practically certain. [*Mauser v. Mauser*, 75 N.C.App. 115, 330 S.E.2d 63 (1985) (dicta).]

d) Bond.

(1) The court, in lieu of granting an injunction, may require a bond or other assurance of sufficient amount to protect the interest of the other spouse in the property. [G.S. § 50-20(i)]

(2) Rule 65 provides that no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant in such sum as the judge deems proper. [N.C.R. CIV. P. 65(c); *but see Huff v. Huff*, 69 N.C.App. 447, 317 S.E.2d 65 (1984) (court held that no security was required when the injunction was issued "to preserve the trial court's jurisdiction over the subject matter involved" or where the court decides that the injunction will do the restrained party "no material damage" and the applicant has sufficient assets to respond in damages if the injunction proves to be wrongful).]

e) Injunctive relief to protect separate property.

(1) Injunctive relief is available to protect separate as well as marital property.

(2) On the application of the owner of separate property removed from the marital home or the possession of its owner by the other spouse, the court may enter an order for reasonable

counsel fees and court costs incurred to regain possession, not to exceed the fair market value of the property at the time of its removal. [G.S. § 50-20(i); *see McKissick v. McKissick*, 129 N.C.App. 252, 497 S.E.2d 711 (1998) (upholding award of attorney fees).]

(3) A trial court had jurisdiction to enter an order pursuant to G.S. § 50-20(i) requiring a husband to return his wife's separate property, even though the court later determined ED barred by premarital agreement. [*McKissick v. McKissick*, 129 N.C.App. 252, 497 S.E.2d 711 (1998) (until the court enters an order finding that the agreement bars ED, the court has jurisdiction to enter preliminary orders pursuant to the ED statute).]

3. Interim distributions. [G.S. § 50-20(i1)]

a) G.S. § 50-20(i1) was amended in 1997 "to encourage interim distribution of property or debt." [1997 N.C. Sess. Laws 302, § 1; *see* [*Wirth v. Wirth*, __ N.C.App. __, 668 S.E.2d 603 (2008) (recognizing that parties should be encouraged to settle as many matters as possible before an ED trial and refusing to discourage such contractual arrangements by interpreting them in a way contrary to their express terms).]

b) 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. [G.S. § 50-20(i1)]

c) 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. [G.S. § 50-20(i1)] The 1997 amendment overruled the holding in *Brown v. Brown*, 112 N.C.App. 15, 434 S.E.2d 873 (1993) (not allowing a cash distributive award before final classification and valuation of the marital estate).]

d) Any order for interim distribution must be taken into consideration at trial and proper credit given. [G.S. § 50-20(i1); *Wirth v. Wirth*, __ N.C.App. __, 668 S.E.2d 603 (2008).]

e) Interim ED orders are by nature preliminary to entry of a final ED judgment and thus are interlocutory. [*Hunter v. Hunter*, 126 N.C.App. 705, 486 S.E.2d 244 (1997) (interim order ruling that insurance proceeds were husband's separate property not immediately appealable).]

f) Depending on the language of an interim order, an order for interim distribution may be the final distribution of property.

(1) Where a consent order making an interim distribution of property provided that the distribution of a condominium to wife was "final" for purposes of equitable distribution and set out the

amount at which the condominium should be valued in the final order, the consent order precluded further valuation of the condominium at the ED trial and precluded consideration of the appreciation of the condominium as divisible property. [*Wirth v. Wirth,* __ N.C.App. __, 668 S.E.2d 603 (2008).]

(2) Where a consent order making an interim distribution of property provided for the sale of the marital residence with the net proceeds to be distributed to the wife, and provided that a sale before the ED trial would establish the net fair market value for purposes of ED, the proceeds upon distribution to the wife became her separate property. Interest earned on the proceeds was wife's separate property and could not be considered divisible property. [*Wirth v. Wirth,* __ N.C.App. __, 668 S.E.2d 603 (2008).]

g) Depending on the language used, an order for interim distribution can preserve certain claims of the parties.

(1) An interim order providing for husband to close on a house under contract on the date of separation that included language that the transaction was "subject to Defendant's [wife's] rights to an equitable distribution of property, both as marital and divisible property…" and further that "Defendant's rights and claims to said property are preserved until an equitable distribution of marital and divisible property…" preserved the wife's claim for equitable distribution of marital and divisible property in that house. [*Brackney v. Brackney,* __ N.C.App. __, 682 S.E.2d 401 (2009).]

B. Pretrial procedures.

1. Inventory affidavit. [G.S. § 50-21(a)]

a) The party who first asserts a claim for equitable distribution must file and serve upon the opposing party an inventory affidavit listing all property claimed to be marital and separate property, as well as an estimated date-of-separation fair market value of each item, within 90 days of filing the claim.

b) The opposing party must serve a responding inventory within 30 days after service of the filing party's inventory.

c) The inventory affidavits are subject to amendment and are nonbinding at trial as to completeness or value.

(1) This is in contrast to stipulations, which once made and of record, are binding on the parties absent fraud or mutual mistake. [*Lawing v. Lawing*, 81 N.C.App. 159, 344 S.E.2d 100 (1986); *see* section V of this Part, page 49, on stipulations.]

(2) Where wife listed husband's painting business with an unknown value at the date of separation, wife was free to present expert testimony at trial when husband had received appropriate

notice of the expert opinion. [*Franks v. Franks*, 153 N.C.App. 793, 571 S.E.2d 276 (2002) (rejecting husband's argument that wife was required to amend her inventory affidavit before trial).]

(3) But when a husband presented no evidence to show 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 listed the word "none" under separate property, trial court did not abuse its discretion when it awarded wife one-half of the account. [*Helms v. Helms,* 191 N.C.App. 19, 661 S.E.2d 906, *review denied*, 362 N.C. 681, 670 S.E.2d 233 (2008), *appeal withdrawn,* 363 N.C. 258, 676 S.E.2d 469 (2009).]

(4) Local rules can make an inventory affidavit binding. [*See Young v. Young*, 133 N.C.App. 332, 515 S.E.2d 478 (1999) (where husband who did not dispute wife's classification of credit card debt as marital on local forms required by local discovery rules deemed to have stipulated that wife's listing was undisputed and therefore credit card debt was marital).]

d) The court may extend the time for filing the inventories upon good cause shown.

e) The inventory affidavits are in the nature of answers to interrogatories propounded to the parties and are subject to the requirements of Rule 11.

f) Any party failing to provide the required affidavits is subject to sanctions pursuant to Rules 26, 33, and 37 of the Rules of Civil Procedure.

g) Property subject to distribution must be included in the equitable distribution order, even if a party failed to include the property in the affidavit.

(1) Trial court erred in failing to classify, value and distribute the wife's profit-sharing plan even though she had not listed the plan in her affidavit filed with the court and it was not included in the pretrial order. [*Fitzgerald v. Fitzgerald*, 161 N.C.App. 414, 588 S.E.2d 517 (2003) (existence of the plan disclosed during the ED hearing).]

2. Scheduling and discovery conference. [G.S. § 50-21(d)]

a) Within 120 days after filing, the party first requesting equitable distribution must request that the court conduct a scheduling and discovery conference. If that party fails to request a conference, the other party may do so.

b) At the conference the court must adopt a discovery schedule, rule on any motions for appointment of expert witnesses, or other applications, including applications to determine the date of separation, and must set a date for the initial pretrial conference.

c) At the initial pretrial conference, the court must determine the status of the case, set a date for completion of discovery and the filing and service of all motions, and set a date for a final pretrial conference and for trial.

d) A final pretrial conference must be conducted in accordance with the Rules of Civil Procedure and the General Rules of Practice applicable to district and superior court. At the final pretrial conference, the court must rule on any matter reasonably necessary to effect a fair and prompt disposition of the case.

3. Pretrial mediated settlement conference. [G.S. § 7A-38.4A]

a) Prior to March 1, 2006, a chief district court judge was authorized but not required to mandate settlement procedures in his or her district. [*See* G.S. § 7A-38.4A(c)]

b) Effective March 1, 2006, in all equitable distribution actions in all districts, a mediated settlement conference or other settlement procedure is required.

(1) At the scheduling conference mandated by G.S. § 50-21(d) in all equitable distribution actions in all judicial districts, or at such earlier time as specified by local rule, the court shall include in its scheduling order a requirement that the parties and their counsel attend a mediated settlement conference or, if the parties agree, other settlement procedure conducted pursuant to the Family Financial Settlement Rules, unless excused by the court pursuant to Rule 1.C(6) or by the court or mediator pursuant to Rule 4.A(2). [RULES IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES (FFS RULES), RULE 1.C(1)]

(2) The court shall dispense with the requirement to attend a mediated settlement conference or other settlement procedure only for good cause shown. [FFS Rule 1.C(1)]

c) The complete text of the Family Financial Settlement Rules implementing G.S. § 7A-38.4A may be found in N.C.G.S. ANNOTATED RULES OF NORTH CAROLINA and also is available at http://www.nccourts.org/Courts/CRS/Councils/DRC/FFS/Rules.asp.

4. Sanctions for delay of an equitable distribution proceeding. [G.S. § 50-21(e)]

a) Upon motion of either party or upon the court's own initiative, the court **shall** impose an appropriate sanction on a party when the court finds both that:

(1) The party has willfully obstructed or unreasonably delayed, or attempted to obstruct or unreasonably delay, discovery proceedings or any pending equitable distribution proceeding; and

(2) The willful obstruction or unreasonable delay of the proceedings is or would be prejudicial to the interests of the opposing party.

b) Sanctions for delay of the proceedings may include an order:

(1) To pay the other party the amount of the reasonable expenses and damages incurred because of the willful obstruction or unreasonable delay, including a reasonable attorneys' fee; and

(2) To appoint, at the offending party's expense, an accountant, appraiser, or other expert whose services the court finds necessary in order for discovery or other equitable distribution proceeding to be timely conducted. [G.S. § 50-21(e)]

c) Delay consented to by the parties is not grounds for sanctions. [G.S. § 50-21(e)]

d) Whether to impose sanctions under G.S. § 50-21(e) and which sanctions to impose are decisions vested in the trial court and are reviewable on appeal for abuse of discretion. [*Wirth v. Wirth*, __ N.C.App. __, 668 S.E.2d 603 (2008); *Zaliagiris v. Zaliagiris*, 164 N.C.App. 602, 596 S.E.2d 285 (2004), *review on additional issues denied*, 359 N.C. 643, 617 S.E.2d 662, *appeal withdrawn*, 360 N.C. 180, 625 S.E.2d 114 (2005); *Crutchfield v. Crutchfield*, 132 N.C.App. 193, 511 S.E.2d 31 (1999).]

(1) A finding of contempt is not required before a court can impose sanctions under G.S. § 50-21(e). [*Wirth v. Wirth*, __ N.C.App. __, 668 S.E.2d 603 (2008).]

(2) Trial court did not abuse its discretion in awarding wife a portion of her attorney fees as a sanction where husband unreasonably delayed ED proceedings by refusing to produce documents for a period of at least nineteen months. [*Wirth v. Wirth*, __ N.C.App. __, 668 S.E.2d 603 (2008).]

(3) Trial court did not err when it awarded wife attorney fees for husband's failure to appear at any hearing in the matter, including court-ordered mediation. [*Dalgewicz (Hearten) v. Dalgewicz*, 167 N.C.App. 412, 606 S.E.2d 164 (2004).]

(4) Trial court did not abuse its discretion when it awarded plaintiff attorney fees as a sanction for the defendant's willful delay or attempted delay of discovery and ED proceedings. [*Crutchfield v. Crutchfield*, 132 N.C.App. 193, 511 S.E.2d 31 (1999) (defendant and her counsel failed to attend hearings).]

e) Notice of sanctions required.

(1) G.S. § 50-21(e) is silent as to what type of notice is required under the statute and how far in advance notice must be given to a party facing sanctions. [*Wirth v. Wirth*, __ N.C.App. __,

668 S.E.2d 603 (2008); *Megremis v. Megremis,* 179 N.C.App. 174, 633 S.E.2d 117 (2006).]

(2) A party has a due process right to notice in advance of the hearing both of the fact that sanctions may be imposed and the alleged grounds for the imposition of sanctions. [*Zaliagiris v. Zaliagiris,* 164 N.C.App. 602, 596 S.E.2d 285 (2004), *review on additional issues denied,* 359 N.C. 643, 617 S.E.2d 662, *appeal withdrawn,* 360 N.C. 180, 625 S.E.2d 114 (2005) (it was error under G.S. § 50-21(e) for the trial court to summarily assess expert witness costs as a sanction against defendant, where defendant was given no notice that he was subject to such a sanction or the grounds upon which such sanction would be imposed).]

f) Notice sufficient.

(1) Where husband had notice of and submitted an argument against wife's request for sanctions over two months before the court imposed sanctions, husband had sufficient notice of the possibility of sanctions. [*Wirth v. Wirth* __ N.C.App. __, 668 S.E.2d 603 (2008) (wife's counsel filed a written closing argument with the trial court, in which she requested fees pursuant to § 50-21(e), set out the amount thereof, and stated that requested fees related to additional time, effort and cost to wife and her attorneys in obtaining necessary documentation that husband had failed to provide, to which husband's counsel submitted a written closing argument in which he argued against wife's request for sanctions).]

g) Notice not sufficient.

(1) Defendant's due process rights were violated when there was no written request for sanctions, no separate hearing on sanctions, and defendant received no notice regarding sanctions prior to the ED trial at which sanctions were imposed. [*Megremis v. Megremis,* 179 N.C.App. 174, 633 S.E.2d 117 (2006); *see Wirth v. Wirth,* __ N.C.App. __, 668 S.E.2d 603 (2008) (stating that *Megremis* stands for the proposition that a party must have notice regarding the imposition of sanctions before the date on which sanctions are imposed).]

h) Notice has been found not to have been provided by:

(1) The fact that a party against whom sanctions were imposed took part in the hearing and did the best he could do without knowing in advance the sanctions that might be imposed. [*Zaliagiris v. Zaliagiris,* 164 N.C. App. 602, 596 S.E.2d 285 (2004), *review on additional issues denied,* 359 N.C. 643, 617 S.E.2d 662, *appeal withdrawn,* 360 N.C. 180, 625 S.E.2d 114 (2005); *Megremis v. Megremis,* 179 N.C.App. 174, 633 S.E.2d 117 (2006), *quoting Zaliagiris*.]

(2) Language in an ED pretrial order that recited the operative language of G.S. § 50-21(e) as a distributional factor and not as a ground for sanctions and did not specify sanctions or cite the sanctions statute. [*Megremis v. Megremis,* 179 N.C.App. 174, 633 S.E.2d 117 (2006).]

(3) A statement by opposing counsel:

(a) At a hearing on a motion to withdraw as wife's counsel and her motion to continue that wife's conduct "amount[ed] to an effort to postpone" the trial, when counsel did not mention sanctions, the statute, or any operative language of the statute. [*Megremis v. Megremis,* 179 N.C.App. 174, 633 S.E.2d 117 (2006).]

(b) During his opening statement at trial that forecast evidence of wife's conduct that he contended was "a willful obstruction and delay of the equitable distribution trial and which should subject [defendant] to sanctions" and asked the trial court "to consider the delay and obstruction of [defendant] . . . under 50-21(e)" when there was no separate hearing on the issue of sanctions but issue of sanctions was decided as part of the larger equitable distribution trial. [*Megremis v. Megremis,* 179 N.C.App. 174, 633 S.E.2d 117 (2006).]

V. Stipulations

A. Generally.

1. Stipulations are different from consent judgments.

a) For a stipulation to be effective, it must either be signed by the parties or the requirements of *McIntosh v. McIntosh,* 74 N.C.App. 554, 328 S.E.2d 600 (1985), must be met.

b) There can be no entry of a consent judgment unless the terms of the judgment are reduced to writing, signed by the judge and filed with the clerk of court. [N.C.R. CIV. P. 58] For more on consent judgments, *see* section III.L.3 of this Part, page 36.

2. Stipulations are judicial admissions which, unless limited as to time or application, continue in full force for the duration of the controversy. [*Fox v. Fox*, 114 N.C.App. 125, 441 S.E.2d 613 (1994); *see Sharp v. Sharp*, 116 N.C.App. 513, 449 S.E.2d 39, *review denied*, 338 N.C. 669, 453 S.E.2d 181 (1994) (stipulation of value of real property at hearing before referee still in force when ED judgment entered 2 years later, despite defendant's argument that value had changed).]

3. Effect of a stipulation.

a) A stipulation, once made and of record, is binding on the parties in the absence of fraud or mutual mistake. [*Lawing v. Lawing,* 81 N.C.App. 159, 344 S.E.2d 100 (1986).]

b) A stipulation is binding in every sense, preventing the parties from introducing evidence to dispute it and relieving them from the necessity of producing evidence to establish the admitted fact. [*Young v. Young*, 133 N.C.App. 332, 515 S.E.2d 478 (1999).]

(1) A stipulation that appreciation of a home in the amount of $181,000 between date of purchase and time of trial and distribution was the result of market forces alone resulted in the classification of appreciation as divisible property. [*Brackney v. Brackney,* __ N.C.App. __, 682 S.E.2d 401 (2009).]

(2) When husband had stipulated in his ED affidavit that his 401(k) account was marital property and put "none" under separate property, there was no abuse of discretion in awarding wife one half of the account even though wife had testified in earlier ED hearing that she and her attorney had determined that she was entitled to a lesser percentage of the account. [*Helms v. Helms,* 191 N.C.App. 19, 661 S.E.2d 906, *review denied*, 362 N.C. 681, 670 S.E.2d 233 (2008), *appeal withdrawn*, 363 N.C. 258, 676 S.E.2d 469 (2009).]

(3) A party's failure to object to the other party's classification of debt as marital deemed by local rule a stipulation that the party's listing is undisputed. [*Young v. Young*, 133 N.C.App. 332, 515 S.E.2d 478 (1999) (where husband failed to object to wife's classification of credit card debt as marital, classification deemed a stipulation per local rule and trial court need not hear evidence either to prove or disprove it).]

(4) Stipulation in a pretrial order, that property acquired subsequent to a reconciliation was included in wife's ED claim, prevented husband from arguing that a separation agreement and property settlement barred wife's ED claim. [*Inman v. Inman*, 136 NC.App. 707, 525 S.E.2d 820, *cert. denied,* 351 N.C. 641, 543 S.E.2d 870 (2000).]

(5) Where the parties stipulate that an equal division of the marital property is equitable, it is not only unnecessary but improper for the trial court to consider, in making that distribution, any of the distributional factors set forth in G.S. § 50-20(c). [*Miller v. Miller*, 97 N.C.App. 77, 387 S.E.2d 181 (1990) (because of stipulation, trial court correctly refused to give the husband credit for mortgage payments he made after separation or to consider payments as a distributional factor).]

4. Pretrial orders.

a) The court may enter a pretrial order reciting, among other things, the agreements made by the parties as to any of the matters considered at the pretrial conference. When entered, the pretrial order controls the subsequent course of the action, unless modified at trial to prevent manifest injustice. [G.S. § 1A-1, Rule 16(a); *see Inman v. Inman*, 136 NC.App. 707, 525 S.E.2d 820, *cert. denied*, 351 N.C. 641, 543 S.E.2d 870 (2000).] For an overview of Rule 16, *see* Bench Book, Vol. 2, *Pretrial Conference,* Chapter 26.

b) For a stipulation in a pretrial order to be binding, the parties must use unequivocal and mandatory language that definitively expresses their intent. [*Despathy v. Despathy,* 149 N.C.App. 660, 562 S.E.2d 289 (2002) (where parties in a pretrial order provided how vehicles "should" be distributed between the parties, the court was free to disregard the stipulation and to distribute the vehicles differently than the stipulation provided).]

c) Stipulation in the pretrial order, that the issue of whether certain property was separate or marital by virtue of the prenuptial agreement was an issue to be decided by the trial court, served as the basis for allowing husband to amend his answer to include the prenuptial agreement, even though court had determined that husband should have pled the agreement in his answer as an affirmative defense. [*Weaver-Sobel v Sobel,* 175 N.C.App. 596, 624 S.E.2d 432 (2006) **(unpublished**) (prenuptial agreement could have affected whether certain assets were separate or marital property, thus it constituted a matter in "avoidance or affirmative defense" and was required to be pled in defendant's answer).]

d) Local rules can result in binding stipulations. [*See Young v. Young*, 133 N.C.App. 332, 515 S.E.2d 478 (1999) (where husband who did not dispute wife's classification of credit card debt as marital on local forms required by local discovery rules deemed to have stipulated that wife's listing was undisputed and therefore credit card debt was marital).]

e) Even though it denied a request to modify a pretrial order, a court has considered an alleged misclassification as a distributional factor. [*See White v. Davis,* 163 N.C.App. 21, 592 S.E.2d 265, *review denied*, 358 N.C. 739, 603 S.E.2d 127 (2004) (where a trial court, citing fairness considerations and in the spirit of *Inman*, allowed the misclassification of husband's medical practice in a pretrial order to be considered as a distributional factor in his favor under G.S. § 50-20(c)(12)).]

f) Trial court erred in failing to classify, value and distribute a profit-sharing plan even though the wife had not listed the plan in her affidavit filed with the court and it was not included in the pretrial order. [*Fitzgerald v. Fitzgerald*, 161 N.C.App. 414, 588 S.E.2d 517 (2003) (existence of the plan disclosed during the ED hearing).]

5. Where a stipulation provides for less than a complete distribution, ED may proceed as to assets not covered by the stipulation.

a) A trial court properly classified a tax refund as marital property even though the parties had not included the refund in their stipulated list of marital property. [*Allen v. Allen*, 168 N.C.App. 368, 607 S.E.2d 331 (2005) (court holding that there was no waiver of equitable distribution of property not listed in the stipulation).]

6. In equitable distribution actions, parties' agreement regarding distribution of their property should be in writing, duly executed and acknowledged. [*McIntosh v. McIntosh*, 74 N.C.App. 554, 328 S.E.2d 600 (1985).]

a) North Carolina courts favor written stipulations that are duly executed and acknowledged by the parties. [*Heath v. Heath*, 132 N.C.App. 36, 509 S.E.2d 804 (1999); *Fox v. Fox*, 114 N.C.App. 125, 441 S.E.2d 613 (1994).]

b) But a written stipulation has been upheld even though not acknowledged and executed by the parties. [*Eubanks v. Eubanks*, 109 N.C.App. 127, 425 S.E.2d 742 (1993) (written stipulation signed by attorneys for both parties and read into the record in the presence of the parties without objection was binding on the parties, even though neither actually signed the document).]

B. If stipulations are not written, requirements set out in *McIntosh v. McIntosh*, 74 N.C.App. 554, 328 S.E.2d 600 (1985), must be met.

1. Oral stipulations are binding if the record affirmatively demonstrates that the court made contemporaneous inquiries of the parties at the time the stipulations were entered into. [*McIntosh v. McIntosh*, 74 N.C.App. 554, 328 S.E.2d 600 (1985).] It should appear that:

a) The trial court read the terms of the stipulations to the parties as dictated to the clerk of court;

b) The parties understood the legal effects of their agreement and the terms of the agreement; and

c) The parties agree to abide by the terms of the stipulation of their own free will. [*Id.; see also Heath v. Heath*, 132 N.C.App. 36, 509 S.E.2d 804 (1999) and *Fox v. Fox*, 114 N.C.App. 125, 441 S.E.2d 613 (1994) (requiring record to show that the trial court read the stipulated terms to the parties and that the parties understood the effects of their agreement).]

2. Some decisions have not construed *McIntosh* to require that the trial court read the stipulations to the parties. [*Chance v. Henderson*, 134 N.C.App. 657, 518 S.E.2d 780 (1999).]

a) *McIntosh* construed to require **either** that the trial court read the agreement in open court **or** that it be reasonably apparent from the record that both parties either read or understood the stipulated terms. [*Chance v. Henderson*, 134 N.C.App. 657, 518 S.E.2d 780 (1999) (*McIntosh* not violated when counsel for one of the parties recited the stipulated terms).]

b) When the parties were present in court, represented by counsel, and indicated that they either read or understood the terms of the proposed distribution, subsequent ED order affirmed even though trial judge did not read to the parties the terms of the proposed distribution of marital property. [*Watson v. Watson*, 118 N.C.App. 534, 455 S.E.2d 866 (1995) (*McIntosh* does not require the trial judge to read terms to the parties in open court under these circumstances).]

3. But if the parties themselves are not present in court, oral stipulations made on their behalf are not valid. [*Hurley v. Hurley,* 123 N.C.App. 781, 474 S.E.2d 796 (1996) (stipulations entered in open court by parties' attorneys not valid).]

4. Trial court's finding of fact, that parties stipulated as to the division of certain retirement accounts, must be affirmatively reflected in the record for the ED judgment to be upheld on appeal. [*Heath v. Heath*, 132 N.C.App. 36, 509 S.E.2d 804 (1999) (where close review of the transcript reflected no oral stipulation as to the division of certain retirement accounts, appellate court concluded that no stipulation authorized the trial court's distributive award of the accounts, despite the trial court's finding of fact to that effect).]

C. Procedure to set aside a stipulation.

1. A party to a stipulation who desires to have it set aside should seek to do so by some direct proceeding, and ordinarily, such relief may or should be sought by a motion to set aside the stipulation in the court in which the action is pending, on notice to the opposite party. [*Sharp v. Sharp*, 116 N.C.App. 513, 449 S.E.2d 39, *review denied*, 338 N.C. 669, 453 S.E.2d 181 (1994), *citing Moore v. Richard West Farms, Inc.*, 113 N.C. App. 137, 437 S.E.2d 529 (1993).]

VI. Agreements in Bar of ED

A. Parties may provide for the distribution of marital and/or divisible property by written agreement executed before, during or after marriage. [G.S. § 50-20(d)]

1. Agreement must be duly executed and acknowledged in accordance with G.S. §§ 52-10 and 52-10.1, or be valid in the jurisdiction where executed. [G.S. § 50-20(d)] [*See Prevatte v. Prevatte,* 104 N.C.App. 777, 411 S.E.2d 386 (1991) (antenuptial agreement executed in Virginia operated as a bar to wife's claim for equitable distribution); *cf. Atassi v. Atassi*, 117 N.C.App. 506, 451 S.E.2d 371, *review denied*, 340 N.C. 109, 456 S.E.2d 310 (1995) (Syrian marriage contract not sufficient to bar wife's right to equitable distribution because agreement did not comply with the Uniform Premarital Agreement Act).]

a) G.S. § 52-10. Validates contracts between husbands and wives that are not inconsistent with public policy. Allows married persons, or persons of "full age" about to be married, to agree to release all property rights arising from the marriage, with or without consideration. Contracts affecting real estate, or income thereof for more than 3 years, entered during the marriage, must be in writing and acknowledged by both parties before a notary.

b) G.S. § 52-10.1. Authorizes the execution of separation agreements by married persons, provided that the agreement is in writing and acknowledged by both parties in front of a certifying officer.

c) Agreements not acknowledged in accordance with the provisions of G.S. §§ 52-10 and G.S. 52-10.1 are not binding upon the court. [*McLean v. McLean*, 88 N.C.App. 285, 363 S.E.2d 95 (1987), *aff'd*, 323 N.C. 543, 374 S.E.2d 376 (1988) (trial court did not err in distributing property in a manner different than provided in a handwritten memorandum signed by the parties where the agreement was not acknowledged in front of a certifying officer); *but cf. Moore v. Moore*, 108 N.C.App. 656, 424 S.E.2d 673, *aff'd per curiam*, 334 N.C. 684, 435 S.E.2d 71 (1993) (party estopped from asserting invalidity of notarization of a separation agreement where party treated the agreement as valid for more than two years).]

d) A conveyance is not an agreement between the parties to distribute real property. [*Beroth v. Beroth*, 87 N.C.App. 93, 359 S.E.2d 512, *review denied*, 321 N.C. 296, 362 S.E.2d 778 (1987) (quitclaim deed conveying wife's interest in entirety property to husband before separation did not remove property from equitable distribution).]

2. Agreement can be executed at any time before, during or after marriage.

a) Property settlements may be executed at any time before, during, or after marriage. [G.S. § 50-20(d); *Stegall v. Stegall*, 100 N.C.App. 398, 397 S.E.2d 306 (1990), *review denied*, 328 N.C. 274, 400 S.E.2d 461 (1991).]

b) However, "pure" separation agreements are void as against public policy unless the parties are living apart at the time of execution or they plan to separate shortly thereafter. [*Stegall v. Stegall*, 100 N.C.App. 398, 403, 397 S.E.2d 306 (1990), *review denied*, 328 N.C. 274, 400 S.E.2d 461 (1991)] *See* Bench Book, Vol. 1, *Spousal Agreements*, Chapter 1, for distinction between property settlements and "pure" separation agreements.

c) Premarital agreements executed on or after July 1, 1987 must comply with the Uniform Premarital Agreement Act, G.S. §§ 52B-1 et. seq. [*Huntley v. Huntley*, 140 N.C.App. 749, 538 S.E.2d 239 (2000); *Atassi v. Atassi*, 117 N.C.App. 506, 451 S.E.2d 371, *review denied*, 340 N.C. 109, 456 S.E.2d 310 (1995); *see Howell v. Landry*, 96 N.C.App. 516, 386 S.E.2d 610 (1989), *review denied*, 326 N.C. 482, 392 S.E.2d 90 (1990) (holding that the Uniform Premarital Agreement Act does not require acknowledgment of premarital agreements).]

3. Agreements must be in writing.

a) Oral agreements concerning the distribution of property are not binding on the parties. [*Wiencek-Adams v. Adams*, 331 N.C. 688, 417 S.E.2d 449 (1992); *Holder v. Holder*, 87 N.C.App. 578, 361 S.E.2d 891 (1987); *Weaver v. Weaver*, 72 N.C.App. 409, 324 S.E.2d 915 (1985); *but see* section V on stipulations for discussion of *McIntosh v. McIntosh*, 74 N.C.App. 554, 328 S.E.2d 600 (1985) (oral stipulations during court hearing may be binding if court makes proper inquiries before accepting agreement).]

b) Written agreements must be signed by both parties. [*Collar v. Collar*, 86 N.C.App. 105, 356 S.E.2d 407 (1987) (refusal of defendant to sign agreement that had been properly acknowledged prevented the agreement from being "duly executed" as required by G.S. § 50-20(d)).]

4. *See* Bench Book, Vol. 1, *Spousal Agreements,* Chapter 1, for discussion of the choice of law governing the interpretation and enforceability of agreements, the effect of reconciliation of the parties, and grounds for rescission of agreements.

B. Terms of the agreement will control the distribution of property.

1. Agreement controls property distribution. [*See, e.g., Torres v. McClain,* 140 N.C.App. 238, 535 S.E.2d 623 (2000) (trial court properly divided military benefits in accordance with terms of written agreement between the parties); *Stewart v. Stewart,* 141 N.C.App. 236, 541 S.E.2d 209 (2000) (court properly applied definition of separate property contained in agreement); and *Franzen v. Franzen,* 135 N.C.App. 369, 520 S.E.2d 74 (1999) (court bound by definitions of marital and separate property contained in the agreement).]

2. Agreements intended by the parties to be a full and final distribution of all property bar equitable distribution. [*Hagler v. Hagler*, 319 N.C. 287, 354 S.E.2d 228 (1987) (comprehensive property settlement held sufficient to bar equitable distribution even though agreement did not mention equitable distribution); *Brenenstuhl v. Brenenstuhl*, 169 N.C.App. 433, 610 S.E.2d 301 (2005); *Anderson v. Anderson,* 145 N.C.App. 453, 550 S.E.2d 266 (2001) (agreement clearly intended to be a full settlement even though it did not divide husband's pension); *McArthur v. McArthur,* 68 N.C.App. 484, 315 S.E.2d 344 (1984) (general release provisions of agreement executed before enactment of equitable distribution statute were sufficient to waive equitable distribution).]

a) When language is unambiguous, determination of whether the parties intended the agreement to be a full and final settlement is a matter of law to be determined by the court. [*Anderson v. Anderson,* 145 N.C.App. 453, 550 S.E.2d 266 (2001) (trial court did not err in refusing to allow evidence on the issue of whether the agreement barred the equitable distribution of husband's pension rights); *Rabon v. Rabon,* 102 N.C.App. 452, 402 S.E.2d 461 (1991) (whether agreements fully dispose of the parties' property is a factual issue to be determined by examining the agreement); *see also Hagler v. Hagler,* 319 N.C. 287, 354 S.E.2d 228 (1987).]

b) Determination of whether the agreement is ambiguous also is a matter of law to be determined by the court. [*Anderson v. Anderson,* 145 N.C.App. 453, 550 S.E.2d 266 (2001).] In making this determination, words are to be given their usual and ordinary meaning and all the terms of the agreement are to be reconciled if possible. [*Id.*]

c) When terms are ambiguous, interpretation is for the trier of fact. [*Smith v. Childs*, 112 N.C.App. 672, 437 S.E.2d 500 (1993) (interpretation of ambiguous terms is for the jury); *Robertson v. Hartman,* 90 N.C.App. 250, 368 S.E.2d 199 (1988) (same).] For factual issues in equitable distribution proceedings, the judge rather than the jury is the trier of fact. [*McCall v. McCall*, 138 N.C.App. 706, 531 S.E.2d 894 (2000).] *See* section VI.C.5 of this Part, page 58.

d) An agreement is ambiguous when the terms of the contract are reasonably susceptible to either of the differing interpretations proffered by the parties. [*McIntyre v. McIntyre,* 188 N.C.App. 26, 654 S.E.2d 798, *aff'd per curiam,* 362 N.C. 503, 666 S.E.2d 749 (2008) (where both parties had offered reasonable, albeit differing, interpretations of the agreement, agreement was ambiguous).]

3. Agreements that waive all property rights bar equitable distribution. [*See Prevatte v. Prevatte,* 104 N.C.App. 777, 411 S.E.2d 386 (1991) (a general release of property rights in an antenuptial agreement was sufficient to bar equitable distribution); *Small v. Small,* 93 N.C.App. 614, 621, 379 S.E.2d 273, *review denied*, 325 N.C. 273, 384 S.E.2d 519 (1989) (right to equitable distribution may be released even if it is not specifically enumerated in a release of spousal rights and even if release was executed before the adoption of G.S. § 50-20(d)); *Blount v. Blount*, 72 N.C.App. 193, 323 S.E.2d 738 (1984), *review denied*, 313 N.C. 506, 329 S.E.2d 389 (1985) (general relinquishment of all property rights was a bar to equitable distribution even though the agreement did not list property owned by husband); *Hartman v. Hartman,* 80 N.C.App. 452, 343 S.E.2d 11 (1986) (general waivers in agreement were sufficient to bar equitable distribution even though agreement made no reference to specific real property).]

4. Agreements that waive a spouse's interest in certain property bar equitable distribution of that property. [*See Stewart v. Stewart,* 141 N.C.App. 236, 541 S.E.2d 209 (2000) (husband's interest in a medical practice was husband's separate property when parties specifically acknowledged in a premarital agreement that husband "is the owner" and that the interest "shall remain the sole and separate property" of the husband; same language supported conclusion that any appreciation of that interest during the marriage was husband's separate property; 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 ERISA, of the wife's interest in her husband's retirement account).]

5. An agreement that contained a limited or incomplete waiver or release held not to bar equitable distribution. [*See McIntyre v. McIntyre,* 188 N.C.App.

26, 654 S.E.2d 798, *aff'd per curiam*, 362 N.C. 503, 666 S.E.2d 749 (2008) (1986 premarital agreement that provided that each party "releases" certain rights, including "all marital rights in the real estate and personal property" of the other spouse and provided that each party would be able to purchase, sell, encumber, dispose of and convey real and personal property throughout the marriage as though unmarried and without the other's consent did not waive either party's right to ED; rather agreement was a "free trader" agreement that allowed each spouse to buy and sell property without the consent or interference of the other during marriage; agreement did not specifically reference property that might be acquired during marriage, did not expressly waive ED, and did not dispose of property in the event of divorce).]

6. An action to enforce a separation agreement that results in a distribution of property does not constitute an action for equitable distribution prohibited by the separation agreement. [*See Gilmore v. Garner*, 157 N.C.App. 664, 580 S.E.2d 15 (2003) (specific performance of a separation agreement that enforced provision granting wife a portion of husband's railroad retirement benefits did not convert the action into a prohibited action for ED).]

7. Until the court enters an order finding that the agreement bars ED, the court has jurisdiction to enter preliminary orders pursuant to the ED statute. [*McKissick v. McKissick*, 129 N.C.App. 252, 497 S.E.2d 711 (1998) (trial court authorized to enter order pursuant to G.S. § 50-20(i) requiring husband to return wife's separate property even though trial court later determined ED barred).]

8. If an agreement provides for less than a complete distribution or waiver, equitable distribution may proceed as to assets not covered by the agreement. [*Hamby v. Hamby*, 143 N.C.App. 635, 547 S.E.2d 110, *review denied*, 552 S.E.2d 163 and 354 N.C. 69, 553 S.E.2d 39 (2001) (agreement controlled classification and distribution of a vehicle owned by the parties but trial court divided other assets in accordance with equitable distribution statute); *Rabon v. Rabon*, 102 N.C.App. 452, 402 S.E.2d 461 (1991) (trial court erred in dismissing claim for equitable distribution due to separation agreement where trial court did not examine agreement to determine whether it was intended to be a full and final settlement of property issues); *see also Morrison v. Morrison*, 102 N.C.App. 514, 402 S.E.2d 855 (1991) (where executory provisions of agreement were rescinded by reconciliation, wife was entitled to equitable distribution of all property acquired since reconciliation and of any property owned by the parties at the time the agreement was executed that was not divided by the agreement).]

9. When an agreement provides that a specific asset will be addressed at a later date, a trial court is authorized to enter a subsequent order with respect to that asset. [*Brenenstuhl v. Brenenstuhl*, 169 N.C.App. 433, 610 S.E.2d 301 (2005) (trial court did not err in dividing a military pension some four years after divorce pursuant to an incorporated agreement reserving issue of retirement for a future date).]

10. Parties can agree to a distribution that gives a party greater rights than allowed by equitable distribution statutes. [*See, e.g., Torres v. McClain*, 140

N.C.App. 238, 535 S.E.2d 623 (2000) (trial court properly distributed unvested military retirement benefits pursuant to agreement even though North Carolina law at the time did not allow a court to order distribution of nonvested retirement rights).]

C. Procedure.

1. Pleading in the alternative is allowed pursuant to G.S. § 1A, Rule 8(e)(2). A party may seek enforcement of a separation agreement and also seek equitable distribution in the event the agreement is not found to be a bar. [*Hendrix v. Hendrix*, 67 N.C.App. 354, 313 S.E.2d 25 (1984).]

2. Agreement as an affirmative defense under G.S. § 1A-1, Rule 8(c).

    a) A contract governing property entered into during the marriage was not an affirmative defense but a piece of evidence to be considered in settling the action for equitable distribution in action where plaintiff filed claim for equitable distribution but alleged that contract prohibited trial court from distributing the real property acquired by the parties during the marriage. [*Street v. Street*, 191 N.C.App. 815, 664 S.E.2d 69 (2008).]

    b) *But see Weaver-Sobel v Sobel*, 175 N.C.App. 596, 624 S.E.2d 432 (2006) **(unpublished**) (since prenuptial agreement could have affected whether certain assets were separate or marital property, it constituted a matter in "avoidance or affirmative defense" and was required to be pled in defendant's answer; husband allowed to amend his answer to include the prenuptial agreement since parties stipulated in the pretrial order that the issue of whether certain property was separate or marital by virtue of the prenuptial agreement was an issue to be decided by the trial court).

3. Summary judgment dismissing a claim for equitable distribution is appropriate if the pleadings and other materials before the court show an agreement that fully disposes of property or waives all rights to equitable distribution. [*Anderson v. Anderson*, 145 N.C.App. 453, 550 S.E.2d 266 (2001); *Carlton v. Carlton*, 74 N.C.App. 690, 329 S.E.2d 682 (1985); *see Dean v. Dean*, 68 N.C.App. 290, 314 S.E.2d 305 (1984) (separation agreement that disposes of all property is an "insurmountable bar" to equitable distribution); *see also Case v. Case*, 73 N.C.App. 76, 325 S.E.2d 661, *review denied*, 313 N.C. 597, 330 S.E.2d 606 (1985) (summary judgment appropriate even before the completion of discovery where all evidence showed a valid separation agreement disposing of all property between the parties).]

4. If there are issues of material fact concerning the validity or enforceability of the agreement, or the effect of reconciliation, summary judgment is not appropriate. [*Carlton v. Carlton*, 74 N.C.App. 690, 329 S.E.2d 682 (1985); *Atassi v. Atassi*, 117 N.C.App. 506, 451 S.E.2d 371, *review denied*, 340 N.C. 109, 456 S.E.2d 310 (1995).]

5. When a separation or other agreement is raised in bar to equitable distribution, there is probably no right to a jury trial on issues relating to the enforceability or interpretation of the agreement. [*See McCall v. McCall*, 138

N.C.App. 706, 531 S.E.2d 894 (2000) (upholding trial court's denial of a jury trial on the issue of the date of separation, finding that there is no right to a jury trial on any issue of fact in an equitable distribution hearing); *Sharp v. Sharp*, 351 N.C. 37, 519 S.E.2d 523 (1999) (third party has no right to a jury trial on issue of imposition of constructive trust raised in an equitable distribution case).]

6. Choice of law provisions contained in an agreement are valid and must be given effect. [*Franzen v. Franzen*, 135 N.C.App. 369, 520 S.E.2d 74 (1999) (where parties specified Ohio law as controlling, court looked to Ohio law to construe the agreement); *Torres v. McClain*, 140 N.C.App. 238, 535 S.E.2d 623 (2000) (applying Illinois law to divide a military pension pursuant to a separation agreement containing an Illinois choice of law provision).]

7. A district court lacks subject matter jurisdiction over a declaratory judgment action to interpret a distributive award provision in an incorporated separation and property settlement agreement. [*Fucito v. Francis*, 175 N.C.App. 144, 622 S.E.2d 660 (2005) (court may construe or interpret the provision as part of an action for contempt).]

VII. Effect of Bankruptcy

Important Note*:* Except as noted, Section VII describes provisions of the federal bankruptcy law effective October 17, 2005.

A. Bankruptcy reform legislation.

1. On April 20, 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [Pub. L. No. 109-8, 119 Stat. 23 (2005) (hereinafter the "Bankruptcy Reform Act")] was signed into law. The provisions relating to family law are effective October 17, 2005, and apply to bankruptcy cases commenced on or after that date.

2. For an overview of the Bankruptcy Reform Act in the area of family law, *see* John L. Saxon, "Impact of the New Bankruptcy Reform Act on Family Law in North Carolina," *Family Law Bulletin No. 20* (School of Government, June 2005).

3. The provisions of the Bankruptcy Code in effect before passage of the Bankruptcy Reform Act will continue to apply in bankruptcy cases filed before October 17, 2005, and pending on or after that date.

4. Additionally, provisions of the Bankruptcy Code in effect before passage of the Bankruptcy Reform Act that were not amended or repealed will continue to apply in bankruptcy cases filed on or after October 17, 2005.

B. Automatic stay.

1. When a debtor files a bankruptcy petition, federal law automatically and immediately imposes a stay precluding the debtor's creditors (including spouses and former spouses) and others (including state courts) from taking certain actions against the debtor, the debtor's property, or property of the bankruptcy estate. [*See* 11 U.S.C. § 362(a)]

a) In the equitable distribution context, an ED claim is stayed if it was or could have been commenced before bankruptcy or affects property of the estate.

b) For specific stay provisions, *see* 11 U.S.C. § 362(a).

2. The automatic stay does not apply to an action for the dissolution of a marriage, except to the extent that the proceeding seeks to determine the division of property that is property of the bankruptcy estate. [11 U.S.C. § 362(b)(2)(A)(iv)]

3. Nondebtor spouse's options in bankruptcy court to allow the state court to proceed with ED. The nondebtor spouse may:

a) Request relief from the stay pursuant to 11 U.S.C. § 362(d) to continue the state court action for ED; or

b) Request that the bankruptcy court abstain from exercising jurisdiction over the matter pursuant to 28 U.S.C. § 1334(c)(1). [*See Perlow v. Perlow*, 128 B.R. 412 (E.D.N.C. 1991).]

4. If the bankruptcy court lifts the stay:

a) The state court can proceed to determine in the ED action the amount of the nondebtor spouse's claim to the marital [and divisible] property in question. [*In re Robbins*, 964 F.2d 342 (4th Cir. 1992).]

b) The lifting of the automatic stay to allow adjudication in state court of the parties' property interests does not automatically include authority for the parties to enter into any form of consensual property settlement agreement that affects property of the bankruptcy estate without prior approval of the bankruptcy court. [*In re Hohenberg*, 143 B.R. 480 (W.D. Tenn. 1992) (court concerned about possible collusion between the parties).]

c) Once the state court has made a determination as to the equitable distribution of the parties' marital [and divisible] property, the nondebtor spouse may enforce the judgment as to property not constituting the bankruptcy estate, if there is any. [*See* 11 U.S.C. § 541]

d) For property awarded that is part of the bankruptcy estate, the case is returned to the bankruptcy court for a determination of the extent to which the state ED judgment may be enforced against the debtor spouse. [*In re Robbins*, 964 F.2d 342 (4th Cir. 1992).]

5. If the bankruptcy court abstains from the exercise of jurisdiction, allowing the state court to determine the interests of the parties in property under state law, most bankruptcy courts retain jurisdiction over the property for purposes of its ultimate distribution once those interests are determined. [HENRY J. SOMMER ET AL., COLLIER FAMILY LAW AND THE BANKRUPTCY CODE ¶ 5.01[2][d] (Alan N. Resnick & Henry J. Sommer eds., 2005).]

6. For a discussion of the application of the automatic stay to domestic support obligations and child support generally, *see* Bench Book, Vol. 1, *Enforcement of Child Support Orders,* Chapter 3, Part 4.

C. Property of the bankruptcy estate.

1. Whether property is property of the estate is important because property of the estate is protected by the automatic stay as set out above. Other reasons that property of the estate may be important in the context of an ED proceeding include:

a) The trustee or other party in control of the estate may demand turnover of property of the estate held by others;

b) Depending on the type of case and other factors, property of the estate may be liquidated to pay claims of creditors; and

c) The value of the property of the estate may be important in determining the amount to be paid to creditors. [HENRY J. SOMMER ET AL., COLLIER FAMILY LAW AND THE BANKRUPTCY CODE ¶ 2.01[2] (Alan N. Resnick & Henry J. Sommer eds., 2005).]

2. In a chapter 7 case:

a) Property of the estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case…" [11 U.S.C. § 541 (a)(1)] and, if within 180 days of the petition date, any interest the debtor acquires in property (i) by bequest, devise or inheritance, (ii) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree, or (iii) as a beneficiary of a life insurance policy or of a death benefit plan. [11 U.S.C. § 541(a)(5)]

(1) Property in which the debtor has an ownership interest is included in the debtor's estate, whether or not it would be classified as "marital property." [*Justice v. Justice*, 123 N.C.App. 733, 475 S.E.2d 225 (1996), *aff'd per curiam*, 346 N.C. 176, 484 S.E.2d 551 (1997).]

(2) A debtor's interest in entireties property becomes part of the bankruptcy estate. [*See In re Bunker,* 312 F.3d 145 (4th Cir. 2002).]

b) For property that is not included as property of the estate, including but not limited to, funds placed in education individual retirement accounts, 529 college savings plans, and amounts withheld or placed in certain pension or retirement plans, *see* 11 U.S.C. § 541(b).

c) Property that the debtor is allowed to keep as exempt is removed from the bankruptcy estate. [*See* 11 U.S.C. § 522 on exemptions.]

3. In a Chapter 13 case, property of the estate includes, in addition to the property specified in 11 U.S.C. § 541, "all property of the kind specified in such

section that the debtor acquires after the commencement of the case" and "earnings from services performed by the debtor after the commencement of the case." [11 U.S.C. § 1306(a)]

a) In other words, in a chapter 13 case, the bankruptcy estate includes the property included in the estate of a Chapter 7 debtor described above, as well as property (including wages and income) acquired by the Chapter 13 debtor **after** he or she files for bankruptcy. [*See* 11 U.S.C. § 1306(a)]

D. Discharge.

1. Chapter 7.

a) For bankruptcy cases commenced on or after October 17, 2005, a discharge under 11 U.S.C. § 727 (Chapter 7) does **not** discharge the debtor from an unsecured, prepetition debt to a spouse or former spouse incurred in connection with a divorce or separation that is not a domestic support obligation. [11 U.S.C. § 523 (a)(15)]

b) Former 11 U.S.C. § 523 (a)(15) provided for discharge if the bankruptcy court found that the debtor had the ability to pay the debt and that the benefit to the debtor from discharge would outweigh the detrimental consequences to the spouse or former spouse.

c) For bankruptcy cases commenced on or after October 17, 2005, to the extent that an unsecured, prepetition debt incurred in connection with a divorce or separation that is not a domestic support obligation is not paid in full in the Chapter 7 proceeding, it is not discharged and the spouse or former spouse can seek enforcement of the obligation after the bankruptcy case is closed. Therefore,

(1) An ED judgment entered before bankruptcy is not discharged in Chapter 7.

(2) An ED claim filed but not completed before bankruptcy filed is not discharged in Chapter 7.

(3) When parties have separated, then one or both parties file a Chapter 7 petition, and a party later asserts a claim for ED, the right to ED is not discharged in Chapter 7.

2. Chapter 13.

a) A debtor who has completed all payments under a confirmed Chapter 13 plan may request and receive a discharge under 11 U.S.C. § 1328(a) (known as a "superdischarge" under provisions of the Bankruptcy Code in effect before passage of the Bankruptcy Reform Act). If the debtor receives a 1328(a) discharge, any unsecured, prepetition debt to a spouse or former spouse incurred in connection with a divorce or separation that is not a domestic support obligation **is** discharged. [11 U.S.C. § 1328(a)]

(1) An unsecured, prepetition debt incurred in connection with a divorce or separation that is not a domestic support obligation is not a priority claim under 11 U.S.C. § 507 that must be paid in full under a Chapter 13 plan pursuant to 11 U.S.C. § 1322(a)(2).

(2) Thus, to the extent that an unsecured, prepetition debt incurred in connection with a divorce or separation that is not a domestic support obligation is not paid in full under the Chapter 13 plan, it is discharged and the spouse or former spouse is permanently enjoined from seeking enforcement of the obligation.

(3) The end result is that a debtor who receives a discharge under 11 U.S.C. § 1328(a) may discharge a debt that cannot be discharged in a Chapter 7 case, specifically, a debt incurred in connection with a divorce or separation that is not a domestic support obligation. Thus, whether an obligation is determined to be a nondischargeable domestic support obligation or a dischargeable property settlement is important in a Chapter 13 case.

(a) Husband's agreement in a separation agreement to pay 2nd deed of trust on marital residence was obligation in the nature of support, or a domestic support obligation, was not dischargeable and had to be paid in full under husband's Chapter 13 plan. [*In re Johnson*, 397 B.R. 289 (Bankr. M.D.N.C. 2008) (rejecting husband's argument that the agreement provided for a dischargeable property settlement and citing line of cases holding that an obligation that is essential to protect a residence constitutes a nondischargeable support obligation).]

(4) A Chapter 13 superdischarge will discharge:

(a) A claim for ED pending when bankruptcy is filed;

(b) An ED judgment entered before bankruptcy is filed [*See In re Halverson*, 151 B.R. 358 (M.D.N.C. 1993) (cited for the general holding that ED is a claim that can be discharged).] NOTE: To the extent that a distributive award is secured by a lien on the debtor's property and not avoided as a judicial lien under 11 U.S.C. § 522(f)(1) or pursuant to the trustee's strong-arm powers under 11 U.S.C. § 544, it will be a secured claim that must be paid in full under the Chapter 13 plan. [*See* 11 U.S.C. § 1325(a)(5) requiring a Chapter 13 plan to pay to a holder of a secured claim an amount not less than the allowed amount of the claim.]

(c) An ED claim that could have filed before bankruptcy [*See Justice v. Justice*, 123 N.C.App. 733, 475 S.E.2d 225 (1996), *aff'd per curiam*, 346 N.C. 176, 484

S.E.2d 551 (1997) (trial court erred when it failed to dismiss husband's prepetition ED claim filed after wife's Chapter 7 discharge; case decided before Bankruptcy Reform Act).]

b) A debtor who has failed to complete payments under a confirmed Chapter 13 plan may request and, under certain circumstances, receive a "hardship" discharge under 11 U.S.C. § 1328(b). If the debtor receives a hardship discharge, any unsecured, prepetition debt to a spouse or former spouse incurred in connection with a divorce or separation that is not a domestic support obligation is **not** discharged. [11 U.S.C. § 523 (a)(15)]

3. Effect of discharge.

a) 11 U.S.C. § 524(a) provides in relevant part that a discharge in a case under Title 11 of the U.S.C.:

(1) Voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727 (chapter 7 case), 1141 (chapter 11 case) and 1328 (chapter 13 case), whether or not discharge of such debt is waived; and

(2) Operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived.

b) Generally the discharge voids only the debtor's personal liability. A creditor's lien rights, if they are not set aside or avoided in the bankruptcy proceeding, may still be enforced. However, the debtor's discharge would preclude the creditor from asserting a claim against the debtor for any deficiency. [BREWER, THE EFFECT OF BANKRUPTCY UPON THE ESTABLISHMENT AND ENFORCEMENT OF DOMESTIC LAW RELATED OBLIGATIONS p. 431 (1995); *see also* John L. Saxon, "Impact of the New Bankruptcy Reform Act on Family Law in North Carolina," *Family Law Bulletin No. 20* (School of Government, June 2005).]

4. A debtor may raise the defense of dischargeability in postbankruptcy equitable distribution or other proceedings.

a) N.C. R. CIV. P. 8(c) requires that a party affirmatively raise the defense of "discharge in bankruptcy."

b) The general rule is that state courts have concurrent jurisdiction with federal courts to determine whether a debt or claim has been discharged pursuant to § 523. [*See Cato v. Cato*, 118 N.C.App. 569, 455 S.E.2d 918 (1995); *see also* 28 U.S.C. § 1334(b), which provides that federal district courts have original but not exclusive jurisdiction of all civil proceedings under title 11, or arising in or related to cases under title 11.]

VIII. Appeal

A. Appealability.

1. As a general rule, a party may properly appeal only from a final order, which disposes of all the issues as to all parties, or an interlocutory order affecting a substantial right of the appellant under G.S. §§ 1-277 and 7A-27. [*Buffington v. Buffington,* 69 N.C.App. 483, 317 S.E.2d 97 (1984); *see also* G.S. § 1A-1, Rule 54(b) for appeal from a final order that disposes of one or more but fewer than all claims.]

2. The Court of Appeals has taken a restrictive view of the substantial right exception in the context of equitable distribution or alimony matters and has previously recognized that interlocutory appeals that challenge only the financial repercussions of a separation or divorce generally have not been held to affect a substantial right. [*Duncan v. Duncan,* __ N.C.App. __, 671 S.E.2d 71 (2008) **(unpublished**), *citing Embler v. Embler,* 143 N.C.App. 162, 545 S.E.2d 259 (2001).]

3. Cases finding no substantial right; immediate appeal not allowed.

    a) Appeal from an order that determined the date of marriage for all matters related to the action did not affect a substantial right and was dismissed as interlocutory. [*Duncan v. Duncan*, __ N.C.App. __, 671 S.E.2d 71 (2008) **(unpublished**).]

    b) Appeal from an order establishing the date of separation for purposes of equitable distribution dismissed as interlocutory. [*Hatmaker v. Hatmaker,* 191 N.C.App. 250, 662 S.E.2d 578 (2008) **(unpublished**) (request to treat appeal as a petition for writ of certiorari denied).]

    c) Appeal from an ED order entered before resolution of the issues of custody, child support, or alimony did not affect a substantial right. [*Embler v. Embler*, 143 N.C.App. 162, 545 S.E.2d 259 (2001) (noting that interlocutory appeals that challenge only the financial repercussions of a separation or divorce generally do not affect a substantial right).]

    d) Appeal from an ED order that left open the issue of alimony dismissed as interlocutory; that appellate court decision on ED could put trial court in a better position to determine alimony or could avoid a retrial on alimony not a "substantial right". [*McIntyre v. McIntyre*, 175 N.C.App. 558, 623 S.E.2d 828 (2006).]

    e) Interim order, that insurance proceeds on life of parties' deceased child were husband's separate property, was not immediately appealable. [*Hunter v. Hunter*, 126 N.C.App. 705, 486 S.E.2d 244 (1997).]

    f) No appeal from a mandatory preliminary injunction ordering wife to return property pending final determination of husband's action for divorce and ED. Injunction intended to maintain the status quo and did not affect a substantial right. [*Dixon v. Dixon*, 62 N.C.App. 744, 303 S.E.2d 606 (1983).]

4. Cases finding a substantial right; immediate appeal allowed.

a) Denial of a motion to amend answer would result in forfeiture of any future claim for ED so denial affects a substantial right and is immediately appealable. [*Goodwin v. Zeydel*, 96 N.C.App. 670, 387 S.E.2d 57 (1990).]

b) Order dismissing an ED counterclaim affected a substantial right. [*Small v. Small*, 93 N.C.App. 614, 379 S.E.2d 273, *review denied,* 325 N.C. 273, 384 S.E.2d 519 (1989).]

c) Order granting husband's motion for summary judgment and dismissing wife's counterclaim for ED was immediately appealable, even though other issues such as specific performance of a separation agreement or damages for its breach remained pending. [*Case v. Case,* 73 N.C.App. 76, 325 S.E.2d 661, *review denied,* 313 N.C. 596, 330 S.E.2d 606 (1985), and *Buffington v. Buffington*, 69 N.C.App. 483, 317 S.E.2d 97 (1984).]

5. There is no right to appeal from a judgment granting a party the relief he or she sought. [*See Finkel v. Finkel,* 162 N.C.App. 344, 590 S.E.2d 472, *cert denied,* 358 N.C. 234, 595 S.E.2d 150 and 358 N.C. 375, 597 S.E.2d 130 (2004) (wife who requested and received unequal distribution in her favor not entitled to appeal trial court's failure to provide an equal distribution).]

B. Effect of appeal of an equitable distribution judgment.

1. Once an equitable distribution is appealed, the district court has no jurisdiction to enter any other orders relating to the judgment appealed from, or upon any matter embraced therein. [G.S. § 1-294]

2. An equitable distribution judgment is not enforceable by contempt pending appeal. [*See Guerrier v. Guerrier,* 155 N.C.App. 154, 574 S.E.2d 69 (2002) (noting in dicta that unlike child support, child custody and alimony, there is no statute on equitable distribution stating that orders of the trial court remain enforceable pending appeal).]

C. Scope of review on appeal.

1. Generally.

a) In complex litigation involving ED, appellate court will not remand for obviously insignificant errors. [*Leighow v. Leighow*, 120 N.C.App. 619, 463 S.E.2d 290 (1995).]

b) Court of appeals presumes that the proceedings in the trial court are correct until shown otherwise. The party asserting error must show from the record not only that the trial court committed error, but that the aggrieved party was prejudiced as a result. Formal errors in an ED judgment do not require reversal, particularly where the record reflects a conscientious effort by the trial judge to deal with complicated and extensive evidence. [*Lawing v. Lawing*, 81 N.C.App. 159, 344 S.E.2d 100 (1986).]

2. Scope of review on appeal of jurisdiction.

a) The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record. [*Bates v. Jarrett*, 135 N.C.App. 594, 521 S.E.2d 735 (1999).]

3. Scope of review on appeal of a classification matter.

a) Trial court's determination that specific property is to be characterized as marital, divisible, or separate property will not be disturbed on appeal if there is competent evidence to support the determination. [*Brackney v. Brackney,* __ N.C.App. __, 682 S.E.2d 401 (2009); *Holterman v. Holterman,* 127 N.C.App. 109, 488 S.E.2d 265, *review denied*, 347 N.C. 267, 493 S.E.2d 455 (1997).]

b) When there is conflicting testimony about an asset, the trial court's classification will be upheld if there is competent evidence in the record to support it. [*Walter v. Walter,* 149 N.C.App. 723, 561 S.E.2d 571 (2002) (trial court's implicit resolution of conflicting testimony in the husband's favor, finding cash held in a safe to be husband's separate property, upheld because it was adequately supported in the record).]

4. Scope of review on appeal of a valuation matter.

a) Task of a reviewing court on appeal is to determine whether the approach used by the trial court reasonably approximates the net value of the property. [*Draughon v. Draughon*, 82 N.C.App. 738, 347 S.E.2d 871 (1986), *review denied*, 319 N.C. 103, 353 S.E.2d 107 (1987).]

b) The trial court's valuation of marital property will not be second-guessed on appeal as long as its findings are supported by competent evidence. [*Leighow v. Leighow*, 120 N.C.App. 619, 463 S.E.2d 290 (1995); *Smith v. Smith*, 104 N.C.App. 788, 411 S.E.2d 197 (1991).]

5. Scope of review on appeal of a distribution matter.

a) Of trial court's application of distributional factors. The trial court has broad discretion in evaluating and applying the statutory distributional factors and will not be reversed absent a showing that its decision is manifestly unsupported by reason. [*Jones v. Jones*, 121 N.C.App. 523, 466 S.E.2d 342, *review denied*, 343 N.C. 307, 471 S.E.2d 72 (1996); *Leighow v. Leighow*, 120 N.C.App. 619, 463 S.E.2d 290 (1995).]

b) Of the trial court's division of property.

(1) The trial court's decision whether to divide the marital estate equally or unequally can be disturbed only if a clear abuse of discretion has occurred. [*Jones v. Jones*, 121 N.C.App. 523, 466 S.E.2d 342, *review denied*, 343 N.C. 307, 471 S.E.2d 72 (1996); *Helms v. Helms,* 191 N.C.App. 19, 661 S.E.2d 906, *review denied,* 362 N.C. 681, 670 S.E.2d 233 (2008), *appeal withdrawn,* 363 N.C. 258, 676 S.E.2d 469 (2009) (standard of review of the percentage

division of marital property in ED cases is for an abuse of discretion).

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

c) Of the trial court's distribution of property.

(1) Only when the evidence fails to show any rational basis for the distribution ordered by the court will its determination be upset on appeal. [*Brackney v. Brackney*, __ N.C.App. __, 682 S.E.2d 401 (2009).]

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

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

6. Scope of review of findings and conclusions.

a) Where the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether those findings of fact supported its conclusions of law. [*Casella v. Estate of Casella*, __ N.C.App. __, 682 S.E.2d 455 (2009).]

b) The trial court's findings are conclusive on appeal if there is evidence to support them, despite the existence of evidence in the record that might support a contrary finding. [*Casella v. Estate of Casella*, __ N.C.App. __, 682 S.E.2d 455 (2009).]

c) In ED, findings of fact are binding on the appellate court if supported by competent evidence. [*Edwards v. Edwards*, 110 N.C.App. 1, 428 S.E.2d 834, *review denied*, 335 N.C. 172, 436 S.E.2d 374 (1993).]

d) Conclusions of law, even if erroneously labeled as findings of fact, are reviewable de novo on appeal. [*See Wilder v. Wilder*, 146 N.C.App. 574, 553 S.E.2d 425 (2001), *citing Carpenter v. Brooks*, 139 N.C.App. 745, 534 S.E.2d 641 (2000); *see also Fletcher v. Fletcher*, 123 N.C.App. 744, 474 S.E.2d 802 (1996), *review denied*, 345 N.C. 640, 483 S.E.2d 706 (1997) (conclusions of law not binding on appellate court and are reviewable as any question of law).]

e) If the trial court's determination is a mixture of findings of fact and conclusions of law, the determination is itself reviewable by the appellate court. [*Hall v. Hall*, 88 N.C.App. 297, 363 S.E.2d 189 (1987) (finding regarding the date of separation was mixed; appellate court to determine whether other facts found by the trial court are sufficient to support DOS determination).]

7. Most other matters are reviewed under an abuse of discretion standard:

a) Trial court's dismissal of plaintiff's ED claim for failure to prosecute when trial court had considered whether lesser sanctions were appropriate. [*Wilder v. Wilder*, 146 N.C.App. 574, 553 S.E.2d 425 (2001).]

b) Whether to impose sanctions under G.S. § 50-21(e) and which sanctions to impose. [*Wirth v. Wirth,* __ N.C.App. __, 668 S.E.2d 603 (2008); *Zaliagiris v. Zaliagiris,* 164 N.C.App. 602, 596 S.E.2d 285 (2004), *review on additional issues denied*, 359 N.C. 643, 617 S.E.2d 662, *appeal withdrawn,* 360 N.C. 180, 625 S.E.2d 114 (2005); *Crutchfield v. Crutchfield*, 132 N.C.App. 193, 511 S.E.2d 31 (1999).]

c) Trial court's denial of a Rule 60(b) motion to set aside a consent order for fraud. [*Coppley v. Coppley*, 128 N.C.App. 658, 496 S.E.2d 611, *review denied*, 348 N.C. 281, 502 S.E.2d 846 (1998).]

d) Trial court's ruling denying appointment of an appraiser. [*Godley v. Godley,* 110 N.C.App. 99, 429 S.E.2d 382 (1993).]

e) Whether or not to appoint an expert to assist in valuation. [*Gratsy v. Gratsy*, 125 N.C.App. 736, 482 S.E.2d 752, *review denied*, 346 S.E.2d 278, 487 S.E.2d 545 (1997).]

f) Trial court's assessment of costs in an ED action. [*Fox v. Fox*, 114 N.C.App. 125, 441 S.E.2d 613 (1994).]

D. Procedure on remand.

1. When case reversed or judgment vacated.

a) Reversal by the court of appeals of the trial court's ED order vacates that judgment. [*Crowder v. Crowder,* 147 N.C.App. 677, 556 S.E.2d 639 (2001).]

b) When appellate court did not explicitly affirm or uphold any part of the ED order, or its findings or conclusions, the trial court on remand was authorized to reconsider the value of a logging company, even though the appellate court did not find error in the original valuation of the company. [*Crowder v. Crowder,* 147 N.C.App. 677, 556 S.E.2d 639 (2001).]

c) When appellate court vacated in part the previous judgment, the trial court was free on remand to reconsider the evidence before it and to enter new and/or additional findings of fact based on the evidence, with the exception that the trial court was bound on remand by any portions of the previous order that the appellate court affirmed. [*Friend-Novorska v. Novorska,* 143 N.C.App. 387, 545 S.E.2d 788, *aff'd per curiam,* 354 N.C. 564, 556 S.E.2d 294 (2001).]

2. When case remanded to trial court for additional findings.

a) On remand for findings on whether postseparation rental income should be a distributional factor, trial court could take additional evidence or make additional findings on the existing record. [*Dolan v. Dolan*, 148 N.C.App. 256, 558 S.E.2d 218, *aff'd per curiam*, 355 N.C. 484, 562 S.E.2d 422 (2002).]

b) On remand for further findings on the value of certain marital assets, trial court should rely on the existing record and receive additional evidence and entertain argument only as necessary to correct errors identified by the court of appeals. [*Cooper v. Cooper*, 143 N.C.App. 322, 545 S.E.2d 775 (2001).]

c) In case that Supreme Court remanded for additional findings of fact in support of valuation of closely held corporation, trial court acted within its discretion on remand in determining that additional evidence on question was not necessary and in making additional findings based on evidence from original hearing. [*Patton v. Patton*, 88 N.C.App. 715, 364 S.E.2d 700 (1988).]

3. When case remanded to trial court for reconsideration of classification, valuation or distribution.

a) After finding a 19 month delay in the entry of the ED order, trial court ordered to give parties an opportunity to offer evidence on the changes, if any, in value of the marital property since the ED trial. [*Wall v. Wall*, 140 N.C.App. 303, 536 S.E.2d 647 (2000).]

b) On remand for additional findings of fact on net value, reclassification and a possible modification of the division of property, court of appeals left to the discretion of the trial court whether additional evidence or arguments of counsel would be necessary. [*Glaspy v. Glaspy,* 143 N.C.App. 435, 545 S.E.2d 782 (2001).]

c) On remand for reconsideration of distribution, trial court is not required to admit new evidence as to all distribution factors but should allow new evidence as to any factor that has changed at the time of the new ED hearing. [*Fox v. Fox*, 114 N.C.App. 125, 441 S.E.2d 613 (1994) (further noting that stipulations as to value from first trial not binding at new hearing).]

d) On remand for redetermination of what constitutes an equitable distribution, the trial court was to rely on the existing record but could hear additional arguments from the parties and take such additional evidence as the court found necessary. [*Smith v. Smith*, 111 N.C.App. 460, 433 S.E.2d 196 (1993), *rev'd in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994).]

e) When court of appeals upheld trial court's equal division but remanded for reclassification and valuation, it stated that its affirmance of the equal division should not be considered as the law of the case and binding on the trial court in making its new determination as to the appropriate disposition of the parties' property. Upon remand, the trial court must decide de novo the manner in which the marital property should be divided, including whether an equal distribution is equitable. [*Hall v. Hall*, 88 N.C.App. 297, 363 S.E.2d 189 (1987).]

IX. Enforcement of Judgment by Civil Contempt

A. Civil contempt available for enforcement.

1. The court may enforce a judgment of equitable distribution by civil contempt. [*Conrad v. Conrad,* 82 N.C.App. 758, 348 S.E.2d 349 (1986).]

2. A consent judgment that has been adopted by the court also may be enforced by civil contempt. [*Watson v. Watson*, 187 N.C.App. 55, 652 S.E.2d 310 (2007), *review denied*, 662 S.E.2d 551 (2008); *Hartsell v. Hartsell*, 99 N.C.App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991).]

3. When contempt proceedings were clearly civil in nature, wife was not entitled to the procedural and evidentiary safeguards required in a criminal contempt proceeding. Notice was adequate even though the notice of hearing did not clearly state whether the proceedings were criminal or civil. [*Watson v. Watson*, 187 N.C.App. 55, 652 S.E.2d 310 (2007), *review denied*, 662 S.E.2d 551 (2008), *citing Hartsell*.]

4. A party can be found in contempt for violating the spirit and intent of an ED order. [*Middleton v. Middleton,* 159 N.C.App. 224, 583 S.E.2d 48 (2003) (trial court properly found husband in contempt of a consent judgment ordering sale of marital residence when he took willful and deliberate action to make the house unattractive and undesirable to prospective purchasers, rejecting husband's argument that he did not violate any specific provision of the consent agreement).]

5. The use of contempt to enforce an ED judgment is limited to matters over which the district court has jurisdiction. [*See Guerrier v. Guerrier,* 155 N.C.App. 154, 574 S.E.2d 69 (2002) (vacating portions of contempt and enforcement orders that removed father as custodian of Uniform Transfer to Minors Act accounts and required father to reimburse mother for funds father removed from those accounts; clerk of court had jurisdiction).]

6. An equitable distribution judgment is not enforceable by contempt pending appeal. [*See Guerrier v. Guerrier,* 155 N.C.App. 154, 574 S.E.2d 69 (2002) (noting in dicta that unlike child support, child custody and alimony, there is no statute on equitable distribution stating that orders of the trial court remain enforceable pending appeal).]

B. Findings.

1. In order to support the conclusion of willfulness necessary to support a judgment of civil contempt, the court must find that the contemnor has the present ability to comply with the court's order. [*Hartsell,* 99 N.C.App. at 385.]

2. Specific findings as to the contemnor's present means are preferable. [*Id.*]

3. Finding that wife had the present means and ability to satisfy credit card obligations that she had assumed responsibility for in a consent order was supported by competent evidence that wife had in excess of $580,000 of equity in real estate in her name individually. [*Watson v. Watson,* 187 N.C.App. 55, 652 S.E.2d 310 (2007), *review denied,* 662 S.E.2d 551 (2008).]

C. Attorney fees.

1. The court may award reasonable attorney fees to the party seeking to enforce the ED order by contempt proceedings, although there can be no award for fees incurred in obtaining the ED order in the first instance. [*Hartsell,* 99 N.C.App. at 390.]

2. Contemnor can be required to pay an award of attorney fees as a condition of purging himself of contempt. [*Watson v. Watson,* 187 N.C.App. 55, 652 S.E.2d 310 (2007), *review denied,* 662 S.E.2d 551 (2008) (wife ordered to pay $11,235.53 towards plaintiff's counsel fees as a condition of purging herself of contempt); *Conrad,* 82 N.C.App. at 759-60; *see also Middleton v. Middleton,* 159 N.C.App. 224, 583 S.E.2d 48 (2003) (district court authorized to award attorney fees as a condition of purging contempt for failure to comply with an ED order).]

3. While it is proper for a court to award attorney fees in a contempt proceeding, a court has no authority to award costs to a private party. Order for wife to pay cost of husband's CPA expert witness reversed. [*Watson v. Watson,* 187 N.C.App. 55, 652 S.E.2d 310 (2007), *review denied,* 662 S.E.2d 551 (2008).]

D. Compensatory damages not available.

1. In *Hartsell,* the court of appeals found the trial court erred when it awarded the wife damages for repair and clean-up of a home the husband was to deliver in "tidy" condition. [*Hartsell*, 99 N.C.App. at 391-92.]

2. The *Hartsell* court distinguished *Conrad*, where as a condition of purging himself from contempt for refusing to deliver certain stock certificates, the court ordered the husband to pay the wife the present value of that stock, which compensated her for any stock splits and dividends she would have received if the husband had complied with the original order. Limiting *Conrad* to its facts, the *Hartsell* court reconciled the *Conrad* case by noting that an order requiring transfer of the actual stock certificates would have accomplished the same thing, as the transfer would necessarily have included passive appreciation of the stock.

E. Standard of review on appeal.

1. Standard of review in a contempt proceeding is limited to determining whether there is competent evidence to support the findings of fact and whether

the findings support the conclusions of law. [*Middleton v. Middleton*, 159 N.C.App. 224, 583 S.E.2d 48 (2003), *citing Miller v. Miller*, 153 N.C.App. 40, 568 S.E.2d 914 (2002).]