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Equitable Distribution

Conquering This 3-Step Process on Your Exam

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I. **Introduction**: TOC

"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 (1985).

Equitable distribution is a 3-step process:

1. Classification (classifying the property);
2. Valuation (calculating the net value of the property); and
3. Distribution (distributing the property in an equitable manner).

The Court must take the steps in order.

Statutes and case law govern each step of the process. Presumptions and burdens are paramount. Ultimately, equitable distribution seeks to distribute, in an equitable manner, marital property between spouses.

II. Classification: TOC

A. Types: Property is classified as marital, separate, and divisible. Courts use the term "mixed property" to describe property with both marital and separate components.

B. Recent Changes to Definitions: Statutory definitions of "marital," "separate," and "divisible property" were amended effective October 1, 2025. Changes to marital and divisible property were not substantive. Changes to separate property were substantive.

C. Marital Property: "All real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property in accordance with this subsection. Marital property includes all vested and nonvested pension and retirement rights and benefits, vested and nonvested deferred compensation rights and benefits, and vested and nonvested military pensions eligible under the federal Uniformed Services Former Spouses Protection Act. It is presumed that all property acquired after the date of marriage and before the date of separation is marital property except property that is separate property under this subsection. It is presumed that all real property creating a tenancy by the entirety acquired after the date of marriage and before the date of separation is marital property. Either presumption may be rebutted by the greater weight of the evidence." N.C. Gen. Stat. § 50-20(b)(1b).

D. Separate Property: "All real and personal property acquired by a spouse before marriage or acquired by a spouse by devise, descent, or gift during the course of the marriage. However, property, other than real property, acquired by gift from the other spouse during the course of the marriage is considered separate property only if this intent is expressly stated in writing. Real property acquired by gift from the other spouse during the course of the marriage is considered separate property only if this intent is expressly stated in a written agreement separate from the conveyance in accordance with subsection (d) of this section. The act of conveying property from one spouse to the other does not in itself state this intent. Property acquired in exchange for separate property remains separate property regardless of whether the title is in the name of one or both spouses and is not considered marital property unless the intent for the property to become marital property is expressly stated in writing. The act of acquiring the property does not in itself state this intent. The increase in value of separate property and the income derived from separate property is considered separate property. All professional licenses and business licenses that would terminate on transfer are considered separate property." N.C. Gen. Stat. § 50-20(b)(2) (substantive changes shown with emphasis added).

1. Effect of Amendment: A deed alone is insufficient to convert real property from marital to separate when a spouse conveys real property to the other during the marriage. A separate written agreement must be signed and acknowledged by the spouses. N.C. Gen. Stat. § 50-20(b)(2).

   Also, a deed alone is insufficient to waive equitable distribution rights to the real property being conveyed. The waiver language must be in a separate written agreement that is signed and acknowledged by the spouses. N.C. Gen. Stat. § 39-13.3(a)(2); N.C. Gen. Stat. § 50-20(b)(2).

E. Divisible Property: "All real and personal property as set forth below:

   a. All appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value that is the result of postseparation actions or activities of a spouse is not treated as divisible property.

   b. All property, property rights, or any portion thereof received after the date of separation but before the date of distribution that was acquired as a result of the efforts of either spouse during the marriage and before the date of separation, including, but not limited to, commissions, bonuses, and contractual rights.

   c. Passive income from marital property received after the date of separation, including, but not limited to, interest and dividends.

   d. Passive increases and passive decreases in marital debt and financing charges and interest related to marital debt." N.C. Gen. Stat. § 50-20(b)(1a).

F. Mixed Property: Undefined by statute. Courts use the term "mixed property" to describe property with both marital and separate components.

G. Marital Debt: Undefined by statute. "Marital debt" is a debt incurred during the marriage and before DOS, by at least one spouse, for the "joint benefit" of the spouses. *Jessee v. Jessee*, 212 N.C. App. 426 (2011).

H. Divisible Debt: "Passive increases and passive decreases in marital debt and financing charges and interest related to marital debt." N.C. Gen. Stat. § 50-20(b)(1a)d.

I. Burdens / Presumptions:

1. A spouse claiming property is marital has the burden to prove by a preponderance: (A) the property was acquired during the marriage and before DOS; (B) the property was owned on DOS by at least one spouse; and (C) the value of the property on DOS.

2. If the burden is met, the entire DOS value is presumed marital.

3. The burden then shifts to the spouse who claims the property is separate, either in whole or part.

4. If both spouses meet their burdens, the property is classified as separate, either in whole or part.

5. "All property" acquired during the marriage and before DOS is presumed marital except property that is separate. N.C. Gen. Stat. § 50-20(b)(1b).

6. Gifts of personal property between spouses are considered marital unless an intent for it to be separate is expressly stated in writing by the donor.

   a. However, when a spouse deposits separate property funds into a joint account, that act, by itself, is insufficient to show a gift. *Manes v. Harrison-Manes*, 79 N.C. App. 170 (1986). Nevertheless, a spouse claiming a separate property interest in such account has the burden to trace out such interest on DOS.

7. Gifts of real property between spouses are considered marital unless an intent for it to be separate is expressly stated in a separate written agreement that is signed and acknowledged by the spouses. The deed itself does not count.

   a. All real property acquired as tenancy by the entirety during the marriage and before DOS is presumed marital unless a contrary intention is expressed in the conveyance. N.C. Gen. Stat. § 50-20(b)(1b); *McLean v. McLean*, 323 N.C. 543 (1988).

8. Gifts from a third party to a spouse during the marriage are considered separate property. N.C. Gen. Stat. § 50-20(b)(2).

   a. However, gifts to both spouses jointly during the marriage are considered marital property. *Burnett v. Burnett*, 122 N.C. App. 712 (1996).

b. Gifts to a spouse from that spouse's parent during the marriage is presumed separate. *Joyce v. Joyce*, 180 N.C. App. 647 (2006). The burden of rebutting the presumption is on the spouse seeking a marital classification. The presumption may be rebutted by showing that it was not a gift, it was a gift to both spouses, or it was a gift to the other spouse.

i. Example: A spouse may show the other spouse did not receive a gift from his or her parent because there was consideration for the transaction (i.e., donative intent fails). *Id.*

9. Property acquired by will or intestate succession from a third party to a spouse during the marriage is considered separate. N.C. Gen. Stat. § 50-20(b)(2).

10. An increase in the value of separate property during the marriage and before DOS—while initially presumed marital by statute—is considered separate if the spouse can show that the increase was passive (e.g., market forces) rather than through marital property, talent, or labor of a spouse.

a. For investment accounts, a multi-factor test is used to determine whether an increase was marital by determining if a spouse provided "substantial activity" during the marriage in managing the accounts. *O'Brien v. O'Brien*, 131 N.C. App. 411 (1998) (referring to factors of: (1) the nature of the investment; (2) the extent to which the investment decisions are made only by the party or parties, made by the party or parties in consultation with their investment broker, or solely made by the investment broker; (3) the frequency of contact between the investment broker and the parties; (4) whether the parties routinely made investment decisions in accordance with the recommendation of the investment broker, and the frequency with which the spouses made investment decisions contrary to the advice of the investment broker; (5) whether the spouses conducted their own research and regularly monitored the investments in their accounts, or whether they primarily relied on information supplied by the investment broker; and (6) whether the decisions or other activities, if any, made solely by the parties directly contributed to the increased value of the investment account).

11. All changes in the value of marital and divisible property are presumed to be divisible property unless the Court finds the change was attributable to post-DOS actions of one spouse. If the Court is unable to find the same, the presumption has not been rebutted and must control. *Romulus v. Romulus*, 215 N.C. App. 495 (2011).

12. Property alleged to be "mixed" (i.e., having both marital and separate components) due to an increase in the value of separate property during the marriage uses the active/passive analysis.

13. Property alleged to be "mixed" due to it being acquired by both marital and separate property uses the source of funds analysis.

    a. Source of Funds: If both the marital estate and a separate estate contributed to the acquisition of a particular property, each estate is entitled to its proportionate return in the total investment in the property. Acquisition of property may be ongoing, such as a mortgage loan. Each estate is entitled to retain, as separate or marital property, the contribution amount each estate made as well as its proportionate return on the investment. The contribution amount includes down payments and mortgage principal payments, not the remaining mortgage balance.

        i. Example: The Court has approved, but not required, the use of the following formula to calculate the marital and separate property interests of beach lots under *Mishler v. Mishler*, 90 N.C. App. 72 (1988):

$$\text{Net Value on DOS} \times \frac{\text{Total Marital Contribution}}{\text{Total Contribution*}} = \text{Value of Marital Interest}$$

* Includes down payments, payments on principal, and passive appreciation from date of purchase to DOM.

$$\text{Net Value on DOS} - \text{Value of Marital Interest} = \text{Value of Separate Interest}$$

14. A spouse claiming a debt is marital must prove by a preponderance: (A) the debt was owed by at least one spouse; (B) was incurred during the marriage and before DOS by at least one spouse; (C) was incurred for the "joint benefit" of the spouses; and (D) the amount owed on DOS.

    a. A "joint benefit" is not presumed based solely on the fact that a debt is in the name of both spouses. *Miller v. Miller*, 97 N.C. App. 77 (1990).

    b. A debt is marital if incurred after DOS by at least one spouse to pay off a marital debt existing on DOS. *Huguelet v. Huguelet*, 113 N.C. App. 533 (1994).

c. The Court must distribute a marital debt even if it was paid in full by the trial date. *Loving v. Loving*, 118 N.C. App. 501 (1995).

15. Property acquired after DOS as a result of an exchange of marital property is marital. *Freeman v. Freeman*, 107 N.C. App. 644 (1992).

16. Property acquired after DOS as a result of an exchange of marital funds is marital to the extent of the contribution. *Brackney v. Brackney*, 199 N.C. App. 375 (2009).

17. Property acquired after DOS by a spouse, an attorney, through a contingency fee of a settlement was neither marital nor divisible property because the spouse did not have any rights to the property as of DOS. The spouse did not have a right to receive the property as there was no guarantee of recovery in the case notwithstanding that the contingency fee contract was entered into before DOS and the work was done before DOS. *Green v. Green*, 255 N.C. App. 719 (2017).

18. Post-DOS Debt Payments: If the Court distributes the property to the spouse who did not have post-DOS use, then that spouse's post-DOS debt payments thereon with non-marital funds are entitled to a credit or distributional factor. *Hill v. Sanderson*, 244 N.C. App. 219 (2015). If the spouse had post-DOS use, then that spouse is not entitled to a credit or distributional factor although the Court may, in its discretion, still consider whether to give such payments consideration as a distributional factor. *Id.*

a. Payments made on a mortgage pursuant to a PSS or other support court order do not receive credit under equitable distribution. *Hill v. Hill*, 229 N.C. App. 511 (2013).

19. Classification of certain assets:

a. A professional license is separate property. *Dorton v. Dorton*, 77 N.C. App. 667 (1985). However, the license may be an unequal distributional factor. N.C. Gen. Stat. § 50-20(c)(1).

b. A 529 Account (Education Savings Plan) maintained for a child's benefit is marital if funded with marital monies. *Berens v. Berens*, 260 N.C. App. 467 (2018).

c. An UTMA Account (Uniform Transfers to Minors Act Account) is not marital as the child is the owner.

d. Military disability pay is separate property. *Hillard v. Hillard*, 223 N.C. App. 20 (2012). However, it can be an unequal distributional factor, although not dollar-for-dollar. *Halstead v. Halstead*, 164 N.C. App. 543 (2004).

e. Social Security benefits cannot be distributed in E.D. *Cruise v. Cruise*, 92 N.C. App. 586 (1989).

f. Social Security disability benefits are separate property. *Cooper v. Cooper*, 143 N.C. App. 322 (2001).

g. Workers' compensation benefits are marital if they compensate for medical expenses, lost wages, or loss of earning capacity during the marriage and before DOS. *Freeman v. Freeman*, 107 N.C. App. 644 (1992). If they compensate for the same post-DOS, they are separate. *Id.*

h. Personal injury proceeds are marital if they compensate for medical expenses (paid with marital funds), lost wages, and loss of earning capacity during the marriage and before DOS. Any portion compensating for pain and suffering is separate. Any portion compensating for post-DOS lost wages, post-DOS loss of earning capacity, and post-DOS medical expenses is separate. Any portion compensating for the loss of services or consortium for the non-injured spouse is separate. *Johnson v. Johnson*, 317 N.C. 437 (1986).

III. Valuation: TOC

A. The Court must find the net value of marital property as of DOS. *Zurosky v. Shaffer*, 236 N.C. App. 219 (2014).

B. The Court must find the net value of divisible property as of the date of distribution. *Id.*

C. The Court has the authority to reject both spouses' valuations and independently value the property as long as it uses a specific and clear methodology. *Williamson v. Williamson*, 217 N.C. App. 375 (2011).

D. An owner is competent to testify as to the value of his or her real property unless it affirmatively appears that the owner does not know the value. *Lund v. Lund*, 244 N.C. App. 279 (2015).

E. Absent objection, tax value can be considered to establish value of real property. *Edwards v. Edwards*, 251 N.C. App. 549 (2017). Otherwise, it the same is improper as tax value does not involve consultation with the owner and generally uses a uniform rather than specific valuation of property. *Id.*

F. Absent objection, an E.D. Inventory Affidavit introduced at trial can serve as evidence that property was acquired during the marriage even though no other evidence was received of an acquisition date. *Kaylor v. Kaylor*, 296 N.C. App. 80 (2024).

G. In valuing a business, the Court should consider the following components of the practice: (1) fixed assets including cash, furniture, equipment, and other supplies; (2) other assets including accounts receivable and value of work in progress; (3) goodwill, if any; and (4) liabilities. *Poore v. Poore*, 75 N.C. App. 414 (1985).

1. Goodwill has been defined as "the expectation of continued public patronage." *Poore v. Poore*, 75 N.C. App. 414, 420 (1985). Goodwill is divided into personal goodwill and enterprise goodwill.

a. Personal goodwill is associated with an individual and represents his or her reputation, knowledge, and skill. Personal goodwill does not qualify as marital property and is, therefore, not subject to E.D. *Sneed v. Sneed*, ___ N.C. ___, 2026 N.C. Lexis 937 (Aug. 14, 2026).

b. Enterprise goodwill is associated with the business entity and exists independently of an individual's efforts, focusing on the established relations with employees, customers, and suppliers. At present, enterprise goodwill is subject to E.D. *Sneed v. Sneed*, ___ N.C. ___, 2026 N.C. Lexis 937 (Aug. 14, 2026).

H. Retirement Benefits:

1. If a retirement benefit is determined, in whole or part, by years of employment (i.e., generally known as a "defined benefit" plan), the Court must determine the marital portion by coverture fraction. N.C. Gen. Stat. § 50-20.1(d).

a. Coverture Fraction:

Total years of marriage up to DOS while the participant was in the plan.

Total years the participant was in the plan.

2. Distribution of retirement benefits must include gains and losses on the prorated portion of the benefit vested on DOS and cost-of-living adjustments and similar enhancements to the participant's benefit. N.C. Gen. Stat. § 50-20.1(d).

3. If the Court equally divides an interest in a defined benefit plan, the Court is not required to determine the total value before classifying and distributing it. N.C. Gen. Stat. § 50-20.1(d). Otherwise, the Court must calculate the present value of the vested pension as of DOS, taking into account the participant-spouse's life expectancy. The Court then applies the coverture fraction to the present value as of DOS to determine the marital portion.

4. For an IRA and retirement accounts based only contributions held in readily determinable account balances (i.e., "defined contribution" plans), the Court must determine the marital portion by determining the amount of the account balance due to contributions made during the marriage and before DOS, together with the gains and losses thereon. N.C. Gen. Stat. § 50-20.1(d1).

5. The Court cannot award an interest in more than 50% of retirement benefits unless the plan or benefit does not prohibit the same and at least one of the following occurs: (1) other assets are insufficient for distribution; (2) there is difficulty in distributing an asset or interest in a business or profession; (3) it is economically desirable for one party to retain an asset or interest free from any claim or interference by the other party; (4) more than one retirement fund is involved, but the benefits award does not exceed 50% of all total benefits of all plans; or (5) both parties consent. N.C. Gen. Stat. § 50-20.1(e).

6. There is a rebuttable presumption that a "separate interest" approach must be used to divide a retirement benefit. N.C. Gen. Stat. § 50-20.1(f1). A separate interest allows an alternate payee to receive benefits independent from the benefits received by the participant. *Id.*

7. There is no statute of limitations to enter a QDRO after an E.D. Judgment. *Welch v. Welch*, 288 N.C. App. 627 (2023). A QDRO implements rather than enforces a judgment and, therefore, is not an "action on a judgment" subject to the 10-year statute of limitations.

IV. <u>Interim Distribution</u>: TOC

A. Unless good cause is shown that there should not be an interim distribution, the Court may enter orders dividing marital and divisible property and debt at any time after the filing of E.D. claim and prior to final judgment. The Court may also declare what is separate property. N.C. Gen. Stat. § 50-20(i1).

B. An interim distribution must be taken into consideration at trial and proper credit given. N.C. Gen. Stat. § 50-20(i1).

1. However, an interim distribution order may provide for the final distribution of property at a certain value and preclude post-DOS appreciation as divisible property. *Wirth v. Wirth*, 193 N.C. App. 657 (2008).

2. For best practice, the interim distribution order should use language which "preserves" a spouse's right to an equitable distribution of the asset, both as marital and divisible property. *Brackney v. Brackney*, 199 N.C. App. 375 (2009).

V. <u>Distribution</u>: TOC

A. A rebuttable presumption exists that an equal division of property is equitable. The spouse seeking an unequal distribution has the burden to show an equal division would not be equitable.

B. When evidence is presented from which the Court could determine an equal division would be inequitable, the Court must consider all distributional factors set out in N.C. Gen. Stat. § 50-20(c) and make sufficient findings for each factor where evidence was offered. *Davis v. Sineath*, 129 N.C. App. 353 (1998).

C. The Court is not required to value any distributional factor. *Gum v. Gum*, 107 N.C. App. 734 (1992).

D. Entry of default against a spouse does not preclude an unequal distribution in his or her favor. *Arrington v. Arrington*, 298 N.C. App. 313 (2025).

E. The Court cannot distribute or order a spouse to pay a separate debt. *Gallagher-Masonis v. Masonis*, 297 N.C. App. 272 (2024). However, the Court can order the spouse to pay that separate debt for purposes of alimony or child support. *Id.*

F. The Court is not required to order a spouse to refinance the mortgage on the marital residence when the Court distributed the debt to one spouse. *Green v. Green*, 255 N.C. App. 719 (2017).

G. There are 14 unequal distributional factors by statute:

1. Income, property, and liabilities of each party at the time the division of property is to become effective.

2. Obligation for support arising out of a prior marriage.

3. Duration of marriage, age, and physical and mental health of both parties.

4. Need of a parent with custody of a child of the marriage to occupy or own the marital residence and to use or own its household effects.

5. Expectation of pension, retirement, or other deferred compensation rights that are not marital.

6. Equitable claim to, interest in, or direct or indirect contribution made to the acquisition of the marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner, or homemaker.

7. Direct or indirect contribution made by a spouse to help educate or develop the career potential of the other spouse.

8. Direct contribution to an increase in value of separate property that occurs during the course of the marriage.

9. Liquid or nonliquid character of all marital and divisible property.

10. Difficulty of evaluating any component asset or any interest in a business, corporation, or profession, and the economic desirability of retaining the asset or interest, intact and free from any claim or interference by the other party.

11. Tax consequences to each party, including those federal and State tax consequences that would have been incurred if the marital and divisible property had been sold or liquidated on the date of valuation. The trial court may, however, in its discretion, consider whether or when the tax consequences are reasonably likely to occur in determining the equitable value deemed appropriate for this factor.

11a. Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue, or convert the marital property or divisible property, or both, during the period after separation of the parties and before the time of distribution.

11b. In the event of the death of either party prior to the entry of any order for the distribution of property made pursuant to this subsection:

a. Property passing to surviving spouse by will or through intestacy due to the death of a spouse.

b. Property held as tenants by the entirety or as joint tenants with rights of survivorship passing to surviving spouse due to the death of a spouse.

c. Property passing to surviving spouse from life insurance, individual retirement accounts, pension or profit-sharing plans, any private or governmental retirement plan or annuity of which the decedent controlled the designation of beneficiary (excluding any benefits under the federal social security system), or any other retirement accounts or contracts, due to the death of a spouse.

d. Surviving spouse's right to claim an elective share pursuant to G.S. 30-3.1 through G.S. 30-33, unless otherwise waived.

12. Any other factor that the Court finds just and proper.

H. Marital fault which adversely affects the value of marital assets may be considered as an unequal distributional factor, such as acts of waste or devaluation. *Kaylor v. Kaylor*, 296 N.C. App. 80 (2024).

VI. Distributive Award: TOC

A. Distributive Award: "Payments that are payable either in a lump sum or over a period of time in fixed amounts, but the term does not include alimony payments or similar payments for support or maintenance of a spouse or child." N.C. Gen. Stat. § 50-20(b)(1).

B. The Court must classify, value, and distribute all marital and divisible property before determining whether a distributive award is required. *Miller v. Miller*, 253 N.C. App. 85 (2017).

C. A rebuttable presumption exists that an in-kind distribution of marital or divisible property is equitable. N.C. Gen. Stat. § 50-20(e).

D. The Court must find the spouse has the ability to pay the distributive award.

1. Example: The Court found that refinancing the marital residence would provide the funds to pay a distributive award, among other sources of funds. *Allen v. Allen*, 168 N.C. App. 368 (2005).

E. A distributive award cannot be reduced to a money judgment as part of an initial equitable distribution judgment as such amounts are not yet past due. *Crowell v. Crowell*, 289 N.C. App. 112 (2023). Once amounts are past due, a party can seek a money judgment. *Id.*

F. The Court cannot order a spouse to sell separate property to pay a distributive award. *Crowell v. Crowell*, 372 N.C. 362 (2019). However, the Court may cite separate property in finding a spouse has the ability to pay the same. *Crowell v. Crowell*, 289 N.C. App. 112 (2023).

G. A distributive award payable over time may be secured by a lien on specific property. N.C. Gen. Stat. § 50-20(e).

H. A distributive award cannot be made payable for more than 6 years after entry of an absolute divorce unless the Court finds that a payor-spouse has a legal or business impediment or that there is overriding social policy which prevents the distribution within 6 years. *Harris v. Harris*, 84 N.C. App. 353 (1987).

1. This time period is based upon federal regulations which treat payments between former spouses within 6 years of the divorce as a transfer of property related to the cessation of the marriage rather than ordinary income. 26 C.F.R. § 1.1041-1T(b).

VII. Procedure: TOC

A. E.D. claim may be filed only when the spouses are separated. N.C. Gen. Stat. § 50-21(a). This is a subject matter jurisdiction issue. N.C. Gen. Stat. § 50-20(k).

1. Injunctive relief to protect marital, divisible, or separate property may be sought prior to separation by alleging an E.D. claim will be filed when it is timely to do so. N.C. Gen. Stat. § 50-20(i).

B. E.D. claim must be asserted before entry of an absolute divorce. N.C. Gen. Stat. § 50-11(e).

1. Exceptions: A spouse may file E.D. claim within 6 months after entry of an absolute divorce if: (1) he or she was served the divorce action by publication and never appeared; or (2) the Court lacked personal jurisdiction

in the divorce action or lacked jurisdiction to dispose of the property. N.C. Gen. Stat. § 50-11(e) and (f).

2. Note: An absolute divorce is entered on the date it is signed by the judge and filed with the clerk. N.C. R. Civ. Pro. 58.

3. The one-year savings clause of Rule 41 does not apply to a voluntary dismissal of E.D. claim filed prior to entry of an absolute divorce. *Rhue v. Pace*, 165 N.C. App. 423 (2004). The one-year savings clause does apply if the dismissal was filed after entry of an absolute divorce. *Stegall v. Stegall*, 336 N.C. 473 (1994).

C. E.D. claim may be filed as a separate civil action, joined with any other claim in a Chapter 50 action, or by a motion in the cause of a Chapter 50 action. N.C. Gen. Stat. § 50-21(a).

1. Subject matter jurisdiction over an action terminates after entry of a final judgment unless a proper post-judgment motion is made (e.g., under Rules 59, 60, 70, etc.).

2. Oral motion is insufficient to assert E.D. claim. *Webb v. Webb*, 188 N.C. App. 621 (2008). *But see Stone v. Stone*, 96 N.C. App. 633 (1989) (holding trial judge did not have authority to reverse another trial judge's reservation of E.D. in an absolute divorce judgment upon an oral motion for E.D.).

D. Venue of E.D. claim is proper in the county where either spouse resides. N.C. Gen. Stat. § 1-82. The Court may change venue for convenience of witnesses, among other considerations. N.C. Gen. Stat. § 1-83.

E. Within 90 days of service of E.D. claim, the asserting party must also serve an E.D. Inventory Affidavit listing all marital property, separate property (of that party), and the fair market values of such property as of DOS. Within 30 days after service of the Affidavit, the responding party must serve an Affidavit with the same information. N.C. Gen. Stat. § 50-21(a).

1. The Affidavits are deemed to be in the nature of answering interrogatories. Accordingly, failure to supply information subjects a spouse to Rules 26, 33, and 37. Rule 37 governs discovery sanctions. Rule 11 also applies.

2. The Affidavits are subject to amendment and are not binding at trial.

F. Within 120 days of service of an E.D. claim, the asserting party must apply to the Court to conduct a scheduling and discovery conference. N.C. Gen. Stat. § 50-21(d). At this conference, the Court can consider applications to determine DOS, determine a discovery schedule, and rule on motions to appoint experts. *Id.*

G. After the scheduling conference, an initial pre-trial conference is held wherein the Court sets a completion date for discovery, mediation, and any applicable motions. N.C. Gen. Stat. § 50-21(d). The Court will also schedule a final pre-trial conference and trial date. *Id.*

H. Sanctions are available in E.D. by motion or the Court's initiative when a party willfully obstructed or unreasonably delayed, or attempted to do so, any proceeding or discovery and the same was prejudicial to the opposing party. N.C. Gen. Stat. § 50-21(e). Sanctions may include, *inter alia*, attorney fees and expert costs. *Id.*

   1. When the Court orders a party to pay expert costs as a sanction, the expert is not required to appear pursuant to a subpoena. *MacDonald v. MacDonald*, ___ N.C. App. ___, 2026 N.C. App. Lexis 375 (May 6, 2026); N.C. Gen. Stat. 7A-314 (requiring a subpoena in order to request travel expenses of an expert to testify at trial);

I. Attorney fees in E.D. are limited and available only when a spouse is: (1) ordered to return separate property to the other spouse (N.C. Gen. Stat. §50-21(i)); (2) sanctioned for delaying or obstructing E.D. (N.C. Gen. Stat. § 50-21(e)); or (3) held in civil contempt for violation of E.D. order, although the fees cannot be from obtaining the initial E.D. order (*Hartsell v. Hartsell*, 99 N.C. App. 380 (1990)). Payment of attorney fees may be a purge condition of civil contempt. *Watson v. Watson*, 187 N.C. App. 55 (2007).

J. There is no statute of limitations to file E.D. claim as long as spouses are not divorced. *Read v. Read*, 288 N.C. App. 376 (2023).

K. There is no right to a jury trial. *Kiser v. Kiser*, 325 N.C. 502 (1989).

L. Necessary Parties:

   1. A third-party who holds legal title to property claimed to be marital is a necessary party under Rule 19 of the North Carolina Rules of Civil Procedure. *Upchurch v. Upchurch*, 122 N.C. App. 172 (1998). Participation of that party is limited to the issue of ownership of that property. *Id.*

   2. Corporations and LLCs are necessary parties if the Court orders them to take certain actions. *Geoghagan v. Geoghagan*, 254 N.C. App. 247 (2017). It is unnecessary to join such entities when the issue concerns valuation and distribution of a spouse's interest therein. *Roesel v. Roesel*, ___ N.C. App. ___, 927 S.E.2d 739 (Feb. 18, 2026).

3. A revocable trust is not a necessary party if all settlors are named parties. *Face v. Face*, ___ N.C. ___, 2026 N.C. Lexis 915 (Aug. 14, 2026). It appears an irrevocable trust is a necessary party. *Id.*; *Upchurch v. Upchurch*, 122 N.C. App. 172 (1996).

M. Death of Spouse:

1. E.D. claim, whether filed or not, survives the death of a spouse so long as the parties are separated at the time of death. N.C. Gen. Stat. § 50-20(*l*)(1). If they resumed marital relations at the time of death, the E.D. claim is unavailable. *Casella v. Estate of Casella* (2009).

2. If E.D. action was not pending at death:

   a. The Personal Representative of the Estate must file E.D. action in District Court within one year of death. Otherwise, the claim is barred. N.C. Gen. Stat. § 50-20(*l*)(3).

   b. The surviving spouse must either: (A) file E.D. claim in District Court against the Personal Representative; or (B) file a written claim with the Personal Representative as provided by Chapter 28A. N.C. Gen. Stat. § 28A-19-19.

      i. E.D. action or written claim must be filed within the time allowed for the presentation of claims against the Estate under Chapter 28A. Generally, the time allowed is within 90 days of the first publication date of a notice to creditors. N.C. Gen. Stat. § 28A-19-3(a).

      ii. If decedent's real property is claimed to be marital, the heirs or devisees are necessary parties as title vested in them as a matter of law. *Swindell v. Lewis*, 82 N.C. App. 423 (1986).

3. If E.D. action was pending at death:

   a. The Personal Representative must be substituted as a party for the decedent spouse within the time allowed for the presentation of claims under Chapter 28A. The motion for substitution counts as the presentation of the claim. N.C. Gen. Stat. § 28A-19-1(c).

4. Death of a spouse can be an unequal distributional factor, including property received by a surviving spouse by will, intestate succession, elective share, life insurance, and other property received due to death. N.C. Gen. Stat. § 50-20(c)(11b).

VIII. **Extra Credit**: TOC

A. Question: Does the Court have the authority to order the sale of real property?

B. Answer: I believe so.

1. The Court has authority to order that real property be sold and the proceeds distributed, even when both spouses requested that they be distributed the marital home as long as the trial court first classifies and values the property as of DOS. *Wall v. Wall*, 140 N.C. App. 303 (2000).

   a. *Wall* reviewed prior decisions which implicitly recognized the Court's power to order a sale.

      i. Trial court did not err in forbidding either party to receive a commission or broker's fee on the sale of the marital home after ordering the home sold. *Dorton v. Dorton*, 77 N.C. App. 667 (1985).

      ii. Trial court erred in ordering the sale of the marital home for not less than the appraised value without first determining its value. *Soares v. Soares*, 86 N.C. App. 369 (1987).

      iii. Trial court did not satisfy the valuation requirement when it appointed commissioners to sell the property at issue and divide the proceeds without finding DOS value. *Thomas v. Thomas*, 102 N.C. App. 127 (1991).

   b. *But see Miller v. Miller*, 253 N.C. App. 85, 105 (2017) (noting trial court's "role is to classify, value, and distribute property, not simply to order that it be sold.") (emphasis added).

      i. However, "[A] panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court." *In re Civil Penalty*, 324 N.C. 373, 384 (1989).

IX. Conclusion: TOC