

GENERAL ASSEMBLY OF NORTH CAROLINA
1997 SESSION

S.L. 1997-302
HOUSE BILL 533

AN ACT TO ADD "DIVISIBLE PROPERTY" AS A CATEGORY OF PROPERTY SUBJECT TO EQUITABLE DISTRIBUTION, TO CREATE A REBUTTABLE PRESUMPTION THAT AN IN-KIND DISTRIBUTION OF PROPERTY IS EQUITABLE, TO ENCOURAGE INTERIM DISTRIBUTION OF PROPERTY OR DEBT, AND TO ALLOW CERTAIN EVIDENCE OF THE VALUE OF MARITAL PROPERTY, AS RECOMMENDED BY THE FAMILY LAW SECTION OF THE NORTH CAROLINA BAR ASSOCIATION.

The General Assembly of North Carolina enacts:

Section 1. G.S. 50-20 reads as rewritten:

"§ 50-20. Distribution by court of marital property upon divorce.

(a) 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 the marital property and divisible property between the parties in accordance with the provisions of this section.

(b) For purposes of this section:

- (1) 'Marital property' means 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 subdivision (2) or (4) of this subsection. Marital property includes all vested pension, retirement, and other deferred compensation rights, including 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 which is separate property under subdivision (2) of this subsection. This presumption may be rebutted by the greater weight of the evidence.
- (2) 'Separate property' means all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage. However, property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance. Property acquired in exchange for separate property shall remain separate property regardless of

whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance. The increase in value of separate property and the income derived from separate property shall be considered separate property. All professional licenses and business licenses which would terminate on transfer shall be considered separate property. The expectation of nonvested pension, retirement, or other deferred compensation rights shall be considered separate property.

- (3) 'Distributive award' means payments that are payable either in a lump sum or over a period of time in fixed amounts, but shall not include alimony payments or other similar payments for support and maintenance which are treated as ordinary income to the recipient under the Internal Revenue Code.

The distributive award of vested pension, retirement, and other deferred compensation benefits may be made payable:

- a. As a lump sum by agreement;
- b. Over a period of time in fixed amounts by agreement;
- c. As a prorated portion of the benefits made to the designated recipient at the time the party against whom the award is made actually begins to receive the benefits; or
- d. By awarding a larger portion of other assets to the party not receiving the benefits, and a smaller share of other assets to the party entitled to receive the benefits.

Notwithstanding the foregoing, the court shall not require the administrator of the fund or plan involved to make any payments until the party against whom the award is made actually begins to receive the benefits unless a plan under the Employee Retirement Income Security Act (ERISA) permits earlier distribution. The award shall be determined using the proportion of time the marriage existed, (up to the date of separation of the parties), simultaneously with the employment which earned the vested pension, retirement, or deferred compensation benefit, to the total amount of time of employment. The award shall be based on the vested accrued benefit, as provided by the plan or fund, calculated as of the date of separation, and shall not include contributions, years of service or compensation which may accrue after the date of separation. The award shall include gains and losses on the prorated portion of the benefit vested at the date of separation. No award shall exceed fifty percent (50%) of the benefits the person against whom the award is made is entitled to receive as vested pension, retirement, or other deferred compensation benefits, except that an award may exceed fifty percent (50%) if (i) other assets subject to equitable distribution are insufficient; or (ii) there is difficulty in distributing any asset or any interest in a business,

corporation, or profession; or (iii) it is economically desirable for one party to retain an asset or interest that is intact and free from any claim or interference by the other party; or (iv) more than one pension or retirement system or deferred compensation plan or fund is involved, but the benefits awarded may not exceed fifty percent (50%) of the total benefits of all the plans added together; or (v) both parties consent. In no event shall an award exceed fifty percent (50%) if a plan prohibits an award in excess of fifty percent (50%).

In the event the person receiving the award dies, the unpaid balance, if any, of the award shall pass to the beneficiaries of the recipient by will, if any, or by intestate succession, or by beneficiary designation with the plan consistent with the terms of the plan unless the plan prohibits such a designation. In the event the person against whom the award is made dies, the award to the recipient shall remain payable to the extent permitted by the pension or retirement system or deferred compensation plan or fund involved.

The Court may require distribution of the award by means of a qualified domestic relations order, as defined in Section 414(p) of the Internal Revenue Code of 1986. To facilitate the calculation and payment of distributive awards, the administrator of the system, plan or fund may be ordered to certify the total contributions, years of service, and pension, retirement, or other deferred compensation benefits payable.

The provisions of this section and G.S. 50-21 shall apply to all pension, retirement, and other deferred compensation plans and funds, including military pensions eligible under the Federal Uniform Services Former Spouses Protection Act, and including funds administered by the State pursuant to Articles 84 through 88 of Chapter 58 and Chapters 120, 127A, 128, 135, 143, 143B, and 147 of the General Statutes, to the extent of a member's accrued benefit at the date of separation, as determined by the court.

(4) 'Divisible property' means all real and personal property as set forth below:

- a. All appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property.
- b. All property, property rights, or any portion thereof received after the date of separation but before the date of distribution that was acquired as a result of the efforts of either spouse during the marriage and before the date of separation, including,

but not limited to, commissions, bonuses, and contractual rights.

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

d. Increases in marital debt and financing charges and interest related to marital debt.

(c) There shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably. Factors the court shall consider under this subsection are as follows:

- (1) The income, property, and liabilities of each party at the time the division of property is to become effective;
- (2) Any obligation for support arising out of a prior marriage;
- (3) The duration of the marriage and the age and physical and mental health of both parties;
- (4) The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects;
- (5) The expectation of pension, retirement, or other deferred compensation rights, which is separate property;
- (6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such 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) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse;
- (8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage;
- (9) The liquid or nonliquid character of all marital property;
- (10) The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party;
- (11) The tax consequences to each party;
- (11a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert such marital property, during the period after separation of the parties and before the time of distribution; and
- (12) Any other factor which the court finds to be just and proper.

(c1) Notwithstanding any other provision of law, a second or subsequent spouse acquires no interest in the marital property of his or her spouse from a former marriage

until a final determination of equitable distribution is made in the marital property of the spouse's former marriage.

(d) Before, during or after marriage the parties may by written agreement, duly executed and acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1, or by a written agreement valid in the jurisdiction where executed, provide for distribution of the marital property in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties.

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

(f) The court shall provide for an equitable distribution without regard to alimony for either party or support of the children of both parties. After the determination of an equitable distribution, the court, upon request of either party, shall consider whether an order for alimony or child support should be modified or vacated pursuant to G.S. 50-16.9 or 50-13.7.

(g) If the court orders the transfer of real or personal property or an interest therein, the court may also enter an order which shall transfer title, as provided in G.S. 1A-1, Rule 70 and G.S. 1-228.

(h) If either party claims that any real property is marital property, that party may cause a notice of lis pendens to be recorded pursuant to Article 11 of Chapter 1 of the General Statutes. Any person whose conveyance or encumbrance is recorded or whose interest is obtained by descent, prior to the filing of the lis pendens, shall take the real property free of any claim resulting from the equitable distribution proceeding. 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 claim of the spouse against property subject to the notice of lis pendens can be satisfied by money damages.

(i) Upon filing an action or motion in the cause requesting an equitable distribution or alleging that an equitable distribution will be requested when it is timely to do so, a party may seek injunctive relief pursuant to G.S. 1A-1, Rule 65 and Chapter 1, Article 37, to prevent the disappearance, waste or conversion of property alleged to be marital property or separate property of the party seeking relief. 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 marital or separate property. Upon application by the owner of separate property which was removed from the marital

home or possession of its owner by the other spouse, the court may enter an order for reasonable counsel fees and costs of court incurred to regain its possession, but such fees shall not exceed the fair market value of the separate property at the time it was removed.

(i1) ~~For good cause shown, including, but not limited to, providing for the subsistence of a spouse while an action is pending, Unless good cause is shown that there should not be an interim distribution,~~ the ~~Court~~ court may, at any time after an action for equitable distribution has been filed and prior to the final judgment of equitable distribution, enter orders declaring what is separate property and may also enter orders dividing part of the marital property, divisible property or debt, or marital debt between the parties. The partial distribution may provide for a distributive ~~award.~~ award and may also provide for a distribution of marital property, marital debt, divisible property, or divisible debt. Any such orders entered shall be taken into consideration at trial and proper credit given.

Hearings held pursuant to this subsection may be held at sessions arranged by the chief district court judge pursuant to G.S. 7A-146 and, if held at such sessions, shall not be subject to the reporting requirements of G.S. 7A-198.

(j) In any order for the distribution of property made pursuant to this section, the court shall make written findings of fact that support the determination that the marital property has been equitably divided.

(k) The rights of the parties to an equitable distribution of marital property are a species of common ownership, the rights of the respective parties vesting at the time of the parties' separation."

Section 2. G.S. 50-21(b) reads as rewritten:

"(b) For purposes of equitable distribution, marital property shall be valued as of the date of the separation of the ~~parties.~~ parties, and evidence of preseparation and postseparation occurrences or values is competent as corroborative evidence of the value of marital property as of the date of the separation of the parties. Divisible property and divisible debt shall be valued as of the date of distribution."

Section 3. The amendments to G.S. 50-20(i1) made by this act become effective October 1, 1997, and apply to motions for interim distribution filed on or after that date but shall apply to divisible property and divisible debt only in actions for equitable distribution filed on or after October 1, 1997. The remainder of this act becomes effective October 1, 1997, and applies to actions for equitable distribution filed on or after that date.

In the General Assembly read three times and ratified this the 7th day of July, 1997.

s/ Marc Basnight
President Pro Tempore of the Senate

s/ Harold J. Brubaker
Speaker of the House of Representatives

s/ James B. Hunt, Jr.

Governor

Approved 9:00 a.m. this 16th day of July, 1997