

## **Equitable Distribution: Can we use the date of separation from the divorce judgment?**

Anyone who works with equitable distribution knows that the date of separation is a critical fact that must be established before anything else can be done in the case because it is the date used to define and value the marital estate. The date of separation should be established before the parties spend time and money engaging in the discovery process and definitely must be established before the court begins the process of classifying and valuing marital and divisible property.

So what is the relationship between a date of separation found as a fact in an absolute divorce judgment and the date of separation in the equitable distribution case? If the parties have obtained an absolute divorce and that judgment contains a date of separation, is that date binding on the equitable distribution case? Can one of the parties argue in the ED case that a different date was the actual date of separation?

The North Carolina Supreme Court has told us pretty clearly that, at least in those situations where neither party in the divorce case alleged a date of separation that was less than one full year before the divorce complaint was filed, a date of separation found as a fact in a divorce judgment is not binding on the court hearing the equitable distribution matter because the date of separation was not at issue in the divorce trial. This is true even if the parties actually disagreed as to the actual date of separation in the divorce proceeding and the trial court resolved the issue.

### [Stafford v. Stafford, 351 NC 94 \(1999\)](#)

On May 14, 1996, plaintiff Ms. Stafford filed a Complaint seeking absolute divorce and equitable distribution. Mr. Stafford filed an Answer and Counterclaims. As usual, the divorce came on for trial before the equitable distribution. The trial court severed the divorce from the remaining issues in the case and tried the divorce. Plaintiff contended, and the trial court found, that the date of separation was the first week of October 1992. The defendant contended that the date of separation was September 13, 1991.

Defendant husband appealed the divorce judgment, arguing that the trial court erred in determining the date of separation to be October, 1992. The court of appeals dismissed the appeal after concluding it was an inappropriate interlocutory appeal. Defendant argued that the trial court's "determination of the date of separation is so fundamental to an equitable distribution trial that it affects a substantial right," entitling him to an immediate appeal. The court of appeals rejected defendant's argument, stating without explaining that no threat of inconsistent verdicts was present in this situation because "[w]hile the determination of the date of separation may have an impact on the unresolved issue of equitable distribution, the same factual issues are not present." Dissenting, Judge Greene wrote that the appeal did affect a substantial right in part because "the

trial court's determination of the date of separation in the divorce action precludes relitigation of that issue for purposes of equitable distribution."

In a short per curium opinion affirming the majority of the Court of Appeals decision that the appeal did not affect a substantial right and evidently disagreeing with the dissent's assertion that the issue of the date of separation could not be litigated again in the ED case, the Supreme Court held that the date of separation in the divorce judgment was not binding on the ED court because the trial court in the divorce case was not required to determine the date of separation to determine whether to grant the divorce. The court stated:

"A basis for granting an absolute divorce is that the parties must live separate and apart for one year. Regardless of the date of separation, the parties [in this case] have been separated for a period far in excess of one year. Therefore, the date of separation has no bearing in this case on the legality of the final divorce judgment. The contested issue of fact concerning the date of separation is an issue in the [pending] equitable distribution claim..."

[Stafford, 351 NC 94 \(1999\).](#)

Similarly, in the more recent decision in [Khaja v. Husna, 777 SE2d 781 \(NC App, Oct. 6, 2015\)](#), the Court of Appeals reversed a trial court's determination that it was bound by the date of separation found in a summary judgment divorce. The trial court hearing an alimony claim ruled that the date of separation contained in the divorce judgment was "law of the case" and refused to hear evidence of a different date of separation. The Court of Appeals held because neither party alleged that the two had not been separated at least one full year, the trial court was not required to determine the date of separation to resolve the divorce claim. Because the findings in the divorce judgment "went beyond facts necessary to resolve the limited issues before it," the unnecessary findings were not binding in subsequent proceedings.

### **So what does this mean?**

Many divorce judgments are entered in cases where the defendant makes no objection to the entry of judgment and raises no issue regarding the date of separation. [Stafford](#) and [Khaja](#) seem to tell us that a judgment entered in one of these cases should not contain an actual date of separation as a finding of fact. If the judgment does contain such a finding, the date is not binding in subsequent alimony and ED cases.

A party can request a jury trial in an absolute divorce proceeding on the issue of whether the parties were separated for a year before the divorce action was initiated. [GS 50-10\(a\)](#); [McCall v. McCall, 138 NC App 706 \(2000\)](#). A jury never should be asked to determine a specific date of separation. Such requests have been made in response to the Court of Appeals' determination that a party is not entitled to a jury trial to determine the specific date of separation in an equitable distribution case. [See McCall, id.](#)

## **What if one party to the divorce does allege less than one year of separation?**

We do not have case law in North Carolina directly addressing this issue. Both [Stafford](#) and [Khaja](#) involved situations where, despite the disagreement between the parties about the specific date of separation, both agreed they had been separated a year. However, both [Stafford](#) and [Khaja](#) remind us that a specific date of separation never is a required finding in a divorce judgment. Even in a situation where one alleges the parties have not been separated a full year, the trial court only needs to determine as ultimate fact that the parties were separated a year. The court never needs to find a specific date to determine whether to grant a divorce. Perhaps this was the meaning of the Court of Appeals statement in *Stafford*, that “the factual issues are not the same” in a divorce case and in an ED case.

If the factual issue resolved in the first proceeding is not the same as that to be resolved in the subsequent proceeding, collateral estoppel does not apply. [See State v. Macon, 227 NC App 152 \(2013\)](#) (collateral estoppel only applies to an issue of ultimate fact determined by a judgment in a previous case when that issue of ultimate fact was necessary to the entry of the judgment). When collateral estoppel does not apply, the court in the subsequent proceeding is not bound by the determination made in the first proceeding.

## **But if there was a judicial admission in the divorce pleadings .....**

Regardless of whether collateral estoppel applies, it seems clear that if a party alleged a specific date of separation in a pleading in the earlier divorce proceeding, judicial estoppel will apply to prohibit that same party from later alleging a different date in the subsequent ED proceeding. [See e.g. Pickard v. Pickard, 176 NC App 93 \(2006\)](#).