

## Equitable Distribution: Classification of a Lawyer's Contingency Fee

In the recent case of [Green v. Green, \(N.C. App., Oct. 3, 2017\)](#), the court of appeals held that a fee received by a lawyer as the result of the resolution of a case his firm took on a contingency basis before the lawyer separated from his wife was not marital or divisible property. The court based this decision on the fact that the lawyer did not receive the fee until after the date of separation and did not have a right to receive the fee on the date of separation because the agreement provided that no fee would be received if there was no recovery in the case. The appellate court reversed the trial court decision that a portion of the fee was 'deferred compensation' for work the husband performed before the date of separation. The trial court had classified this portion of the fee as divisible property pursuant to [GS 50-20\(b\)\(4\)\(b\)](#) which provides that divisible property includes property received "as the result of the efforts of either spouse during the marriage and before the date of separation."

This decision by the court of appeals is significant because it is the first time the court of appeals actually reviewed a decision by a trial court interpreting this particular category of divisible property and because the holding of the appellate court seems to say this category is much more limited than the language of the statute indicates.

### **Background: property received after separation can be marital property**

It is fundamental that only property 'acquired' during the marriage and owned on the date of separation is marital property. This generally means that property, such as a large cash payment, received by a spouse after the date of separation is not marital property.

However, sometimes property actually received after the date of separation is marital property because the right to receive it was 'acquired' before the date of separation. In *Smith v. Smith*, 111 NC App 460 (1993), the court explained:

"[O]ur appellate courts have recognized that funds received after the date of separation may appropriately be classified as marital property under certain circumstances when the right to receive those funds is acquired during the marriage and before separation. .... In [Johnson \[v. Johnson, 317 N.C. 437, 346 S.E.2d 430 \(1986\)\]](#), our Supreme Court expressly refused to hold that the personal injury settlement received by the husband had to be classified as his separate property because it was received after the date of separation, explaining as follows:

"To summarily classify the \$95,000 as separate property of the plaintiff-husband merely because a check in that amount was received by him after separation of the parties would ignore the classification scheme of our Equitable Distribution Act. In order to classify the \$95,000 for equitable distribution purposes, the trial court was required to determine the nature of the asset. Was it a

gift? An inheritance? Earnings of a spouse? Proceeds from the sale of marital property? ... Only after determining the nature of the asset received by one spouse *after separation*, yet claimed by the other to be “marital property,” may a classification be made of that asset as between “marital” or “separate” property.

The court in *Smith* relied on *Johnson* to hold that the proceeds from the sale of stock received by husband after the date of separation were marital property because the sale occurred and husband acquired the right to receive the proceeds before the date of separation. Because he had the unconditional right to the funds on the date of separation, the property actually received after the date of separation was property acquired during the marriage and before the date of separation and therefore was marital property. See also [Talent v. Talent, 76 N.C. App. 545, 334 S.E.2d 256 \(1985\)](#) (where a loan was made during the marriage from marital funds and collected by one of the spouses after the date of separation, the funds collected should be considered marital property), and *Allen v. Allen*, 168 NC App 368 (2005)(tax refund for taxes paid before separation was marital property).

However, if a spouse did not have the right to receive the funds on the date of separation, funds received after separation are not marital property. See e.g., *Godley v. Godley*, 110 NC App 99 (1993)(commissions, not vested or certain on the date of separation, but received by husband after separation not marital property even though the commission was paid for work performed during the marriage); *Edwards v. Edwards*, 110 NC App 1 (1993)(where husband’s right to receive bonus for work performed during the marriage was not certain on the date of separation, bonus he received after the date of separation was not marital property).

### **Background: property received after separation can be divisible property**

The results in both *Godley* and *Edwards* were perceived by many to be inequitable because the effort that lead to the receipt of the money clearly was marital effort. The General Assembly responded to this concern and others arising out of post-separation occurrences in equitable distribution cases by creating the classification of divisible property in 1997. One category of divisible property, the one at issue in [Green](#), provides that divisible property includes:

“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”.

[GS 50-20\(b\)\(4\)\(b\)](#).

The only appellate case before the recent decision in *Green* to discuss this category of divisible property was *Ubertaccio v. Ubertaccio*, 359 NC 175 (2004), adopting concurring opinion in 161 NC App 352 (2003). In that case, the trial court concluded that stock grants received by wife after the

date of separation were not marital property because she did not have the right to receive them on the date of separation. However, the trial court held the grants were divisible property pursuant to [GS 50-20\(b\)\(4\)\(b\)](#) because the stock grants were given as compensation for work wife performed before the date of separation. While this issue in the case was not raised on appeal, the appellate court stated that the focus in the classification of this type of post-separation asset should be on the “source” from which the property was generated and not on whether a spouse’s rights in the property were “vested” on the date of separation.

### **[Green v. Green](#): Contingency fee received after separation**

Evidence in the trial court established that 78% percent of the total hours worked by husband’s law firm on the case that eventually lead to the contingency fee occurred before the separation of the parties. The trial court used that percentage as a basis for concluding that a portion of the fee received by husband when the case settled during separation was divisible property pursuant to [GS 50-20\(b\)\(4\)\(b\)](#). The court described that conclusion by stating that evidence showed a portion of the fee was ‘deferred compensation’ for the work performed by husband before the date of separation.

The court of appeals reversed the trial court. First, the court held that the fee was not the type of ‘deferred compensation’ properly classified as marital property pursuant to [GS 50-20\(b\)\(1\)](#), which states that “marital property includes all vested and nonvested pension, retirement, and other deferred compensation rights.” Relying on rules of statutory construction, the court of appeals held that the contingency fee received by husband in this case did not fall within this category of marital property because it was not in the nature of a pension or retirement plan. The court also cited the decision by the Oklahoma Supreme Court in *Musser v. Musser*, 909 P.2d 37 (1995), to support the general idea that a spouse’s interest in a contingency fee contract is not marital property when the case is not resolved by the time the marriage ends.

### **Not a bonus or a contract, so not divisible property**

Significantly, the court of appeals also rejected the trial court’s conclusion that a portion of the fee was divisible property. The court cited the language of [GS 50-20\(b\)\(4\)](#) and concluded that the fee received by husband after the date of separation did not fall within this category of divisible property because it did not represent a contract right of either party or a bonus. Without discussing whether the fee was “acquired as the result of the efforts of either spouse during the marriage and before the date of separation,” the court of appeals held that the entire fee was husband’s separate property because it was “compensation [husband] received by virtue of his ownership interest in the firm.” The fact that a large percentage of the work that resulted in husband receiving this compensation was performed by husband during the marriage and before the separation of the parties was not sufficient to support the trial court’s conclusion that a portion of the fee was divisible property.