Equitable Distribution: Divisible Property and Burdens of Proof

In my last post, I wrote about the marital property presumption and the significance of that presumption in the classification of marital property. Divisible property is not marital property, so the marital property presumption does not apply to help with the classification of property, value or debt acquired after the date of separation. So when there is evidence that marital property has increased in value between separation and the ED trial, does one party have to prove the cause of the increase before the court can distribute the increased value? Or, when one party has received income from a marital asset, like a rental house or an LLC, does one party have to prove that the income was not received as the result of the actions of a party before the court can divide the income between the parties?

Divisible Property

Because the marital estate 'freezes' on the date of separation, *see Becker v. Becker*, 88 NC App 606 (1988), an increase or decrease in the value of marital property occurring after the date of separation, property received after separation, or income received from marital property after the date of separation, is not included in the marital estate. The category of divisible property was created to allow a court to distribute these postseparation assets along with the marital property in some circumstances. If the change in value, new property or income received is classified as divisible, it can be distributed. If it is not divisible property, the court can do nothing more than consider the property, income or change in value as a distribution factor.

Increases and Decreases in Value of Marital Property

GS 50-20(b)(4)a. defines as divisible property:

"[a]ll 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."

The court of appeals has held that the "plain language" of this definition creates a presumption that any increase or decrease in the value of marital property after the date of separation and before the date of distribution is divisible property. *Wirth v. Wirth*, 193 NC App 661 (2008). This means that a party who wants the trial court to distribute the increase or decrease between the parties only has to show that marital property increased or decreased in value and the amount of that change. Once the amount of increase/decrease is established, the entire change is subject to distribution unless the other party proves the change in value was caused by the efforts of one of the spouses. *See also Lund v. Lund,* 779 SE2d 175 (2015)(wife met her burden of proof simply by testifying that, in her opinion, the value of the marital home increased in value by $35,000 since the date of separation. The increase must be classified as divisible property unless husband can show the increase was caused by the efforts of one of the spouses).

The significance of this presumption is illustrated by the result in *Romulus v. Romulus*, 215 NC App 495 (2011). Husband was a dentist and his dental practice was classified as marital property. Evidence showed that the value of the practice increased during separation and wife argued the increased value was divisible property and subject to distribution. Husband argued that his daily work in the practice caused the increase. The trial court made the following findings of fact:

“As to the change in value of John M. Romulus, PA after the separation of the parties, the Court finds that such increase was passive and is thus divisible property. In support of this conclusion, the Court finds that Dr. Romulus' efforts to grow the business were essentially unchanged from DOS until DOT. The Defendant did not invest substantially more time working at his practice than on the DOS, and in fact continued to work “dentist's hours”, which included taking at least one weekday afternoon out of the office or otherwise away from work. There was no evidence of other substantial efforts to grow the business by Dr. Romulus, by increasing advertising, adding new services, new patient recruitment, patient retention efforts or the like.

Even though Dr. Romulus undoubtedly actively worked in the business by going to the office and doing dentistry, that does not lead to the conclusion that the increase in value of his practice is active and his separate property. Take the example of a shopkeeper who runs a corner store. He works from Monday to Friday, 9am to 5pm. A 20 story residential complex is completed across the street and his receipts increase greatly. Contrast that situation with a similar shopkeeper who expands his hours to nights and weekends, increases advertising to capture new customers, and establishes a website offering online shopping and delivery. This shopkeeper sees a similar increase in receipts, without the benefit of the new apartment building across the street. Although both shopkeepers were actively involved in the business of running the store, the increase in the value of the business itself is passive in the first case and active in the other.

Dr. Romulus has not presented sufficient evidence to rebut the presumption that the increase in value of marital property post separation is divisible property, and thus such increase will be classified as divisible property and distributed as set out in this order.”

The court of appeals affirmed the trial court’s conclusion, stating:

“Essentially, the trial court found that it could not determine the cause of the postseparation increase in value, and because of the statutory presumption, it must be considered divisible.”

Other categories of Divisible Property

In addition to increases and decreases in the value of marital property not caused by the actions of one spouse, divisible property also 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.

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

Passive increases and passive decreases in marital debt and financing charges and interest related to marital debt.

GS 50-20(b)(4)b-d.

There is no statute or case identifying a presumption relating to the classification of any of these other categories of divisible property. In a footnote in *Walter v. Walter*, 149 NC App 723, fn 2 (2002), the court stated that the party claiming property to be divisible has the burden of proving "that it is so." This appears to mean that the party asking the court to distribute the property or debt has the burden of proving that the property or debt falls within one of these three definitions and the party must do so without the aid of any presumption.

Passive Income Received From Marital Property

Most appellate cases reviewing the classification of divisible property have involved the first category, increases and decreases in value of marital property. However, there also have been several appellate cases involving one spouse's receipt of income from a marital asset after separation and the question of whether the court had the authority to distribute some or part of that income to the other spouse. Although the appeal was resolved on other grounds, the trial court order reviewed in *Montague v. Montague*, 238 NC App 61 (2014), shows how difficult it can be to differentiate passive shareholder distributions from an employee spouse's compensation for work performed after separation. The burden clearly is on the spouse asking the court to distribute the income to prove the income was completely or at least in part passive. *See also Binder v. Binder*, *unpublished*, 231 NC App 514 (2013)(evidence was sufficient to support trial court's conclusion that part of cash withdrawals from a marital LLC were compensation for husband's postseparation work but that rest were passive shareholder distributions that were divisible property).

While there are no presumptions to help with the classification of income received after separation, the court of appeals has made a couple of broad statements that should be helpful to litigants seeking to have funds classified as divisible property. In *Montague v. Montague*, 238 NC App 61, 65-66 (2014), the court stated that shareholder distributions from an LLC generally are passive income that should be classified as divisible property, and in *Lund v. Lund,* 779 SE2d 175 (2015), the court of appeals stated that rental income generated from marital property after separation is passive income that should be classified as divisible.