

## Equitable Distribution: Post-Separation Changes in Debt

Almost every equitable distribution case involves marital debt. And because there often is a significant amount of time between the date of separation – the point in time when the marital estate is created and valued – and the date the marital estate actually is distributed, most every case also involves post-separation changes in the amount owed on that marital debt. The amount either increases because neither party pays the bills and interest and finance charges accrue, or the amount decreases because one of the parties make payments. North Carolina law has struggled to determine the best way to address these changes in the distribution process.

### *Increases in Marital Debt*

Before the creation of divisible property in 1997, a trial court was without authority to distribute post-separation increases a marital debt. Appellate courts repeatedly held that the court's authority was limited to distribution of the marital estate. Because the marital estate 'freezes' on the date of separation, increases in marital debt after separation could not be allocated. Trial courts were limited to considering such increases as a distribution factors.

In 1997, [GS 50-20\(b\)](#) was amended to create 'divisible' property and debt. The statute now requires that divisible property and debt be distributed in addition to marital property and debt. Divisible debt was defined to include all increases in marital debt, giving courts the authority to assign responsibility for these increases.

In 2013, the definition of divisible debt was amended to include only **passive** increases in marital debt. [S.L. 2013-103](#)(more below about the effective date). Passive means an increase not caused by the 'actions' of one or both spouses. While there is no case law to date defining the term passive in relation to a change in the amount owed on a debt, it probably will include interest and finance charges that accrue automatically as the result of a debt remaining unsatisfied. But it also can be argued that a failure to pay debt amounts to an 'action' on the part of a spouse who has the ability to pay but chooses not to do so. If the increase is active rather than passive, the increase will not be divisible debt and the court will have no authority to assign responsibility for the additional debt.

## **Decreases in Marital Debt**

As with post-separation increases, before 1997 appellate courts held that post-separation decreases in marital debt could not affect the net value of the marital estate. Instead, trial courts were allowed to decide how to best ‘account for’ such decreases when the decrease occurred due to one party making payments. In *Smith v. Smith*, 111 N.C. App. 460, 510 (1993), the court stated that “[d]etermination of the appropriate treatment of marital debts and postseparation payments towards those debts depends upon the particular facts of each case and is left to the discretion of the trial court.”

The *Smith* court summarized the options the trial court had for addressing post-separation payments related to marital debt as including “apportioning” the debts between the parties, “ordering one spouse to reimburse the other spouse for payments made towards the debts,” considering post-separation payments “as a distribution factor,” “crediting a spouse in an appropriate manner for post-separation payments made,” or using an “actual credit” to account for the payments.

## **2002 Legislation**

The definition of divisible debt was amended in 2002 to include *decreases* in marital debt. [S.L. 2002-159, sec. 92](#). Responding to arguments that courts should not be allowed to “only loosely consider” payments made by one party, this amendment required courts to classify, value and specifically distribute all payments made by either party during separation which decreased marital debt.

The inclusion of decreases within the category of divisible property increased the complexity of the classification stage of an equitable distribution trial but did not reduce the trial court’s discretion in determining how to distribute the decrease between the parties in the final equitable distribution

judgment. There still was no requirement that a paying party receive dollar-for-dollar credit, or any credit for that matter, for payments made and the court remained free to “only loosely consider” those payments when the court deemed it appropriate. See [McNeely v. McNeely, 195 N.C. App. 705 \(2009\)](#) and [Peltzer v. Peltzer, 732 S.E.2d 357 \(N.C. App., 2012\)](#).

## 2013 Legislation

In addition to addressing increases in debt, [S.L. 2013-103](#) also amended divisible debt to include only **passive** decreases in marital debt. Because the payment of debt has been held to cause an **active** reduction, see [Hay v. Hay, 148 N.C. App. 649 \(2002\)](#), this amendment means post-separation debt payments no longer are required to be classified and accounted for as divisible debt.

## Effective Date of 2013 Amendment

The 2013 amendment likely applies only to payments made on or after October 1, 2013 rather than to equitable distribution cases filed on or after that date. This is because the court of appeals held that the 2002 amendment originally defining decreases in marital debt as divisible property applied to payments made by parties on or after the effective date of that statutory change, October 11, 2002. [Cooke v. Cooke, 185 N.C. App. 101 \(2008\)](#). So as with the last amendment, both the old law and the new law will apply in some equitable distribution cases if the parties made payments both before and after October 1, 2013. See [Warren v. Warren, 175 NC App 509 \(2006\)](#).

## So Where Are We Now?

It appears the law now is back to where it was before the 2002 amendment, except that **passive** changes in marital debt remain divisible debt that must be classified, valued and distributed. While the court no longer is required to classify and distribute post-separation debt payments, it is clear the court must give “some consideration” to payments, especially payments from non-marital funds that benefit the marital estate or that benefit the party who did not make the payments.

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However, the manner and extent of consideration remains completely within the discretion of the trial judge.

For more detail on this issue, read this Family Law Bulletin – [Equitable Distribution Update](#) .