

## Equitable Distribution: The Marital Property Presumption

Immediately following the definition of marital property in G.S. 50-20(b)(1), the statute states “[i]t 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 probably is the most important core principle of classification of property in North Carolina equitable distribution because it defines the burdens of proof.

### Why is the burden of proof important?

Appellate courts consistently have held that the party claiming a particular classification of property has the initial burden of presenting evidence to support the classification and to support the court’s valuation of the asset. See *Johnson v. Johnson*, 317 NC 437 (1986); *Brackney v. Brackney*, 199 NC App 375 (2009). A trial court must identify and classify “property as marital or separate depending upon the proof presented to the trial court of the nature of the assets.” *Atkins v. Atkins*, 102 NC App 199, 206 (1991). In other words, a trial court is only obligated to classify and value property in accordance with the evidence presented. If neither party meets the burden of proof to establish that the property is marital or that it is separate, the property falls outside of equitable distribution. This means that the property is neither distributed nor considered in distribution, and the parties are limited to seeking common law remedies to determine their respective interests in the property. *Grasty v. Grasty*, 125 NC App 736 (1997)(business); *Johnson v. Johnson*, 230 NC App 280 (2013)(military pension).

### Proving property is marital

A party seeking a marital classification for a particular item of property must show that the property was acquired 1) by either spouse or both spouses, (2) during the course of the marriage, and (3) before the date of separation, and that the property was (4) owned by either spouse or both spouses on the date of separation. *Atkins v. Atkins*, 102 NC App 199 (1991). Once the party has met that burden, the statutory marital property presumption applies and the property is presumed to be marital. There is no requirement that a party seeking a marital classification prove that the property is not separate property. See *Uhlig v. Civitarese, unpublished*, 781 SE2d 828 (2016)(explaining that there is no presumption that property is marital until the party seeking the marital classification proves the elements listed above).

The court of appeals has made it clear that a party seeking a marital classification also bears the burden of proving the date of separation net value of the asset. Early appellate opinions held that a trial judge has the affirmative obligation to value marital property and remanded cases to the trial court when there was no finding of value or when there was insufficient evidence of value offered to support a finding. See e.g. *Wade v. Wade*, 72 NC App 372 (1985)(court must value asset even though conduct of defendant made it difficult). However, more recent opinions have clarified that the trial court’s obligation to value exists only when there is credible evidence offered by the

parties supporting the value of the asset. *Lund v. Lund*, 798 SE2d 424 (2017); *Johnson v. Johnson*, 230 NC App 280 (2013). Rather than remanding cases to give parties another opportunity to offer proper evidence of value, the court has held that the party with the burden of proof on classification also bears the burden on valuation. Therefore, if credible evidence of value is not offered, the asset cannot be distributed in equitable distribution even when it is clearly shown to be marital property.

For example, in *Grasty v. Grasty*, 125 NC App 736 (1997), defendant wife established that a business titled in the name of plaintiff husband was a marital asset. However, the trial court found her evidence of value of the business to be “wholly incredible and without reasonable basis,” and plaintiff offered no evidence of value. The court of appeals held that it was defendant’s burden to prove the business marital and to prove its value on the date of separation. Without credible evidence of value, defendant did not meet her burden. Therefore, according to the court, the business “is not subject to distribution ... [and] [a]ny interest the parties have in Grasty Service will necessarily pass outside the Act and be determined by alternative means of property distribution ...”.

The result was the same when wife failed to offer a date of separation value of husband’s military pension in *Johnson v. Johnson*, 230 NC App 280 (2013).

### **The burden to show property is separate property**

Just as a party seeking a marital classification of an asset has the burden of showing that the asset fits within the definition of marital property, a party seeking a separate classification has the burden of showing the asset fits within one of the categories of property defined as separate by G.S. 50-20(b)(2). *Watkins v. Watkins*, 228 NC App 548 (2013)(asset is not separate property simply because other party failed to prove it is marital property). Even if the other party has met the burden required to invoke the marital property presumption, if the party seeking the separate classification proves by the greater weight of the evidence that the property falls within one of the categories of separate property, “then under the statutory scheme of N.C.G.S. 50-20(b)(1) and (b)(2), the property is excepted from the definition of marital property and is, therefore, separate property.” *Finney v. Finney*, 225 NC App 13 (2013). This is why cases say that if both parties meet their respective burdens of proof, the property is separate property. *Atkins; Finney*.

### **Mixed Assets (such as joint accounts)**

The significance of the marital property presumption is especially apparent in the classification of mixed assets, meaning assets that have some amount of both marital and separate value. The presumption often is cited by the appellate courts to support the principle that once a party shows that an asset was physically acquired by one party or both parties during the marriage and before the date of separation and owned on the date of separation, the entire value of the asset is presumed marital. The burden then shifts to the party seeking a partial separate classification to trace the separate component of the asset. As such tracing can be difficult, if not impossible, the

presumption often means that such assets will be classified as entirely marital property.

For example, in *Minter v. Minter*, 111 NC App 321 (1993), the parties owned, among other things, substantial investment accounts and checking accounts on the date of separation which had been opened during the marriage. Earnings from these accounts had been used to purchase other property during the marriage. Evidence showed that defendant had commingled assets he received from three separate inheritances during the marriage with the marital assets in these accounts. There also was evidence that defendant had deposited stock he owned before the marriage into these accounts. Defendant argued that because both inherited property and property owned before marriage is separate property, a portion of the date of separation value of the accounts and of other assets purchased with funds from these accounts should be classified as his separate property. However, both defendant and his expert admitted during the trial that “dollar for dollar” tracing of the separate components of these assets was a “practical impossibility” because of the number of transactions within these accounts during the marriage. Plaintiff did not dispute that defendant had contributed substantial separate property to these accounts. However, the trial court classified all of the assets owned on the date of separation as marital property after finding that defendant failed to meet his burden of proving the value of his separate interest in the accounts and other assets.

The court of appeals upheld the trial court, stating since “there was no dispute that the contested properties were acquired during the marriage and before the date of separation and presently owned,” the burden was on defendant to prove that the “source of the property was separate property, ...”. The admission by defendant and his expert that it was impossible to identify the value of the separate component of the assets on the date of separation was sufficient to support the trial court’s conclusion that defendant had failed to meet his burden of proof.

The court reached the same conclusion in *Holterman v. Holterman*, 127 NC App 109 (1998). In that case, plaintiff received two significant inheritances during the marriage. The inherited funds were commingled with marital assets to purchase various stocks, bonds, and bank accounts. The parties owned those stocks bonds and accounts on the date of separation. The trial court classified all of the property owned on the date of separation as marital property, finding that plaintiff had not produced sufficient evidence to trace the separate component of the assets. Citing *Minter*, the court of appeals upheld the trial court, stating:

... the contested assets in the present case were acquired during the marriage. There is competent evidence to support the court’s determination that the plaintiff failed to carry her burden of proof to show that the investments were her separate property. Plaintiff was unable to trace her inheritances to the present assets owned joined by the parties at the time of separation.

For similar holdings regarding mixed accounts, see *Carpenter v. Carpenter*, 781 SE2d 828 (2016); *Comstock v. Comstock*, 771 SE2d 602 (2015); and *Clark v. Dyer*, SE2d (2014).

## **Appreciation of Separate Property**

While GS 50-20(b)(2) states that an increase in value of separate property is separate property, case law tells us that an increase in value that occurs as the result of marital effort (an active increase) is marital property. *Wade v. Wade*, 72 NC App 372 (1985). As with other mixed assets such as joint accounts, the marital property presumption applies to place the burden of proving that an increase in value of separate property that occurs during the marriage is passive rather than active falls on the person seeking to have the increase classified as separate. *Conway v. Conway*, 131 NC App. 609 (1998); *O'Brien v. O'Brien*, 131 NC App 411 (1998). In other words, any increase in value of separate property during the marriage is presumed to be marital (active). The owner of the separate property has the burden to prove the increase was not the result of marital effort (passive), which frequently is very difficult to do. For recent application of this rule, see *Porter v. Porter*, 798 SE2d 400 (2017)(husband failed to show any passive appreciation of his investment of separate funds in an LLC so entire increase in the value of his investment was classified as marital).

### Marital Debt

The marital property presumption does not apply to the classification of marital debt. The party seeking a marital classification for a debt has the burden to prove the debt was incurred by one or both spouses during the marriage and before the date of separation, the amount of debt owed on the date of separation, and that the debt was incurred for the joint benefit of the parties. See blog post [Equitable Distribution: The Classification of Marital Debt](#), June 19, 2015.