

## Equitable Distribution: What is Property?

In the recent case of [Miller v. Miller, \(NC App. April 18, 2017\)](#), the court of appeals held that a “Timber Agreement” was “too speculative” to be identified as a property interest in equitable distribution. The agreement between a husband and his cousin provided that husband would receive at some point in the future the value of timber growing on a specific track of land. Citing *Cobb v. Cobb*, 107 NC App 382 (1992), the court stated that the future value of timber that will not mature until many years after the trial should not be considered marital property or a distribution factor, since “characterizing growing trees as a vested property right is far too speculative,” and “an equitable distribution trial would become overwhelmingly complicated.”

This case raises the interesting question of what exactly is the definition of “property” in the context of equitable distribution?

### **To be marital property, an item or interest first must be property.**

Fortunately, most items in these cases constitute property within the generally recognized meaning of that term. Tangible things, such as houses and other real estate, automobiles, money, jewelry, furniture, etc., clearly are property. Even family pets have been classified as property for purposes of equitable distribution in other states. See e.g. *Bennett v. Bennett*, 655 So. 2d 109 (Fla. Dist. Ct. App. 1995). See also *Shera v. NC State University Veterinary Hospital*, 219 NC 117 (2012)(dog is personal property in North Carolina).

However, the status of intangible rights is less clear. Courts in other states have struggled over whether interests such as job seniority, accumulated sick leave and vacation, frequent flyer miles, the future right to purchase medical insurance in retirement and future inheritance rights constitute property interests that need to be considered in equitable distribution. For more discussion, see Brett Turner, Golden, *Equitable Distribution of Property*, § 5.08-10, 269 (3<sup>rd</sup> Edition 2005). Regarding inheritance rights in North Carolina, see *Loeb v. Loeb*, 72 N.C. App. 205, 324 S.E. 2d 33 (1985) (allowing consideration as a factor in distribution that wife had a vested interest in a trust, the principal of which would pass to her upon the death of her mother).

### **Do we have a definition?**

The short answer is not really.

North Carolina's equitable distribution statute does not contain a definition of property and the few cases that have addressed this issue have not offered a definition. Further, North Carolina property law does not recognize a general definition that gives the term precisely the same meaning in all contexts. Instead, the definition of property is broad and necessarily varies "according to the subject treated of and according to the context." *Wachovia Bank and Trust v. Wolfe*, 243 N.C. 469,

475 (1956). In other words, whether an interest constitutes property very much depends on whether the question is asked in an equitable distribution case or in a taxation case, for example. Some legal scholars argue that, in general, determining whether an interest constitutes property is as much a question of public policy as anything else. For example, a New York court held that equitable distribution creates a new species of property and that interests should be classified as property if necessary to accomplish the goals of equitable distribution, regardless of the common law definition of property. *O'Brien v. O'Brien*, 489 N.E.2d 712 (1985).

Most dictionary definitions of property indicate that transferability, meaning the ability to exchange the interest for value or to pass ownership to another, is an important characteristic of property. However, North Carolina clearly recognizes items that cannot be transferred or assigned a *market* value as valuable property interests; consider pensions, professional licenses, and interests in closely held businesses and corporations.

Because the concept of property is necessarily broad and non-specific, the law, both in North Carolina and other states, has traditionally identified property interests on a case-by-case basis, weighing the traits of the interest against those traditionally recognized as attributes of property and considering the public policy issues raised by the context of each particular case. See Brett Turner, *Equitable Distribution of Property*, § 5.08-10, 269.

## **Besides timber contracts, what else is not property in North Carolina ED?**

### 1. VA Loan Eligibility

In *Jones v. Jones*, 121 N.C. App. 523 (1996), the court refused to classify certain veteran benefits as property for purposes of equitable distribution. Defendant argued that his VA loan eligibility should be classified as his separate property. The parties had used defendant's eligibility to obtain a VA loan for the purchase of the marital residence. At the time of separation, the only value of the residence was the VA loan and defendant argued that the court should have "restored" his separate property to him by awarding him the marital residence. The court of appeals rejected defendant's contention that his VA loan eligibility was analogous to military pensions and should likewise be identified as property. The court reasoned that while "[a] military pension is a quantifiable, legally enforceable property interest[,] ...[d]efendant's VA loan eligibility in itself created no enforceable right in defendant other than the right to *apply* for a VA loan. In order to receive a loan, defendant still had to *qualify* for such a loan."

### 2. Educational Degrees

In North Carolina, professional and business licenses are property but educational degrees are not, at least in the context of equitable distribution. Our case law outside of equitable distribution recognizes professional licenses as valuable property interests entitled to protection under the law, see e.g., *N.C. State Bar v. Dumont*, 52 N.C. App. 1, 15, (1981), and the North Carolina equitable

distribution statute also recognizes professional licenses as property. G.S. 50-20(b)(2) provides that "all professional and business licenses which would terminate on transfer shall be considered separate property." In *Poore v. Poore*, 75 N.C. App. 414, 423, 331 S.E. 2d 266, 272-73 (1985), the court of appeals held that it was reversible error for a trial judge to fail to classify the defendant's license to practice dentistry as defendant's separate property and to consider that property interest when deciding how to distribute the marital property. Further, in a concurring opinion in *Sonek v. Sonek*, 105 N.C. App. 247 (1992), Judge Greene wrote that "[a] professional license is a valuable property right, reflected in the money, effort, and lost opportunity for employment expended in its acquisition, and also in the enhanced earning capacity of its holder ...."

However, in *Haywood v. Haywood*, 106 N.C. App. 91 (1992), *rev'd on other grounds*, 333 N.C. 342 (1993), the court of appeals held that defendant's masters degree in economics and business was not property, stating that "[b]ecause educational degrees, like professional and business licenses, are personal to their holders, are difficult to value, cannot be sold, and represent enhanced earning capacity, the vast majority of states which have addressed the issue have held that such degrees are not property for purposes of equitable distribution." The court acknowledged that the equitable distribution statute specifically defines professional and business licenses as property, but rather than distinguishing degrees from licenses, the court held that by not including degrees in the definition of separate property along with licenses, the General Assembly evidenced a legislative intent that educational degrees not be recognized as property.

### 3. Contingent Contract Rights

In *Godley v. Godley*, 110 N.C. App. 99 (1993), defendant was a party to a contract which granted him the right to receive a portion of the profits earned by a business in exchange for his consulting services. By the date of separation, he had finished providing the consulting services but the amount he would receive as compensation was uncertain due to the fact that the company had yet to realize the profits upon which defendant's commission would be based. The court of appeals characterized defendant's right to receive the commissions as "a mere contractual right to receive an uncertain amount of commissions at some indefinite time in the future, if at all," and held that the commission was "too speculative" to be distributed or considered in distribution.

Like the recent *Miller* case, the court in *Cobb v. Cobb*, 107 NC App 382 (1992), was faced with the issue of whether the future value of timber being grown on marital property should itself be classified as marital property. The parties had planted trees on their property in 1971, they divorced in 1989, and evidence indicated that the timber would be ready for clear cut in 2007, at which time the owner would realize approximately \$174,300 from the sale of the timber. Defendant argued that the projected earnings from the timber should be classified as marital property. The court, however, held that the right to receive the profit from the timber sale in the future was "far too speculative" to characterize as a "vested property right," and held that the future interest could not be classified as marital property nor considered as a factor in distribution. In support of its conclusion, the court pointed to the risk that the future value might not be realized "if, for example, the trees are

destroyed by fire or insects, or if [the owner] decides to sell the property or to not cut the trees at all.”

However, in *Christensen v. Christensen*, 101 N.C. App. 47, 50, 398 S.E. 2d 634, 636 (1990), the court identified a management contract for future services as a valuable asset of a business. The contract at issue in *Christensen* provided for services to be rendered for a specified period of time (40 years) and the amount to be paid for the services was certain (\$36,000 per year).

Likewise, in *Smith v. Smith*, 111 N.C. App. 460, 433 S.E. 2d 196 (1993), the court indicated that a contract to redeem stock was a vested property interest where the sale price and time for payment was clearly identified in the contract.