

Equitable Distribution: When Marital Property is Not Owned by a Party.....

In the recent case of [Nicks v. Nicks, 774 SE2d 365 \(NC App 2015\)](#), husband transferred property acquired during the marriage to an LLC and the LLC thereafter was transferred to a trust. All of this occurred before the date of separation. Understandably, the trial judge in the equitable distribution action filed after the parties separated felt that the property transferred to the LLC should be classified as marital property and distributed between the spouses, so the trial court classified the LLC itself as marital property and distributed it the husband as his share of the marital estate. The court of appeals vacated the ED judgment and remanded the case to the trial court after concluding the LLC was not marital property because it was not owned by either or both spouses on the date of separation.

Does this mean a spouse can avoid ED simply by transferring ownership of property to an LLC or other third party before the date of separation, or by allowing family members or others to hold legal title to property acquired with marital funds during the marriage?

Not necessarily. Equitable principles can be applied to bring property that should have belonged to one or both spouses on the date of separation into the marital estate, but only if appropriate procedure is followed and the legal title holder of the property is afforded due process.

Only Marital and Divisible Property Can be Distributed

As I said in [my last post addressing when a marital LLC needs to be joined as a party to an ED action](#), equitable distribution is all about – and only about – distributing marital and divisible property. The court has no authority to distribute any property that is not marital or divisible property. Marital property includes only property owned by either or both spouses on the date of separation. In [Nicks](#), the court of appeals vacated the ED judgment because the trial court distributed the LLC that was owned by the trust rather than by either or both spouses. Similarly, in *Weaver v. Weaver*, 72 NC App 409 (1988), a piano gifted to the children of the parties before the date of separation was not marital property because it was not owned by either spouse on the date of separation. And there are a number of other similar opinions from the court of appeals. Property cannot be marital property unless it is owned by one or both spouses on the date of separation.

Ownership Includes Equitable Ownership

However, in *Upchurch v. Upchurch*, 122 NC App 172 (1996)(Upchurch I), the court of appeals held that ownership for purposes of ED includes both legal and equitable ownership and recognized that within the context of an ED proceeding, a court has the equitable authority to impose a constructive or resulting trust upon property legally owned by someone other than a spouse. While in other

situations a party has a right to have a jury determine whether grounds exist for the imposition of a trust, the Supreme Court held in *Sharp v. Sharp*, 351 NC 37 (1999), that there is no jury trial right when the issue arises in the context of an ED case. The judge rather than the jury must decide whether a trust should be imposed.

The court of appeals also has held that a trial court can impose a trust on property owned by a third party even if neither spouse expressly requests that relief in a pleading. *Weatherford v. Keenan*, 128 NC App 178 (1998).

If the trial court finds grounds to impose a trust, the court can order the title to the property be conveyed to one or both spouses and classified as marital property. *Gragg v. Gragg*, 94 NC App 134 (1989).

Three Types of Trusts

The three types of trust are express, resulting and constructive. Express is as the name implies; a trust created by an actual agreement between the parties that a third party will hold title for one or both spouses. The court simply enforces the express agreement between the parties.

A resulting trust arises from the presumed intent of the parties at the time title is taken by one party under facts and circumstances showing that the beneficial interest in the real or personal property is in another. The most common situation giving rise to a resulting trust is when title is held by one person but one or both spouses provided the purchase money for the property. For example, a resulting trust was imposed in *Gragg* because although husband's father held title to the parties' marital home and had paid a down payment for the property, the husband and wife made monthly payments on the mortgage for 10 years.

A constructive trust is the most commonly imposed trust, appropriate when the court determines it is necessary to prevent the unjust enrichment of the title holder when he or she acquired title through fraud, breach of duty or some other circumstance making it inequitable for that person to retain title. *Upchurch; Glaspy v. Glaspy*, 143 NC App 435 (2001); *Dechkovskaia v. Dechkovskaia*, 754 SE2d 831 (NC App 2014). So in *Upchurch v. Upchurch*, 128 NC App 46 (1998)(Upchurch II), the court imposed a constructive trust in favor of wife on bonds, title to which was transferred shortly before separation by husband to son to avoid equitable distribution. And in *Weatherford*, a constructive trust was imposed in favor of wife on one-half the value of improvements made to the parties' home, which was originally titled in name of husband's parents but which husband inherited after separation.

Legal Owner Is a Necessary Party

Significantly, the court of appeals in [Nicks](#) did not reverse the trial court. Instead, the court vacated and remanded, holding that while it was inappropriate for the trial court to classify the LLC as

marital property while it was owned by the trust rather than by one of the parties, the party seeking to have the property classified as marital was not without a remedy. However, the remedy cannot be imposed unless the legal owner of the property – in this case the trust – is joined as a party to the ED action for the sole purpose of determining whether an equitable trust should be imposed. Principles of due process require that property not be taken from a legal owner without the court first acquiring jurisdiction over the person or entity and affording the person or entity the opportunity to participate in the legal process that may result in the loss of ownership of that property.

Dechkovskaia.