CREATIVE USES OF
FINANCIAL STANDING AFFIDAVITS AND PRETRIAL ORDERS

By

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- Attachments from this manuscript have been omitted on this website.

- Please note that this manuscript is for informational purposes only. It is dated November 2006 and only purports to discuss issues relevant at that time. Laws and rules change, and this manuscript has not been updated to reflect any revisions in such laws and rules that may have become effective since May 1, 2005.

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I. Pretrial Orders

North Carolina's equitable distribution statute, which is set out in §50-20 et seq., of the North Carolina General Statutes, requires the Equitable Distribution Court to classify property as either marital, divisible or separate property, to value said property and to equitably distribute the marital and divisible property among the plaintiff and the defendant. In a case where the parties have few items for distribution, it may be easy for a court to quickly and easily dispose of a case, even if there were no pretrial order entered. Where, however, the parties have amassed significant assets and debts, the judicial process would grind to a halt if trial judges were required to hear evidence with regard to each and every item which needs to be distributed to a party.

Pretrial Equitable Distribution Orders can be a very useful tool in helping the court identify what issues the parties are able to agree upon on their own and which issues are necessary for the court to hear evidence about and make specific rulings on. In essence, an equitable distribution pretrial order is a series of schedules with notations as to any stipulations which the parties can agree to, and which will be binding upon the parties during trial. Over the last few years, there have been a number of appellate cases which have made it clear that the courts will accept stipulations as binding and that the courts reliance upon said stipulations will not be disturbed, absent an abuse of discretion.

Although the topic of this manuscript is "Creative Uses For Financial Standing Affidavits And Pretrial Orders," the word creative can simply be interchanged with thoroughness after considering North Carolina appellate law and statutory direction.

A. Statutory Requirements in Preparing Pretrial Orders

North Carolina general Stat. §50-21 sets forth the procedures which are to be followed after an equitable distribution action has been filed. Subsection (a) provides that the party who first asserts a claim for equitable distribution shall, within 90 days after service of said claim, prepare and serve upon the opposing party and equitable distribution inventory affidavit which lists all property that said party claims as marital property and separate property. The estimated date of separation fair market value of each item of marital and separate property shall be listed. Within 30 days after the initial inventory affidavit has been served on the opposing party, the opposing party shall serve an inventory affidavit upon the initial claimant.

The initial inventory affidavits are subject to amendment and are not binding at trial as to completeness or value. The court may extend the time within which these affidavits are to be served for good cause. In some jurisdictions, it is not uncommon for the parties to stipulate that these time requirements be set aside and that the parties will work towards the preparation of a pretrial order in advance of trial. Such an agreement, however, should be approved by the court so that neither party can be subject to sanction in the event that an otherwise "oral agreement" is rescinded by a party. Delay which is consented to by the parties is not, however, ground for sanctions.

Subsection (b) of §50-21 mandates that for purposes of equitable distribution, the marital property shall be valued as of the parties date of separation. Divisible property, both assets and debts, are to be valued as of the date of distribution.

The initial inventory affidavits are subject to Rule 11 of the North Carolina Rules of Civil Procedure and are deemed to be in the nature of answers to interrogatories. The failure to supply the necessary information in an affidavit subjects the failing party to sanction. The court is also empowered to sanction a party to has willfully obstructed or unreasonably delayed a pending equitable distribution proceeding when such obstruction or delay is willful and prejudicial to the interests of the opposing party. See, NCGS §50-21 (e) (1)(2).

B. Preparation of Preliminary Inventory Affidavits Is Precursor to Preparation of Pretrial Order

The preparation of the preliminary inventory affidavit is the first step towards the preparation and completion of a pretrial order. The attached "**Exhibit A**" is a type of inventory affidavit that can be completed by the client. The preparation of a first draft of this agreement should be one of the first assignments for your client. The 90-day and 30-day requirement of §50-21 (a) can move quickly and there is often much work that needs to be done in order to provide a complete document.

The inventory affidavit provides any step by step mechanism for preparing a pretrial order. The pretrial order is made up of a number of different schedules, although, the number and title of the schedules may vary from location to location and case to case. "**Exhibit B**" is a form pretrial order that is commonly used in Forsyth County, North Carolina (the 21st judicial district). The schedules on this particular pretrial order include the following:

Schedule A is a list of marital property upon which there is agreement as to both value and distribution.

Schedule A(d) is a list of divisible property upon which there is agreement as to value and distribution.

Schedule B-1 is a list of marital property upon which the parties agree should be distributed to defendant, but disagree as to the value.

Schedule B-1(d) is a list of divisible property upon which the parties agree should be distributed to defendant, but disagree as to the value.

Schedule B-2 is a list of marital property upon which the parties agree should be distributed to plaintiff, but disagree as to the value.

Schedule B-2(d) is a list of divisible property upon which the parties agree should be distributed to defendant, but disagree as to the value.

Schedule C is a list of marital property upon which there is agreement as to value, but disagreement as to distribution.

Schedule C(d) is a list of divisible property upon which there is agreement as to value, but disagreement as to distribution.

Schedule D is a list of marital property upon which there is disagreement as to distribution and disagreement as to value.

Schedule D(d) is a list of divisible property upon which there is disagreement as to distribution and disagreement as to value.

Schedule E is a list of items upon which there is agreement as to value, but disagreement as to whether the item is marital.

Schedule E(d) is a list of items upon which there is disagreement as to whether the item is divisible property or a divisible debt.

Schedule F is a list of items upon which there is disagreement as to whether the item is marital property or a marital debt and as to value.

Schedule F(d) is a list of items upon which there is disagreement as to whether the item is divisible property and as to value.

Schedule G is a list of Wife's contentions as to why an equal division of marital property is not equitable.

Schedule H is a list of Husband's contentions as to why an equal division of marital property is equitable.

Schedule I is a list of the parties' contentions as to whether a debt is marital.

Schedule I(d) is a list of the parties' contentions as to whether a debt is divisible property.

Schedule J is a list of the Husband's separate property.

Schedule K is a list of the Wife's separate property.

The equitable distribution Judge will rely upon the stipulations made by the parties at the time that the pretrial order was executed in those stipulations are generally binding. With regard to the assets and debts which are not agreed upon by the parties for distribution and valuation purposes, the judge shall determine the classification of the property as either marital, divisible or separate property, provide the fair market value as of the parties date of separation, the increase or decrease in said value as of the date of distribution, and said property shall be distributed equitably between the plaintiff and the defendant while taking into consideration the items which have already been stipulated and agreed upon by the parties.

C. Okay, Here Come the "Creative Uses"!

(*Are you on the edge of your seat yet?*)

1) Stipulations Matter

Various local jurisdictions have differing local rules which set forth either standard pretrial order forms or procedures for the entry of such documents. A pretrial order, however, represents the stipulations that can be reached between two parties, and their counsel. Often, with the cooperation of the trial Judge, the parties can stipulate to language in an agreement which may differ from the standardized requirements.

The attached Exhibit B, pretrial order, has an open ended adjudicatory section and provides:

> (18) The Presiding Judge shall rule on all issues raised by the evidence presented at trial.
> (19) Pending the call of the case for trial herein, the Court retains jurisdiction to amend this Pre-Trial Order upon written stipulation, signed by both parties and their counsel of record, or upon proper motion by either party, for good cause shown.

Assuming that the trial Judge would not require more specific language, the parties would be able to more freely exchange information regarding experts or witnesses without strict deadline and make modifications to the pretrial order with regard to values or statements as to which schedule property belongs on.

An example of a more comprehensive adjudicatory section of a pretrial order can be found by reviewing the attached Exhibit C, which is a partial copy of the

pretrial order in the case of Ann Litton White [Davis] v. John Blevins Davis, 163 N.C. App. 21, 592 S.E.2d 265 (2004).

In the White v. Davis case, the parties' pretrial order contained separate dollar amounts claimed by each party. In a number of spaces, specific values were not provided and the parties indicated that they were "TBD" (to be determined). The pretrial order provided that:

> In the event that either party hereto has not listed any value for item(s) of property that is marital... As itemized in this Pre-Trial Order... Such party shall be required to notify the other party hereto through counsel of her or his value (s) of such property at least (30) days in advance of the commencement of the equitable distribution trial... Or upon the failure of such party to do so, the value(s) of such item(s) shall be the listed value(s) listed on this Pre-Trial Order by the other party hereto...

Subsequent to the commencement of the equitable distribution trial, the plaintiff filed a motion to amend pretrial order to include values for property she had previously marked as "TBD" in the pretrial order. The plaintiff's motion was denied by the trial Judge. On appellate review, the plaintiff alleged that the trial court abused its discretion in denying her motion to amend pretrial order. The North Carolina Court of Appeals disagreed and found the stipulations of the pretrial order binding on the parties. The defendant's values were accepted by the court when he had stated a value for a particular item and where the plaintiff had stated "TBD."

TIP: If you include "TBD" as a value on your pretrial order, make certain that the adjudicatory section of the pretrial order permits you to change or value prior to trial, and if a deadline is imposed, make sure to follow it.

Another case which explains the appellate courts interpretation of pretrial orders is Hunley v. Hunley, __ S.E.2d __, __ N.C. App. __ (2003). The parties entered into a equitable distribution pretrial order which contained several schedules listing the parties assets and debts, along with their values and the proposed distribution. The adjudicatory portion of the pretrial order provided that the contents of the order were to be treated as stipulations of the parties. The Court of Appeals noted that "An admission in a pleading or a stipulation admitting a material fact becomes a judicial admission in a case and eliminates the necessity of submitting an issue in regard thereto to the jury... It has long been established that judicial admissions are binding on the pleader as well as the court." *Id. (citations omitted).*

The Court of Appeals went on to note that:

> When a conference is held prior to the trial of a matter in an effort, among other things, to simplify and formulate the issues, the trial court is to make an order following the conference which recites... the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. *Id. (citations omitted).*

The parties in the Hunley case stipulated on Schedule C of their pretrial order that the net value of the defendant's 401(k) plan was $319,017.85. The trial court deviated from the stipulated value of the plan and failed to a previous marriage affected the division of the plan. The trial court, in this particular circumstance, did not provide the plaintiff with the full interest in which she could have been awarded, nor did she contest her award. Because the trial court's error benefit of the defendant, the Court of Appeals failed that the defendant was not harmed by the error. This opinion, however, does indicate that the court will follow the stipulations of the parties.

One of the more important cases discussing the effect of stipulations and a pretrial order is that of Hamby v. Hamby, 143 N.C. App. 635, 547 S.E.2d 110 (2001). In Hamby, the parties entered into a pretrial order which distributed a substantial portion of the personal property of the plaintiff and the defendant. Supplemental pretrial orders were also entered by agreement which, inter alia, result certain issues regarding real estate and other assets. The only assets in question at the equitable distribution trial related to the husband's insurance agency, his deferred compensation and incident credits, his extended earnings and a 1995 Isuzu trooper automobile.

The husband stipulated in the pretrial order that his deferred compensation plans were marital property, yet he argued on appeal that neither of those plans should have been deemed marital property under the equitable distribution statute as it existed in 1995, the time that the parties separated. He argued that it had been a mistake to characterize the deferred compensation plans as marital property and alleged that the trial court committed reversible error by finding that the plans were marital property in subjecting them to equitable distribution.

The Court of Appeals disagreed with the husband's assertion. It noted that there was no dispute that the parties signed a binding pretrial order. The Court held that the husband, by executing the pretrial agreement, "effectively waived his right to a trial court's later determination of whether the Plans were marital property and subject to the equitable distribution statutory provisions of N.C. Gen. Stat §50-20... Furthermore, by agreeing that the plans were marital property and thereby subject to equitable distribution, Mr. Hamby also waived his right to retain, as separate

property, that portion of Deferred Compensation which was not yet vested as of the date of separation. *Id*. at 143 N.C. App. 643. (*Citations omitted*).

The Court of Appeals found that the husband was able to sign away his right to claim that the Plans or her separate property. The court found an analogy in the case of Prevatte v. Prevatte, 104 N.C. App. 777, 411 S.E.2d 386 (1991) which held that an antenuptial agreement was valid to below are a wife's claim to certain property rights which arose out of marriage and also operated to release her statutory right to equitable distribution. The Court of Appeals in Hamby reasoned that the husband was able to sign away his right to keeping separate property separate just as the wife and the Prevatte case was able to sign away her statutory right to equitable distribution.

Tip: As in Hamby, a stipulation, even enough a mistake in legal interpretation, can bind a client. If there is any question as to the validity of the stipulations that are going to be entered into in a pretrial order, make certain to use qualifying language which will allow an amendment to the preliminary stipulation at some later date.

In a case decided under law which existed prior to the 1997 amendment to the equitable distribution statute (the concept of divisible property was not yet incorporated into the equitable distribution statute at this time) the North Carolina Court of Appeals found that the parties stipulated in Schedule A of their pretrial order that the marital portion of the defendant's profit sharing plan had a net value of $245,791.53 as of the parties date of separation. The parties further stipulated that the item was to be distributed to the defendant. The stipulation on Schedule A stated that the net value included post-date of separation growth. On Schedule M of the pretrial order, the parties stipulated that the separate portion of the defendant's profit sharing plan was valued at $170,674.00 on the date of separation.

The trial court held, inter alia, that additional growth had occurred since trial and that the "new marital portion of this plan, including all growth on the funds in the account as of date of separation, should be calculated... In such portion divided equally between the parties. The defendant contended that the trial court cared by using and by arguing that any postseparation gains following the separation of the parties would not be subject to division by the Court but would be treated as distributional factors. Although the Court of Appeals noted that it would normally be error for the trial court not to value an item of marital property as of date of separation, excluding gains or losses on the property since the date of separation, that he or the parties and counsel stipulated to the value of the profit-sharing plan as of the parties date of separation. The court noted that that value included some gains on the plan assets after date of separation and the defendant is bailed by his stipulation and estopped to question the value used by the trial court.

The court states that a pretrial order is:

> designed to narrow the issues, save trial time and expense, and lead to a just result... During the entire proceeding, defendant did not question the accuracy of the stipulation with regard to the value of his profit-sharing plan on the date of separation, and the trial court properly relied on that agreement. Parties are not free to enter into stipulations for the purpose of trial, then abandoned those agreements and charge a different course with a sale and to the appellate waters. *Id*. at 140 N.C. App. 310.
>
> In Inman, the parties signed a pretrial order with stipulations as to the classification of various items of property as marital property, and stipulated that the marital property be equally divided... The plaintiff later objected when items he believed to be his separate property were deemed marital by the court; he also disagreed with other facts which were the subject of pretrial stipulations... We noted in Inman there was no evidence in the record showing any attempt to modify the terms of the pretrial order, nor was there any evidence showing that the stipulations were not voluntarily agreed upon. Consequently, plaintiff was mailed by his stipulations... The same is true in the present case. The voluminous record does not show any and voluntary actions by the parties regarding their stipulations. Absent such evidence, we will deem the parties bailed by their stipulations and will not allow retroactive alterations of those stipulations. Therefore, based on the stipulation of the parties, the trial court did not err in finding that the date of separation net value of the profit-sharing plan was $245,791.53. *Id*. (*citations omitted*).

2. Omissions Matter Too!

What happens when a party fails to admit in a pretrial order that she has a vested account balance and a profit sharing plan. The Court of Appeals, in a case of Fitzgerald v. Fitzgerald, 161 N.C. App. 414, 588 S.E.2d 517 (2003) addressed such an issue. During trial, the defendant testified on cross-examination that she had an interest in a profit-sharing plan through her employer. This was not listed on her affidavit filed with the court. The equitable distribution judge made no specific finding regarding the defendant's interest in the profit-sharing plan and it was not included in the equitable distribution order. The Court of Appeals held that the trial court erred by failing to consider evidence of the defendant's profit sharing plan and

by failing to make findings of fact classifying, valuing and distributing her interest in the plan.

The court distinguished this particular situation from that in the case of Hamby, *see supra,* by noting that in that case the parties entered into a pretrial agreement classifying a deferred compensation plan as marital property, and that by doing so, the party waives any argument that the deferred compensation plan was separate property. Here, in Fitzgerald, no such agreement had been made concerning the profit-sharing plan. The court specifically noted that the plaintiff could not have entered into such an agreement because the defendant failed to disclose the existence of the plan until hearing. The Court of Appeals remanded the case so that the trial court could include a profit-sharing plan and its equitable distribution judgment and to determine how to equitably distribute sign.

The opinion by the court in Fitzgerald was further explained by the North Carolina Court of Appeals of the case of Allen v. Allen, 607 S.E.2d 331, 2005 N.C. App. Lexis 265 (2005). In Allen, the parties listed all of the property which was to be distributed by the court on their pretrial order. One item was not listed on the pretrial order, two wit: a tax refund which was divided by the trial court. The defendant argued that since the parties did not include the tax return on their stipulated list of marital property, that it should not be divided between the parties as a marital asset. The Court of Appeals disagreed and noted that:

> Here, the parties signed a pre-trial order containing a stipulation that all property to be classified , a value waited, and distributed was disclosed on the attached schedules. When entered, this order was binding upon the parties as to all assets classified as marital property. See Hamby v. Hamby, 143 N.C. App. 635, 642-43, 547 S.E.2d 110, 114-15 (2001) (where parties stipulated and pre-trial order that retirement and deferred compensation plans were marital property, neither party can later challenge this classification". However, with respect to any property not listed in the pre-trial agreement between the parties, plaintiff has not waived its inclusion in the equitable distribution. See Fitzgerald v. Fitzgerald, 161 N.C. App. 414, 418, 588 S.E.2d 517, 521 (2003) (plaintiff spouse did not waive inclusion of defendant's profit-sharing plan in marital property distribution where parties did not enter into any agreement concerning the plan prior to trial). We hold that the trial judge did not in err in considering the tax refund as marital property. Allen at 607 S.E.2d at 335

Tip: Omissions from a pretrial order may be classified, valued and distributed by the trial court in certain circumstances.

3. When can the trial court deviate from the stipulations of the parties in a pretrial order?

Generally, case law supports the proposition that the trial court follow the stipulations of the parties which are set out in their pretrial order. The Court of Appeals has, however, in the case of Despathy v. Despathy, 149 N.C. App. 660, 562 S.E.2d 289 (2002) the court did showed its willingness to entertain a certain amount of *wiggle room* for trial court's to exercise. In this case, the trial court approved 23 stipulations and the parties equitable distribution pretrial order including the following:

> 10. The 1967 Buick
> This car is in Wife's possession and should be distributed to Wife.
> No lien.
>
> 11. The 1970 Buick
> This car is in Husband's possession and should be distributed to husband.
> No lien.

The trial court deviated from the stipulations of the pretrial order and awarded the 1970 Buick to the plaintiff and the 1967 Buick to the defendant. The judge, in a "Letter of Opinion" stated that he would distribute the more valuable 1967 vehicle to the defendant and the 1970 Buick to the plaintiff because the defendant " is the collector, and because it helps reduce the final Distributive Award [plaintiff] will owe him." Id. at 149 N.C. App. 660.

The Court of Appeals determined whether the trial court was obligated under the terms of the pretrial stipulations to distribute the vehicles as the parties had previously agreed. The appellate court held that the trial court was not mailed by the stipulations. The plaintiff argued that it was within the trial court's discretion to deviate from the pretrial order and award plaintiff the less valuable automobile. The North Carolina Court of Appeals agreed with the plaintiff and noted that the purpose of a stipulation is to "limit the issues for trial to those not disposed of by admissions or agreements of counsel." *Id*. at 662. The court held, however, that the language in the parties pretrial order "failed to definitively dispose of the issue of ownership of the Buick vehicles. It went on to state:

> Rather than assigning ownership of the automobiles to one party or the other, the stipulations stated that the 1960 Buick "*should* be distributed to Wife" and that the 1970 Buick "*should* be distributed to Husband" as such, the stipulations regarding the automobiles did not remove

> the issue of their distribution from dispute, and under the plain language of the stipulations, the trial court was not mailed to abide by the parties' suggestions concerning distribution of the vehicles. The equivocal nature of the stipulations is even more apparent when contrasted with the other stipulations contained in the pre-trial order. For example, the parties stipulated that all "personal property... Has been divided equally." The trial court therefore did not address the issue of the parties' personal property and its equitable distribution judgment, as that issue had been properly "withdrawn from the realm of dispute." Further stipulations listed various assets and debts of the parties, followed by the words "DISTRIBUTION: HUSBAND." Accordingly, the trial court assigned such assets and debts to defendant. Thus, if the parties had desired to removed from the trial court's consideration the issue of ownership of the Buick automobiles, they could have done so. Because the language of the stipulations regarding the automobiles was permissive rather than mandatory, we hold that the trial court could properly award the automobiles according to its discretion. *Id*. at 662-663.

Tip: Make sure that any stipulations you enter into are clear and mandatory in nature rather than permissive. Use of "shall distribute" instead of "should distribute."

4. Distributional factors of Schedules G & H.

North Carolina General Statutes §50-20(c) sets forth a number of distributional factors that shall be considered by the court in making his determination as to whether one party should receive greater than or less than one half of the net marital and divisible estate. An example of some factors that may be alleged by a party can be found in Exhibit D, Schedule __ & __. The assertions by each party represent the client that he or she is making to the trial court in support of his or her contention for an unequal distribution of property. North Carolina's appellate courts have rendered numerous decisions which shed light as to how affective certain of these contentions are and as to how certain arguments are to be interpreted by the court. As these assertions need to initially be presented in the parties pretrial order, the issue will be discussed herein.

Again, it is important to understand the local rules of a given locality as well as the preferences of the equitable distribution judges in a particular jurisdiction. In Forsyth County, it is not uncommon for attorneys to draft these schedules by merely

listing the statutory reference under §50-20 (c) and waiting until trial to make a formal argument. Other judges may require a more comprehensive statement setting out, with some specificity, the client which are being made.

When a party introduces evidence of a distributional factor at trial , the trial court must consider the factor and make a finding of fact with regard to it. See Freeman v. Freeman, 107 N.C. App. 644, 656, 421 S.E.2d 623, 629 (1992). Where parties enter into a consent order prior to trial in which they stipulated "issues of debts, tax consequences, and credits are all to be resolved by the Court, but other than such factors, the marital property will be divided equally..." they are bound by them. Quick v. Quick, __ S.E.2d __, __ N.C. App. __, (2002). In Quick, the Court of Appeals noted that "our courts favor *written stipulations* which are duly executed and acknowledged by the parties." *Id*. (citing Fox v. Fox, 114 N.C. App. 125, 132, 441 S.E.2d 613, 618 (1994) (emphasis in original)). "Although "[a] stipulation is not itself evidence,... it removes the admitted fact from the field of evidence by formally conceding its existence." *Id.* (See Fox at 133, 441 S.E.2d at 618 (quoting Kenneth S. Broun, Brandis & Broun on North Carolina evidence §198 (4th ed. 1993)).

In Quick, each party stipulated that certain factors, such as the liquid or nonliquid character of marital property, would not be considered by the equitable distribution court. The Court of Appeals held that the parties "effectively removed this factor from the field of evidence." This case stands for the premise that parties can stipulate in a pretrial order that certain distributional factors not be considered by the court, and the court will uphold such an agreement.

TIP: In order to limit the issues for the trial Judge to determine, stipulations as to legal arguments can be useful. If the parties can agree that certain distributional factors will not be presented to the court, then such a stipulation will serve to streamline any hearing and also give advance notice to both parties as to which issues day need to prepare for and argue at trial.

One particular distributional factor that the Legislature has set forth in §50-20 (c)(11) are the "tax consequences to each party." This particular factor is not interpreted by the courts as plainly as the Legislature had written it and the equitable distribution statute. The North Carolina appellate courts have construed this provision "as requiring the court to consider tax consequences that **will** result from the distribution of property that the court **actually occurs**." Weaver v. Weaver, 72 N.C. App. 409, 416, 320 4 S.E.2d 915, 920 (1985) (emphasis added). "It is error for a trial court to consider 'hypothetical tax consequences as a distributive factor.'" Wilkins v. Wilkins, 111 N.C. App. 541, 553, 432 S.E.2d 891, 897 (1993).

In the case of Dolan v. Dolan, 148 N.C. App. 256, 558 S.E.2d 2 A. King (2002), the trial court made a finding that death rental properties were liquidated at the stipulated value that the plaintiff what have personal income tax consequences of $46,726.00 as well as a corporate tax liability of $65,415.00. The court also made findings that the defendant would have income tax consequences of $21,500.00 if

she were to liquidate three rental properties distributed to her no finding was made that as a direct result of the distribution that the parties would have to liquidate the rental properties or that there would be any actual tax consequences. The trial court did not order any of the rental properties to be liquidated as part of distribution. *Id*. at 148 N.C. App. 259.

The Court of Appeals determined that the trial court was in error for using hypothetical and speculative tax consequences as a distributional factor. It held that since there was no finding that there would be tax consequences as a direct result of the distribution, that it was error to consider those speculative tax consequences.

The equitable distribution statute §50-20(e) provides for a presumption in every action that an in-kind distribution of marital or divisible property is equitable. The presumption "may be rebutted by the greater weight of the evidence, or by evidence that the property is a closely held business entity or is otherwise not susceptible to division in-kind. In any action in which the presumption is rebutted, the court in lieu of in-kind distribution shall provide for a distributive award in order to achieve equity between the parties."

An argument can be made that certain stipulations in a pretrial order can be made which would require that certain assets actually be sold rather than having them be distributed pursuant to an in-kind distribution. In such an event, the trial court would have a stronger incentive to consider tax consequences as a distributional factor since the equitable distribution judgment will be causing certain property to be sold. Additionally, if one can convince opposing counsel to stipulate and the pretrial order that speculative or hypothetical tax consequences shall be deemed a proper distributional factor, a strong argument can be made that no appeal will lie as a consequence of the court's consideration of same.

TIP: If you want to be able to allege tax consequences as a distributional factor and said consequences would otherwise be speculative or hypothetical, try and make stipulations which would either force a court to order property sold or try and enter into a stipulation with opposing counsel that will permit the court to take said consequences into account in determining whether or not to grant a party more than one half of the net marital and divisible estate.

The trial Judge must make specific findings of fact showing that it has considered the testimony, even death the court rejects the contention or gives it little weight. From the standpoint of whether or not to include marginal issues as allegations for a distributional factor, so long as the argument is in good faith and of merit, it may be worthwhile to list all such alleged distributional factors. (See Wall v. Wall, 140 N.C. App. 303, 536 S.E.2d 647 (2000), holding that "Even if the trial court did not find the defendant's testimony to be credible, the court still should have made findings of fact to indicate that the court had considered the testimony, but rejected it or gave it little weight.")

In the Wall case referenced above, the defendant testified at trial about his health situation and argued that it should be used as a distributional factor. The trial court was found to be in error for failing to consider the defendant's physical and mental health and to make findings to address the factor. The trial court appeared to give little to no weight to the proposed distributional factor, however it did not make specific findings of fact. If allegations can be made which could affect a party's ability to work in the future, certain health problems, even if not serious or life-threatening, can arguably have an effect on a parties ability to earn income. Since the court is required to make specific findings with regard to the allegations presented, a single factor, or a series of factors taken together, may convince the trial judge to make a distribution in favor of your client.

The party desiring an unequal division of marital property has the burden to produce evidence that at least one of the twelve statutory factors under §50-20(c) exist by a preponderance of the evidence and that an equal division would not be equitable. If no evidence is admitted which would show an equal division to be inequitable, the trial court must divide marital property equally. See, Henderson v. Henderson, ___ N.C. App. ___ , ___ S.E.2d ___ (2003). The trial court can divide the property on and on equal basis solely upon finding that a single statutory factor exists. In its findings of fact supporting its conclusion that an equal division is not equitable, the trial court must "list the distributional factor or factors which are supported by the evidence and which justify an unequal distribution." Id. (see also, Patterson v. Patterson 81 N.C. App. 255, 343 S.E.2d 595 (1986).

Tip: Since the trial court must make specific findings of fact with regard to see allegations of each party as to whether or not proper distributional factors exist which would justify an unequal distribution, it is wise to list all factors which could possibly apply in the pretrial order so as to preserve the argument for trial.

5. Do not make quick assumptions as to which schedule property belongs on.

When determining whether property should be listed on a particular schedule, give consideration to placing the item on the schedule which will give you the most flexibility in arguing your case. For example, if the wife, in a case, had received significant "gifts" of jewelry during marriage from husband, it may be a mistake for the husband to automatically list said property on the schedule stipulating as to wife's separate property. Instead, if husband lists said property on the schedule in which there is disagreement as to whether an item is marital property, he would at least be able to present evidence to the court that no intention for the jewelry to remain the wife's separate property was stated at the conveyance. (See, Sloan v. Hitt, ___ N.C. App. ___ , ___ S.E.2d ___ (2004), holding that the party attempting to show in items separate nature must produce by a preponderance of the evidence that the gift was given with such an intention, and further holding that where the defendant testified that the jewelry was purchased with the intent of making a gift to

plaintiff, the testimony "merely shows defendant intended the jewelry to be a gift. Plaintiff failed to prove by a preponderance of the evidence that defendant intended for the jewelry to be her separate property. Accordingly, the trial court properly classified the jewelry as marital property.")

TIP: Leave yourself the flexibility to make a favorable argument at trial by placing an issue on a schedule which permits argument rather than a schedule which stipulates as to the classification or value or distribution of certain property.

Ultimately, as this is a conference specifically addressing the Alimony and Postseparation Support, a reason why one should be concerned with the use of the Equitable Distribution Pretrial Order is because an alimony trial can be impacted by the parties' equitable distribution. If a party receives income producing assets pursuant to an equitable distribution judgment a party's need for alimony may decline. In stipulating as to which items the husband and the wife will each receive, consideration should be given to whether or not such a distribution will force the trial judge to distribute other assets, which may produce income or which create liquid assets, to one party over the other. In an equitable distribution, the pay your spouse may wish to stipulate that the payee spouse received income producing assets such as rental properties. By entering into such a stipulation, the pay or spouse can not only achieve an equitable distribution, but also potentially reduce his alimony exposure, if any because the payee spouse has a source of income which will contribute to his or her needs. Additionally, in considering Pala V. marital and divisible estate should be divided, consideration may also be given to the responsibility for debt payments. In the event that the pay or spouse or to stipulate that they be responsible for a disproportionate amount of marital debt, the needs of the payee spouse would likely be reduced.

TIP: Strategic use of stipulations may increase or decrease a parties potential liability to pay alimony or a parties potential to receive same. Remember that income producing assets will be considered as income for alimony purposes.

2. Financial Standing Affidavits

A. Local Rules

When preparing financial standing affidavits, one must be sure that they conform to local rules or local custom if no specific rule is given. In some jurisdictions, trial judges routinely permit attorneys to vary from the local rules, while others are more strict in making sure that formalities are followed.

Examples of the variety of local rules follow: (these rules have been copied from the AOC website and should be reviewed to make certain that they have not been more recently updated).

1) **Mecklenburg County** - Rule 10 of the Mecklenburg County local rules discusses the use of financial affidavits in postseparation support and alimony cases.

Rule 10.1 states "in all cases involving claims for postseparation support (PSS) or alimony or a modification of a previous order for alimony, both Parties shall file and exchange an Affidavit of Financial Standing (Form CCF-31)."

Rule 10.2 states “The Party seeking PSS or alimony or a modification of alimony shall attach the Affidavit of Financial Standing to his or her unusual Pleading. The responding Party shall file and serve the opposing Party with the Affidavit of Financial Standing with his or her responsive pleading or by the Wednesday preceding the first week of the domestic term in which the case is scheduled for hearing or trial, whichever is earlier.

Rule 10.3 states "In cases involving a trial of an alimony or modification of alimony claim, each Party shall file and serve the opposing Party with an updated Affidavit of Financial Standing no later than the Wednesday preceding the first week of the domestic term in which the case is scheduled for trial.

2) **Wake County** – Rule 9 of the Wake County local rules provides, in pertinent part:

Rule 9.5 (b), Use of affidavits, states "Except for good cause shown, evidence in post-separation support hearings shall be by affidavits. Parties wishing to use affidavits from the parties, accountants, private investigators or other third parties must deliver the affidavits to the other party by any means reasonably calculated to ensure receipts no later than ten (10) business days prior to the scheduled hearing. Rebuttal affidavits, i.e., affidavits that are filed in response to the other party's affidavits, shall be delivered to the opposing party by any means reasonably calculated to ensure receipts no later than five (5) business days before the

scheduled hearing. The Court will not consider affidavits which are not served on the opposing party in accordance with these Rules.

Rule 10: INITIAL DISCLOSURES REGARDING FINANCIAL ISSUES IN CHILD SUPPORT, POSTSEPARATION SUPPORT AND ALIMONY - provides, inter alia, that a financial affidavit (Form DOM-10) the exchanged and sets forth a schedule for compliance.

3) **Forsyth County** - In it's local rules, Forsyth County requires financial affidavits to be used in child support and spousal support cases. "Each party who seeks support or from whom support is sought shall file with the Clerk of Superior Court and serve upon the other party a Financial Affidavit using the form attached hereto. Unless otherwise agreed to by parties in writing, financial affidavits shall be served and filed at least 10 days before the first scheduled hearing. The Court may, in his discretion, postpone or waive these filing requirements."

As can be noted from the few examples of local rules listed above, each local jurisdiction may have differing roles and procedures with regard to the use and filing of financial affidavits and they may have specific forms which should be used. In Forsyth County, for example, it is not uncommon for modified financial affidavits to be filed with the clerk of Court provided that they incorporate at least the minimum information which is set forth in the forms provided in the local rule. Several examples of different financial affidavits are attached as Exhibits E, F & G.

TIP: Know your local rules and whether or not he or judges will permit deviations to any form financial affidavit normally used in your locality.

B. Statutory Reference for Use of Affidavits in Spousal Support Cases

North Carolina's postseparation support statute specifically provides that "The verified pleading, verified motion, or affidavit of the moving party shall set forth the factual basis for the relief requested." NCGS §50-16.2A(a). NCGS §50-16.8 further authorizes the use of financial affidavits in postseparation support cases and states: When an application is made for postseparation support, the court may base its award on a verified pleading, affidavit, or other competent evidence..."

It is the above statutory reference that has prompted individual jurisdictions to submit local rules which permit the reliance by the trial court on financial standing

affidavits in postseparation support cases and which can lead to abbreviated hearings where the court relies upon affidavits rather than live testimony.

Consequently, it is vital, especially in postseparation support cases, four a financial affidavit to be complete and accurate. If the document is relied upon by the Judge in lieu of "live" testimony, all of the information which needs to be conveyed to the court must be listed on the affidavit. One solution is to attach a series of exhibits to the financial affidavit supporting each and every contention.

At an initial client interview, consider asking your client to produce documentation going back at least one year for each expense listed all on his or her affidavit and with regard to bills and payments for each debt listed on the affidavit. These documents should be placed in order for the past 12 months, in such documentation is available, calculated to show the total payments made over a one-year period of time and divided by the total number of months. Often the average cost per month is the most appropriate value to insert in the affidavit because expenses vary month to month. You can then attach the monthly statements, canceled checks or bills to the financial affidavit in support of each contention which is asserted in the affidavit. When documentation such as this is presented, it is difficult for the trial judge to make assumptions that the expenses provided are unreasonable and you are more likely to have your affidavit accepted as intended.

Another reason why it is helpful to average expenses over the period of one year, or longer, is because not all expenses are consistent month to month. Typically, a party's natural gas bill is going to be substantially higher during the winter months than during the summer months. Reliance on only a few months in the summertime will underestimate the expense. Other expenses, such as major automobile repairs do not occur with frequency, unless of course you are referring to be Morrow Alexander "firm automobile." Therefore, an average can be taken for this expense.

Similarly, other expenses, whether summer camp for children, costs associated with seasonal activities, i.e., boating, waterskiing, snow skiing and the like may also be averaged.

Often, there may be a valid reason as to why expenses of a party have changed subsequent to separation, such as less income with which to pay expenses. In such a circumstance, a dependent spouse, for example, may take advantage of a modification to a standard financial affidavit and have multiple columns showing expenses at varying times along with an explanation as to why the values are different. If you refer to the attached exhibits F & G you will find examples of this meeting done in a similar fashion.

If representing a dependent spouse who has, for example, reasonable expenses of $5,000 per month at the time of the parties separation, but has only maintained expenses of approximately $2,000 subsequent to separation because of

a lack of income, a financial affidavit which shows pre-separation expenditures along with the current expenditures will assist a judge viewing both situations and the reason why such a change has taken place.

If representing a supporting spouse who has, postseparation, provided monies toward child support and spousal support, or make payment on marital debts, a similar type affidavit would be useful. In one column, show V. expenses which the party had for at least one year prior to the date of separation. In another column, be sure to include the expenses which have been paid by him or her after the separation of the parties so that a court will recognize that the supporting spouse is disposable income has been reduced.

Where as the court can rely solely upon financial standing affidavits in a postseparation support hearing, the court must hear testimony and an alimony hearing. Nevertheless, the financial standing affidavit is no less important in an alimony action. (See, In the Matter of the Custody of Tracy Marlene Griffin, 6 N.C. App. 375, 170 S.E.2d 84 (1969), in which the North Carolina Court of Appeals, in a child custody case noted: "For example, in determining preliminary or interlocutory motions, in ruling on applications for alimony pendente lite, and in finding facts as a basis for issuing temporary restraining orders, use of affidavits has been considered proper. In all of these situations there is a compelling need for expeditious procedure. In most of them in the normal course of the litigation opportunity is subsequently afforded to the opposing party to refute the affidavits or to cross-examine the affiants. However, we perceive in the normal circumstances which attend child custody proceedings no such compelling necessity for speedy action as warrants action based upon inferior evidence. If the circumstances of a particular case require, the court may enter an order for temporary custody, even pending service of process or notice, and use of affidavits as a basis for finding necessary facts for such purpose may be appropriate. Awarding custody on a permanent basis is quite another matter.... [A party] must object when affidavits are offered or ask permission to cross examine, else his silence gives consent. By implication, if timely objection is made, affidavits should not be received, at least not without affording an opportunity for cross-examination.").[1]

During a trial in which financial standing affidavits are introduced and where testimony is permitted, cross examination of an affiant can be interesting, especially when they have not relied upon documentation verifying their assertions. If the affiant has made guesses as to actual expenditures, an attorney on cross examination may be successful in convincing the trial judge that the "guess "is an over or under estimation. Additionally, during such cross examination, one should question whether or not the expenses which are listed are averaged over a one-year

[1] *See also,* Gustafson v. Gustafson, 272 N.C. 452, 158 S.E.2d 619 (1968), which stated "Should we accept the contentions of the defendant and forbid the use of affidavits and require the presents, examination and cross examination of each of the witnesses at preliminary and temporary hearings and motions pending trial, it would cause serious and unnecessary delay. The ultimate right of cross-examination will be afforded the parties at the trial of the cause..."

period, and if not, what the time frame is. As noted above, a party may try and over inflate certain expenses by listing only the prior three months worth of gas bills during a trial in the month of February. This would not take into account the additional nine months when the gas bill may be substantially less.

Again, during cross-examination, it is wise to question the affiant as to whether or not be fax disclosed in the affidavit are true and within the affiant's personal knowledge, and how said knowledge was acquired. Where one client has documentation verifying expenses and one person does not, the judge will usually accept the assertion of the party with verification.

Another area that can be explored during cross-examination as to do with the asserted debt payments which are been made, or which have to be made by the affiant. Questions with regard to these issues can explore whether or not debt has been incurred subsequent to date of separation, what the debt was for, the reasonableness of the debt and to determine whether or not it was incurred for the purpose of reducing an income stream. For example, if after separation, a spouse has taken on $10,000 in debt for the purchase of a motorcycle, when he already has reliable transportation, a Judge will likely ignore the affiant's contention that monthly payments must be made, especially where there is not enough money readily available for the support of both parties.

A useful way to verify that a party is providing accurate income information is by submitting an employer's affidavit, in advance of trial, to the other parties employer. Depending upon local rule, such an affidavit, if returned prior to trial may be accepted by the court without the need for testimony of the employer. A copy of an employer's affidavit for, consistent with the local rules for Forsyth County, has been attached as Exhibit H. such an employer affidavit can be helpful in identifying whether or not all income is being listed by an affiant. Often, a party will only lists his or her base rate of pay, without consideration of bonuses. This bonuses are normally paid, they may be properly included in a party's gross income. Such information, from the employer, can be especially useful when one of the parties is in a relatively new job or possession without day history to rely upon as to such payments. If the employer's affidavit provides that a bonus will be paid, it may properly be considered by the trial judge in determining a parties gross income.

One a party is self employed, that party has much flexibility in portraying his or her income to be less than it may actually be. In order to be able to properly cross examine the affiant, subpoenas or discovery should be issued requesting documentation such as corporate tax returns, corporate bank records, receipts, and the like. A Judge may determine that the party receives benefits which are not directly included in his or her paycheck and include them in two the parties income for support purposes.

Although not directly relating to the use of financial standing affidavits, one particular decision by the North Carolina Court of Appeals has created an

opportunity for a creative attorney to take advantage of a loophole in the law with regard to postseparation support. This loophole exists as a consequence of the decision rendered in Vittitoe v. Vittitoe, 150 N.C.App. 400, 563 S.E.2d 281 (2002). In Vittitoe, the trial judge awarded a dependent spouse $800 per month postseparation support continuing "until the final determination of the alimony claim." At the time, no action for alimony was pending, nor was a claim for alimony preserved prior to the date in which the judgment of absolute divorce was entered. Subsequent to the divorce, the trial court refused to terminate the postseparation support award. The Court of Appeals was faced with the question as to whether postseparation support terminated upon entry of absolute divorce in circumstances where no pending alimony claim had been made prior to that time. The Court of Appeals ruled that postseparation support is not terminated by divorce and, in this particular situation, may continue indefinitely.

The decision by the Court of Appeals, with regard to this case, appears to be in conflict with the intention of the postseparation support statute, and the a bill which will correct this problem by, inter alia, stating that postseparation support shall terminate upon the entry of a judgment of absolute divorce unless a pending claim for alimony has been filed prior to the entry of the divorce judgment. Such a revision will make clear the proposition that postseparation support is a temporary measure which will last for the period set forth by the trial Judge, or the granting or denial of alimony, whichever shall first occur. (See, H923, Amend Postseparation Support Laws).

Although it seems likely that the aforementioned bill will pass the Legislature, there is no guarantee of success, and therefore, when representing the supporting spouse, you must make certain that any award of postseparation support by the trial Judge has a termination date so that a party cannot take advantage of an open ended postseparation support award by dismissing a marginal alimony claim prior to divorce and potentially receiving postseparation support indefinitely.