

FAMILY LAW

Equitable Distribution Of Stock Grants The Lesson Of *Ubertaccio*

By JON B. KURTZ

Recently, the North Carolina Supreme Court affirmed the concurring opinion of the Honorable Eric Levinson of the North Carolina Court of Appeals, and, for the first time, the appellate courts directly addressed how the equitable distribution statute applies with regard to nonvested stock grants which are provided to an employee spouse prior to the date of separation and which vest after the date of separation as a consequence of the continued employment of the recipient spouse.

In the case of *Ubertaccio v. Ubertaccio*, 161 N.C. App. 352, 588 S.E.2d 905 (2003), 359 N.C. 175, 604 S.E.2d 912 (2004), the wife had been employed by Lucent Technologies, Inc. for many years during marriage. Prior to separation, the wife began working for ASA Corporation, which was a spinoff division of her prior employer. The wife entered into an employment agreement with ASA and as part of the agreement, she was eligible to receive 10,000 shares of ASA stock at the end of a probationary period. The husband and the wife separated approximately six weeks after the wife entered into the employment contract. Wife continued to work for ASA after separation, and she completed her probationary period.

ASA Corporation was later purchased by AON Corporation and, as a result of said purchase, the wife obtained AON Corporation stock in exchange for her ASA stock. Ultimately, the wife cashed the stock, which had a fair market value of \$168,483.62. After taxes were withheld by AON Corporation, the wife received \$82,637.

Wife asserted, inter alia, that the stock which she received as a consequence of the grant was her separate property, or in the alternative, part separate property and part marital property. She argued on appeal that at most, the husband was entitled to claim a percentage of the total asset, which essentially represented the approximate six weeks that the wife worked prior to separation. Wife argued that her continued employment and subsequent execution of a covenant not to compete indicated that the grant was based upon her agreeing to continue her employment and to give up the right to seek employment with competitors. The trial court disagreed and held that the entire net proceeds from the sale of stock was divisible property, and in the alternative, marital property. Ultimately, the husband was awarded

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55 percent and the wife 45 percent of the marital and divisible estate.

The trial court specifically made findings that: "[T]he AON Corporation stock and proceeds derived therefrom by the plaintiff in the year 2000 (after the date of separation, but before the date of distribution) was acquired as a result of the efforts of the plaintiff during the marriage and before the date of separation, said efforts including, but not limited to, bonuses and contractual rights. The court makes the ultimate finding of fact that said AON Corporation stock and the proceeds derived therefrom by the plaintiff constitute divisible property pursuant to G.S. § 50-20(b)(4)."

The court further made a specific finding that the ASA Corporation stock which was received by the wife pursuant to her accepted employment agreement with ASA was marital property; that the AON stock was acquired in exchange for the marital property ASA stock, and that the AON stock therefore became marital property pursuant to G.S. § 50-20(b)(1).

On appeal, the Appellant, wife, contended that the trial court erred in its classification of the aforementioned stock as divisible or marital property and the distribution of said property as part of the marital and/or divisible estate. Specifically, wife argued:

- The stock grants were not granted, vested or matured as of the date of separation and that the plaintiff was required to execute a covenant not to compete after the date of separation.

- That even if a portion of the stock proceeds were marital or divisible property, that the court should have applied a coverture formula, or some other rational formula which would take into consideration that the employment agreement was only executed several weeks prior to the parties' date of separation and that the wife continued to maintain employment through her probationary period, after separation, in order to receive the stock.

The Court of Appeals contained two concurring and one dissenting opinion. The North Carolina Supreme Court affirmed the concurring opinion of Judge Levinson who supported the trial court decision. His opinion stated that the wife received, "contemporaneous with her employment engagement, the right to receive "units" of value which were part of a hybrid form of phantom stock program so long as she remained an employee for a specific duration."

The court's analysis was that the provisions of G.S. § 50-20.1 did not control the classification or distribution of the stock grants as argued by wife.

Judge Levinson held that: "I do not believe that all forms of 'salary substitutes' or compen-



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sation, the receipt of which is deferred to some point in the future, must be classified and distributed in accordance with the provisions and limitations of G.S. §50-20.1 (d) (awards pursuant to this statute must be determined using the 'coverture fraction'); G.S. § 50-20.1 (a) and (b) (limiting the method of distribution for awards made pursuant to this statute). Rather, the clear intent of that statute is to provide for the classification and distribution of only those 'other forms of deferred compensation' that are in the nature of pension and retirement benefits. To interpret G.S. § 50-20.1 so broadly as to cover assets such as those at issue in this case would render G.S. § 50-20(b)(4)(b) meaningless."

With the aforementioned decision, the Court of Appeals, as affirmed by the North Carolina Supreme Court, has distinguished the procedure for classifying and distributing stock grants, as opposed to stock options and other forms of pension and retirement benefits. Arguably, the most significant factor in the *Ubertaccio* case is the fact that the trial judge made a specific finding of fact that the stock was acquired as a consequence of the efforts of wife during marriage and before the date of separation. In essence, a nonvested interest was acquired at the time that the grant was made and the trial court specifically held that the grant was acquired as a result of the efforts of the plaintiff during the marriage and before the date of separation, said efforts including, but not limited to, bonuses and contractual rights. It also is important to note that in this specific case, the covenant not to compete was only discretionary and that wife executed an agreement approximately two months after having received the grant of stock. Therefore, the execution of the covenant not to compete did not appear to be a requirement in order for wife to receive the grant of stock. In fact, the trial court found the grant to be made as a consequence of, inter alia, the prior employment of the plaintiff during marriage and before separation. The mere continuation of employment did not change the classification of the asset. In the event that a covenant not to compete or other contract, in which the employee spouse gives consideration, is a condition precedent to the grant being made, the court could draw a different conclusion.

In *Ubertaccio* the husband's argument prevailed. Had the trial court not made findings of fact which were so specific and which so clearly classified the grant of stock as an award due to past performance, bonuses or contractual rights, it is possible that the courts could have found that the stock was separate property or a mixture of marital, divisible and/or separate property. The lesson to be learned from this case is that an argument must be clearly made as to the intention and purpose of the grant of stock in order for the courts to make a certain determination as to the stocks classification. Since the appellate court's decision states that G.S. § 50-20.1 does not automatically apply to stock grants, a clear argument will need to be made as to how the asset is ultimately supposed to be classified.