

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1997

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HOUSE BILL 533  
Committee Substitute Favorable 4/10/97  
Third Edition Engrossed 4/16/97  
Senate Judiciary Committee Substitute Adopted 6/12/97

Short Title: Equit. Distr./Divisible Prop.

(Public)

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Sponsors:

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Referred to:

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March 18, 1997

A BILL TO BE ENTITLED

1 AN ACT TO ADD "DIVISIBLE PROPERTY" AS A CATEGORY OF PROPERTY  
2 SUBJECT TO EQUITABLE DISTRIBUTION, TO CREATE A REBUTTABLE  
3 PRESUMPTION THAT AN IN-KIND DISTRIBUTION OF PROPERTY IS  
4 EQUITABLE, TO ENCOURAGE INTERIM DISTRIBUTION OF PROPERTY OR  
5 DEBT, AND TO ALLOW CERTAIN EVIDENCE OF THE VALUE OF MARITAL  
6 PROPERTY, AS RECOMMENDED BY THE FAMILY LAW SECTION OF THE  
7 NORTH CAROLINA BAR ASSOCIATION.  
8

9 The General Assembly of North Carolina enacts:

10 Section 1. G.S. 50-20 reads as rewritten:

11 "**§ 50-20. Distribution by court of marital property upon divorce.**

12 (a) Upon application of a party, the court shall determine what is the marital  
13 property and divisible property and shall provide for an equitable distribution of the  
14 marital property and divisible property between the parties in accordance with the  
15 provisions of this section.

16 (b) For purposes of this section:

1 (1) 'Marital property' means all real and personal property acquired by  
2 either spouse or both spouses during the course of the marriage and  
3 before the date of the separation of the parties, and presently owned,  
4 except property determined to be separate property or divisible property  
5 in accordance with subdivision (2) or (4) of this subsection. Marital  
6 property includes all vested pension, retirement, and other deferred  
7 compensation rights, including military pensions eligible under the  
8 federal Uniformed Services Former Spouses' Protection Act. It is  
9 presumed that all property acquired after the date of marriage and before  
10 the date of separation is marital property except property which is  
11 separate property under subdivision (2) of this subsection. This  
12 presumption may be rebutted by the greater weight of the evidence.

13 (2) 'Separate property' means all real and personal property acquired by a  
14 spouse before marriage or acquired by a spouse by bequest, devise,  
15 descent, or gift during the course of the marriage. However, property  
16 acquired by gift from the other spouse during the course of the marriage  
17 shall be considered separate property only if such an intention is stated  
18 in the conveyance. Property acquired in exchange for separate property  
19 shall remain separate property regardless of whether the title is in the  
20 name of the husband or wife or both and shall not be considered to be  
21 marital property unless a contrary intention is expressly stated in the  
22 conveyance. The increase in value of separate property and the income  
23 derived from separate property shall be considered separate property.  
24 All professional licenses and business licenses which would terminate  
25 on transfer shall be considered separate property. The expectation of  
26 nonvested pension, retirement, or other deferred compensation rights  
27 shall be considered separate property.

28 (3) 'Distributive award' means payments that are payable either in a lump  
29 sum or over a period of time in fixed amounts, but shall not include  
30 alimony payments or other similar payments for support and  
31 maintenance which are treated as ordinary income to the recipient under  
32 the Internal Revenue Code.

33 The distributive award of vested pension, retirement, and other  
34 deferred compensation benefits may be made payable:

- 35 a. As a lump sum by agreement;
- 36 b. Over a period of time in fixed amounts by agreement;
- 37 c. As a prorated portion of the benefits made to the designated  
38 recipient at the time the party against whom the award is made  
39 actually begins to receive the benefits; or
- 40 d. By awarding a larger portion of other assets to the party not  
41 receiving the benefits, and a smaller share of other assets to the  
42 party entitled to receive the benefits.

1 Notwithstanding the foregoing, the court shall not require the  
2 administrator of the fund or plan involved to make any payments until  
3 the party against whom the award is made actually begins to receive the  
4 benefits unless a plan under the Employee Retirement Income Security  
5 Act (ERISA) permits earlier distribution. The award shall be  
6 determined using the proportion of time the marriage existed, (up to the  
7 date of separation of the parties), simultaneously with the employment  
8 which earned the vested pension, retirement, or deferred compensation  
9 benefit, to the total amount of time of employment. The award shall be  
10 based on the vested accrued benefit, as provided by the plan or fund,  
11 calculated as of the date of separation, and shall not include  
12 contributions, years of service or compensation which may accrue after  
13 the date of separation. The award shall include gains and losses on the  
14 prorated portion of the benefit vested at the date of separation. No  
15 award shall exceed fifty percent (50%) of the benefits the person against  
16 whom the award is made is entitled to receive as vested pension,  
17 retirement, or other deferred compensation benefits, except that an  
18 award may exceed fifty percent (50%) if (i) other assets subject to  
19 equitable distribution are insufficient; or (ii) there is difficulty in  
20 distributing any asset or any interest in a business, corporation, or  
21 profession; or (iii) it is economically desirable for one party to retain an  
22 asset or interest that is intact and free from any claim or interference by  
23 the other party; or (iv) more than one pension or retirement system or  
24 deferred compensation plan or fund is involved, but the benefits  
25 awarded may not exceed fifty percent (50%) of the total benefits of all  
26 the plans added together; or (v) both parties consent. In no event shall  
27 an award exceed fifty percent (50%) if a plan prohibits an award in  
28 excess of fifty percent (50%).

29 In the event the person receiving the award dies, the unpaid balance,  
30 if any, of the award shall pass to the beneficiaries of the recipient by  
31 will, if any, or by intestate succession, or by beneficiary designation  
32 with the plan consistent with the terms of the plan unless the plan  
33 prohibits such a designation. In the event the person against whom the  
34 award is made dies, the award to the recipient shall remain payable to  
35 the extent permitted by the pension or retirement system or deferred  
36 compensation plan or fund involved.

37 The Court may require distribution of the award by means of a  
38 qualified domestic relations order, as defined in Section 414(p) of the  
39 Internal Revenue Code of 1986. To facilitate the calculation and  
40 payment of distributive awards, the administrator of the system, plan or  
41 fund may be ordered to certify the total contributions, years of service,  
42 and pension, retirement, or other deferred compensation benefits  
43 payable.

1           The provisions of this section and G.S. 50-21 shall apply to all  
2 pension, retirement, and other deferred compensation plans and funds,  
3 including military pensions eligible under the Federal Uniform Services  
4 Former Spouses Protection Act, and including funds administered by  
5 the State pursuant to Articles 84 through 88 of Chapter 58 and Chapters  
6 120, 127A, 128, 135, 143, 143B, and 147 of the General Statutes, to the  
7 extent of a member's accrued benefit at the date of separation, as  
8 determined by the court.

9           (4) 'Divisible property' means all real and personal property as set forth  
10 below:

11           a. All appreciation and diminution in value of marital property and  
12 divisible property of the parties occurring after the date of  
13 separation and prior to the date of distribution, except that  
14 appreciation or diminution in value which is the result of  
15 postseparation actions or activities of a spouse shall not be  
16 treated as divisible property.

17           b. All property, property rights, or any portion thereof received after  
18 the date of separation but before the date of distribution that was  
19 acquired as a result of the efforts of either spouse during the  
20 marriage and before the date of separation, including, but not  
21 limited to, commissions, bonuses, and contractual rights.

22           c. Passive income from marital property received after the date of  
23 separation, including, but not limited to, interest and dividends.

24           d. Increases in marital debt and financing charges and interest  
25 related to marital debt.

26           (c) There shall be an equal division by using net value of marital property and net  
27 value of divisible property unless the court determines that an equal division is not  
28 equitable. If the court determines that an equal division is not equitable, the court shall  
29 divide the marital property and divisible property equitably. Factors the court shall  
30 consider under this subsection are as follows:

31           (1) The income, property, and liabilities of each party at the time the  
32 division of property is to become effective;

33           (2) Any obligation for support arising out of a prior marriage;

34           (3) The duration of the marriage and the age and physical and mental  
35 health of both parties;

36           (4) The need of a parent with custody of a child or children of the  
37 marriage to occupy or own the marital residence and to use or own  
38 its household effects;

39           (5) The expectation of pension, retirement, or other deferred  
40 compensation rights, which is separate property;

41           (6) Any equitable claim to, interest in, or direct or indirect contribution  
42 made to the acquisition of such marital property by the party not  
43 having title, including joint efforts or expenditures and contributions

- 1 and services, or lack thereof, as a spouse, parent, wage earner or  
2 homemaker;
- 3 (7) Any direct or indirect contribution made by one spouse to help  
4 educate or develop the career potential of the other spouse;
- 5 (8) Any direct contribution to an increase in value of separate property  
6 which occurs during the course of the marriage;
- 7 (9) The liquid or nonliquid character of all marital property;
- 8 (10) The difficulty of evaluating any component asset or any interest in a  
9 business, corporation or profession, and the economic desirability of  
10 retaining such asset or interest, intact and free from any claim or  
11 interference by the other party;
- 12 (11) The tax consequences to each party;
- 13 (11a) Acts of either party to maintain, preserve, develop, or expand; or to  
14 waste, neglect, devalue or convert such marital property, during the  
15 period after separation of the parties and before the time of  
16 distribution; and
- 17 (12) Any other factor which the court finds to be just and proper.

18 (c1) Notwithstanding any other provision of law, a second or subsequent spouse  
19 acquires no interest in the marital property of his or her spouse from a former marriage  
20 until a final determination of equitable distribution is made in the marital property of the  
21 spouse's former marriage.

22 (d) Before, during or after marriage the parties may by written agreement, duly  
23 executed and acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1,  
24 or by a written agreement valid in the jurisdiction where executed, provide for  
25 distribution of the marital property in a manner deemed by the parties to be equitable and  
26 the agreement shall be binding on the parties.

27 (e) Subject to the presumption of subsection (c) of this section that an equal  
28 division is equitable, it shall be presumed in every action that an in-kind distribution of  
29 marital or divisible property is equitable. This presumption may be rebutted by the  
30 greater weight of the evidence, or by evidence that the property is a closely held business  
31 entity or is otherwise not susceptible of division in-kind. In any action in which the court  
32 determines that an equitable distribution of all or portions of the marital property in kind would  
33 be impractical, presumption is rebutted, the court in lieu of such in-kind distribution shall  
34 provide for a distributive award in order to achieve equity between the parties. The court  
35 may provide for a distributive award to facilitate, effectuate or supplement a distribution  
36 of marital or divisible property. The court may provide that any distributive award  
37 payable over a period of time be secured by a lien on specific property.

38 (f) The court shall provide for an equitable distribution without regard to alimony  
39 for either party or support of the children of both parties. After the determination of an  
40 equitable distribution, the court, upon request of either party, shall consider whether an  
41 order for alimony or child support should be modified or vacated pursuant to G.S. 50-  
42 16.9 or 50-13.7.

1 (g) If the court orders the transfer of real or personal property or an interest  
2 therein, the court may also enter an order which shall transfer title, as provided in G.S.  
3 1A-1, Rule 70 and G.S. 1-228.

4 (h) If either party claims that any real property is marital property, that party may  
5 cause a notice of lis pendens to be recorded pursuant to Article 11 of Chapter 1 of the  
6 General Statutes. Any person whose conveyance or encumbrance is recorded or whose  
7 interest is obtained by descent, prior to the filing of the lis pendens, shall take the real  
8 property free of any claim resulting from the equitable distribution proceeding. The court  
9 may cancel the notice of lis pendens upon substitution of a bond with surety in an amount  
10 determined by the court to be sufficient provided the court finds that the claim of the  
11 spouse against property subject to the notice of lis pendens can be satisfied by money  
12 damages.

13 (i) Upon filing an action or motion in the cause requesting an equitable  
14 distribution or alleging that an equitable distribution will be requested when it is timely to  
15 do so, a party may seek injunctive relief pursuant to G.S. 1A-1, Rule 65 and Chapter 1,  
16 Article 37, to prevent the disappearance, waste or conversion of property alleged to be  
17 marital property or separate property of the party seeking relief. The court, in lieu of  
18 granting an injunction, may require a bond or other assurance of sufficient amount to  
19 protect the interest of the other spouse in the marital or separate property. Upon  
20 application by the owner of separate property which was removed from the marital home  
21 or possession of its owner by the other spouse, the court may enter an order for  
22 reasonable counsel fees and costs of court incurred to regain its possession, but such fees  
23 shall not exceed the fair market value of the separate property at the time it was removed.

24 (i1) ~~For good cause shown, including, but not limited to, providing for the subsistence of~~  
25 ~~a spouse while an action is pending. Unless good cause is shown that there should not be an~~  
26 interim distribution, the Court ~~court~~ may, at any time after an action for equitable  
27 distribution has been filed and prior to the final judgment of equitable distribution, enter  
28 orders declaring what is separate property and may also enter orders dividing part of the  
29 marital ~~property~~ property, divisible property or debt, or marital debt between the parties.  
30 The partial distribution may provide for a distributive ~~award~~ award and may also provide  
31 for a distribution of marital property, marital debt, divisible property, or divisible debt.  
32 Any such orders entered shall be taken into consideration at trial and proper credit given.

33 Hearings held pursuant to this subsection may be held at sessions arranged by the  
34 chief district court judge pursuant to G.S. 7A-146 and, if held at such sessions, shall not  
35 be subject to the reporting requirements of G.S. 7A-198.

36 (j) In any order for the distribution of property made pursuant to this section, the  
37 court shall make written findings of fact that support the determination that the marital  
38 property has been equitably divided.

39 (k) The rights of the parties to an equitable distribution of marital property are a  
40 species of common ownership, the rights of the respective parties vesting at the time of  
41 the parties' separation."

42 Section 2. G.S. 50-21(b) reads as rewritten:

1       "(b) For purposes of equitable distribution, marital property shall be valued as of  
2 the date of the separation of the ~~parties~~—parties, and evidence of preseparation and  
3 postseparation occurrences or values is competent as corroborative evidence of the value  
4 of marital property as of the date of the separation of the parties. Divisible property and  
5 divisible debt shall be valued as of the date of distribution."

6           Section 3. The amendments to G.S. 50-20(i1) made by this act become  
7 effective October 1, 1997, and apply to motions for interim distribution filed on or after  
8 that date but shall apply to divisible property and divisible debt only in actions for  
9 equitable distribution filed on or after October 1, 1997. The remainder of this act  
10 becomes effective October 1, 1997, and applies to actions for equitable distribution filed  
11 on or after that date.