

First Supplement to Memorandum 81-78

Subject: Study F-610 - Community Property (Enhanced Earning Capacity)

Equitable division of community property has been suggested as one means of equalizing the financial positions of husband and wife at dissolution of marriage. In this connection, the Commission should examine equitable division standards applicable in other jurisdictions. Professor Reppy offers the Idaho law as an example of a statutory listing of equities. See Exhibit 1. Also of interest is a recently enacted North Carolina statute, similar to the Idaho law, that provides for equal division of marital property unless the court determines that an equal division would be inequitable, in which case the court considers a number of factors in arriving at an equitable division. See Exhibit 2.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

Idaho Statute

Community Property and Homestead--Disposition

32-712. Community property and homestead — Disposition. — In case of divorce by the decree of a court of competent jurisdiction, the community property and the homestead must be assigned as follows:

1. The community property must be assigned by the court in such proportions as the court, from all the facts of the case and the condition of the parties, deems just, with due consideration of the following factors:

(a) Unless there are compelling reasons otherwise, there shall be a substantially equal division in value, considering debts, between the spouses.

(b) Factors which may bear upon whether a division shall be equal, or the manner of division, include, but are not limited to:

(1) Duration of the marriage;

(2) Any antenuptial agreement of the parties; provided, however, that the court shall have no authority to amend or rescind any such agreement;

(3) The age, health, occupation, amount and source of income, vocational skills, employability, and liabilities of each spouse;

(4) The needs of each spouse;

(5) Whether the apportionment is in lieu of or in addition to maintenance;

(6) The present and potential earning capability of each party; and

(7) Retirement benefits, including, but not limited to, social security, civil service, military and railroad retirement benefits.

2. If a homestead has been selected from the community property, it may be assigned to either party, either absolutely, provided such assignment is considered in distribution of the community property, or for a limited period, subject in the latter case to the future disposition of the court; or it may be divided or be sold and the proceeds divided.

3. If a homestead has been selected from the separate property of either, it must be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the other spouse. [1875, p. 635, § 12; R.S., § 2480; reen. R.C. & C.L., § 2670; C.S., § 4650; I.C.A., § 31-712; am. 1965, ch. 63, § 1, p. 98; am. 1980, ch. 378, § 9, p. 961.]

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1981

RATIFIED BILL

CHAPTER 815

SENATE BILL 24

AN ACT FOR EQUITABLE DISTRIBUTION OF MARITAL PROPERTY.

The General Assembly of North Carolina enacts:

Section 1. G.S. Chapter 50 is amended by adding a new section to be numbered G.S. 50-20 and to read as follows:

"§ 50-20. Disposition of separate and marital property upon divorce.--(a) Upon application of a party, the court shall determine what is the marital property and shall provide for an equitable distribution of the marital property between the parties in accordance with the provisions of this section.

(b) For purposes of this section:

- (1) 'Marital property' means all real and personal property acquired by either spouse during the course of the marriage and presently owned, except property determined to be separate property in accordance with subdivision (2) of this section.
- (2) 'Separate property' means all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage. However, property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance. Property

acquired in exchange for separate property shall be considered separate property regardless of whether the title is in the name of the husband or wife or both. The increase in value of separate property and the income derived from separate property shall be considered separate property. All professional licenses and business licenses which would terminate on transfer shall be considered separate property. Vested pension or retirement rights and the expectation of nonvested pension or retirement rights shall be considered separate property.

- (3) 'Distributive award' means payments that are payable either in a lump sum or over a period of time in fixed amounts, but shall not include payments that are treated as ordinary income to the recipient under the Internal Revenue Code.

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

- (1) the income, property, and liabilities of each party at the time the division of property is to become effective;
- (2) any obligation for support arising out of a prior marriage;

- (3) the duration of the marriage and the age and physical and mental health of both parties;
- (4) the need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects;
- (5) vested pension or retirement rights and the expectation of nonvested pension or retirement rights, which are separate property;
- (6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker;
- (7) any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse;
- (8) any direct contribution to an increase in value of separate property which occurs during the course of the marriage;
- (9) the liquid or nonliquid character of all marital property;
- (10) the difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free

from any claim or interference by the other party;

(11) the tax consequences to each party; and

(12) any other factor which the court finds to be just and proper.

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

(e) In any action in which the court determines that an equitable distribution of all or portions of the marital property in kind would be impractical, the court in lieu of such distribution shall provide for a distributive award in order to achieve equity between the parties. The court may provide for a distributive award to facilitate, effectuate or supplement a distribution of marital property. The court may provide that any distributive award payable over a period of time be secured by a lien on specific property.

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

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

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

(i) Upon filing an action or motion in the cause requesting an equitable distribution, a party may seek an injunction pursuant to G.S. 1A-1, Rule 65 and G.S. Chapter 1, Article 37.

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

(k) The rights of the parties to an equitable distribution of marital property are a species of common ownership, the rights of the respective parties vesting at the time of the filing of the divorce action."

Sec. 2. G.S. 50-11 is amended by adding new subsections (e) and (f) to read:

"(e) An absolute divorce obtained within this State shall destroy the right of a spouse to an equitable distribution of the marital property under G.S. 50-20 unless the right is asserted prior to judgment of absolute divorce; except, the defendant may bring an action or file a motion in the cause for equitable distribution within six months from the date of the judgment in such a case if service of process upon the defendant was by publication pursuant to G.S. 1A-1, Rule 4 and the defendant failed to appear in the action for divorce.

(f) An absolute divorce by a court that lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property shall not destroy the right of a spouse to an equitable distribution of marital property under G.S. 50-20 if an action or motion in the cause is filed within six months of the date of the divorce. The validity of such divorce, which is a prerequisite to equitable distribution, may be attacked in the action for equitable distribution."

Sec. 3. G.S. 52-1 is amended by deleting the phrase "such regulations and limitations as the General Assembly may prescribe" and substituting in lieu thereof the phrase "G.S. 50-20 and such other regulations and limitations as the General Assembly may prescribe".

Sec. 4. G.S. 1-75.4 is amended by adding a new subdivision to read:

"(12) Marital relationship. In any action under G.S. Chapter

50 that arises out of the marital relationship within this State, notwithstanding subsequent departure from the State, if the other party to the marital relationship continues to reside in this State."

Sec. 5. G.S. 7A-244 is amended by adding after the word "divorce" the phrase, "equitable distribution of property".

Sec. 6. G.S. 50 is amended by adding a new section to be numbered G.S. 50-21 and to read as follows:

"§ 50-21. Procedures in actions for an equitable distribution of property.--Upon application of a party to an action for divorce, an equitable distribution of property shall follow a decree of absolute divorce. A party may file a cross action for equitable distribution in a suit for an absolute divorce, or may file a separate action instituted for the purpose of securing an order of equitable distribution, or may file an action or motion in the cause as provided in G.S. 50-11(e) and (f). Nothing in G.S. 50-20 or this section shall restrict or extend the right to trial by jury as provided by the Constitution of North Carolina. The equitable distribution may not precede a decree of absolute divorce. Real or personal property located outside of North Carolina is subject to equitable distribution in accordance with the provisions of G.S. 50-20 and the court may include in its order appropriate provisions to insure compliance with the order of equitable distribution."

Sec. 7. This act shall become effective October 1, 1981, and shall apply only when the action for an absolute divorce is filed on or after that date.

In the General Assembly read three times and ratified, this the 3rd day of July, 1981.

JAMES C. GREEN

James C. Green

President of the Senate

LISTON B. RAMSEY

Liston B. Ramsey

Speaker of the House of Representatives