

# VALUATION METHODOLOGIES in NORTH CAROLINA DISTRIBUTION ACTIONS

By Clarence E. Horton Jr.

## Introduction

In 1981, Senate Bill 24 (S.L. 1981, Ch. 815) added North Carolina to the ranks of “equitable distribution” states. The Act was grounded in concepts that recognized marriage as an economic partnership, valued both the nonmonetary and monetary contributions of the parties, and fairly (“equitably”) divided the property between them regardless of who “held title” at the time of separation and divorce. Public policy favored an equal division of the marital property.

Classification and distribution involved legal concepts, procedures, and nomenclature new to the North Carolina bench and bar. Valuation, on the other hand, involves familiar concepts that are also involved in cases concerning eminent domain, assessment of property for taxation, valuation of stolen property in larceny cases, and so on. Although the valuation of pension and retirement benefits presented a new problem in North Carolina, there was precedent in the areas of valuation of real estate and business interests.

In 1997, the General Assembly added the concept of “divisible property” in House Bill 534 to deal with the fluctuations in valuation of marital property and debt after the date of separation but before the date of distribution. Divisible property, as defined in N. C. Gen. Stat. 50-20(b)(4), is also to be classified, valued and distributed. Thus, the trial court must now follow the following procedure:

- (1) classify property as being marital, divisible, or separate property;
- (2) calculate the net value of the marital and divisible property; and
- (3) distribute equitably the marital and separate property.

*Finney v. Finney*, \_\_\_\_ N.C. App. \_\_\_\_ (15 January 2013) (quoting *Cunningham v. Cunningham*, 171 N.C. App. 550, 555 (2005)).

This paper examines the general principles of valuation, including the use of pre-trial procedures and opinion evidence, in an effort to identify the various valuation methodologies available to the trial court, the options available to the trial court when the parties do not present sufficient evidence to allow the court to value items of marital property, or when the court is not satisfied with the expert testimony presented. Various approaches to valuation of household goods and other personal property are considered, as well as the valuation of the marital residence and other parcels of real estate; the valuation of business interests and pension benefits; and the difficult problem of change in value of marital assets between the date of separation and the date of distribution.

## I.

### Valuation Overview

#### A. The Relationship of Valuation to the Distribution Decision.

G. S. 50-20 (a) and (c) provide that “[u]pon application of a party, the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties . . . There shall be an equal division by using *net value* of marital property and *net value* of divisible property unless the court determines that an equal division is not equitable.” (emphasis added). “Net value” is not defined in the statute, but our courts have defined it as “market value, if any, less the amount of any encumbrance serving to offset or reduce market value.” *Alexander v. Alexander*, 68 N.C. App. 548, 551 (1984). *Carlson v. Carlson*, 131 N.C. App. 609 (1997). “Encumbrance” is usually defined as a “claim, lien, charge, or liability attached to and binding real property . . . [or] . . . a burden or charge on personal property.” Black’s Law Dictionary 908 (4th ed. 1968) (defining “incumbrance”).

#### B. Fair Market Value Defined.

“Fair market value” has often been defined as “[t]he amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts.” Black’s Law Dictionary 537 (5th ed. 1979). “Value is a word of many meanings.” *Southwestern Bell Telephone v. Public Service Comm’n*, 262 U.S. 276, 310 (1923). Fair market value is not equivalent to purchase price, replacement value, book value, going concern value, or the amount received in a recent sale of similar property. All of these concepts, however, may be valuable aids in determining market value.

In some cases, the parties will be unable to agree on the disposition of intimate personal items having only sentimental value, such as family picture albums. The North Carolina Act “does not require the distribution of articles that have no net value,” *McManus v. McManus*, 76 N.C. App. 588, 592 (1985), but it would seem that the court should make some disposition of all items in order to make as full and final a judgment as possible.

#### C. Necessity of Valuation.

Regardless of the difficulties involved, the valuation process is essential. Faced with a lack of evidence, or the complexity of the task, it is tempting to avoid the difficulty by ordering property sold and the net proceeds equally divided between the parties. The appellate courts have understandably held that the trial court must carry out its valuation duties. Otherwise, the trial court is not able to determine net values of the marital estate on the dates of separation and distribution, and thus make an informed distribution decision. Together with such factors as the length of the marriage, the size of the marital

estate may well guide the trial court's exercise of discretion in determining an equitable distribution.

Thus, the court may not merely order property sold by commissioners and divided equally, without first determining the date-of-separation value. *Thomas v. Thomas*, 102 N.C. App. 127 (1991). Nor may the court merely determine the portions of a pension to which the parties are entitled, without first finding the present value on the date of separation. *Cunningham v. Cunningham*, 171 N.C. App. 550 (2005). The object is to determine the net value of the marital estate, as that may well help determine the ultimate distribution decision.

#### D. Date of Valuation.

G. S. 50-21(b) provides that “[f]or purposes of equitable distribution, marital property shall be valued as of the date of separation of the parties. . . . Likewise, marital debt is valued as of the date of separation. *Mrozek v. Mrozek*, 129 N.C. App. 43 (1998). Divisible property and divisible debt shall be valued as of the date of distribution.” It is not always be error to use a later valuation date. In *Shoffner v. Shoffner*, 91 N.C. App. 399, 371 S.E.2d 749 (1988), the trial court valued the parties’ pensions on December 31, 1984, although they had separated seven days earlier. The Court of Appeals held that use of the later date was not error, as the appellant had not demonstrated that either of the parties had made any additional contributions, or that any additional interest had accrued to the retirement plans during the interval between separation and valuation.

Experts may testify as to the value of real and personal property on the date of separation, although their examination of the property took place some eighteen months later, where there was (1) no evidence that the expert considered post-separation occurrences, (2) the expert demonstrated familiarity with the market values of such property at the date of separation, and (3) there was no evidence that the condition of the property had changed between the date of separation and the date of the appraisal. *Atkins v. Atkins*, 102 N.C. App. 199 (1991). The court could, of course, consider the passage of time in evaluating the opinion testimony.

#### E. Determination of “Net” Value.

The general rule is straightforward, providing for determination of fair market value, then subtraction of liens and encumbrances. Such deductions may not be unduly speculative. Many of the questions that have arisen are in the area of tax consequences upon the disposition of the asset. In 2005, the Act was amended to provide that in cases filed after 1 October 2005, the trial court should consider the tax consequences to the parties if the marital or divisible property had been sold or liquidated on the date of valuation, with discretion in the trial court to consider whether or when such consequences are likely to occur. 2005 N.C. Sess. Laws 353.

Estimated expenses which would be associated with the sale of an asset may not be deducted from fair market value when the sale is neither imminent or contemplated. *Crowder v. Crowder*, 147 N.C. App. 677 (2001) (error to deduct sales commissions, wind up fees, and income taxes, associated with future speculative sale of business.) Thus, the court could not consider the tax consequences of the husband withdrawing from his accounting partnership, in the absence of any evidence he was withdrawing. *Armstrong v. Armstrong*, 322 N.C. 396 (1988).

#### F. Role of the Trial Judge.

There is no right to a jury trial in North Carolina equitable distribution actions. *Kiser v. Kiser*, 325 N.C. 502 (1989); *Phillips v. Phillips*, 73 N.C. App. 68 (1985). Unless the trial court utilizes an advisory jury, the judge must assess the credibility of the witnesses and determine the weight to be given their testimony. *Mayo v. Mayo*, 73 N.C. App. 406, 410 (1985). “When there is conflicting testimony as to value, the trial court may not merely guess at a figure somewhere in between, but may arrive at such a middle figure after considering the factors involved in the various appraisals.” *Nix v. Nix*, 80 N.C. App. 110, 115 (1986). “This type of hearing is different and is governed by rules of evidence different from those followed in jury trials. The Judge’s experience and learning enable him to weigh and to evaluate the testimony and to disregard that which under strict rules would be inadmissible in a jury trial. *Cotton v. Cotton*, 269 N.C. 759, 760, (1967).” *Harris v. Harris*, 51 N.C. App. 103, 105 (1981). hearing the evidence, the court must make findings of fact, based on competent evidence, in support of its conclusions. *Nix* at 115. As the finder of fact, the trial court “is in the unique position of hearing the evidence, evaluating its significance, and determining its applicability and relevance to the case.” *Christensen v. Christensen*, 107 N.C. App. 431 (1992) (held not to be error for the trial judge to fail to adopt the testimony of one of the expert witnesses, where there was conflicting testimony). The court is not bound by expert testimony, even though it be uncontradicted. Questions of credibility and weight are for the trial judge. *Bodie v. Bodie*, \_\_\_ N.C. App. \_\_\_ (5 June 2012), citing *Scott v. Scott*, 336 N.C. 284, 291 (1994).

A North Carolina trial judge is required to include in the equitable distribution judgment a listing of all marital assets and the value of each. *Little v. Little*, 74 N.C. App. 12 (1985). While the property need not be valued in “infinite detail,” the task must be performed with sufficient detail to permit meaningful appellate review. *Wade v. Wade*, 72 N.C. App. 372 (1985), *disc. rev. denied*, 313 N.C. 612 (1985). “Parties may, of course, stipulate the value of assets, but when there is disagreement, the method or methods by which a court determines the value of property is largely a matter of judicial discretion. Findings of value are clearly issues of fact, not of law, so that such findings will be binding on appeal if supported by competent evidence.” Sharp, *supra*, at 237. There is no mandated single method for valuing assets; the valuation approach must be sound. *Walter v. Walter*, 149 N.C. App. 723 (2002).

## G. Pre-Trial Role of the Trial Judge.

Inadequate pre-trial preparation makes it much more difficult for the trial court to adequately perform its fact-finding functions, lead to a waste of valuable court time and the risk of inequitable decisions. The necessity for the trial court's involvement in the pre-trial preparation of an equitable distribution matter is not only self-preservation, but is mandated by pertinent statutes, case law, and local rules. "[D]espite the difficulty of the task, the [trial] court [is] required to identify the marital property with sufficient detail to enable an appellate court to review the decision and test the correctness of the judgment." *Wade v. Wade*, 72 N.C. App. at 376. *See also Stiller v. Stiller*, 98 N.C. App. 89 (1990) (court held trial court must correctly value pension and retirement benefits although insufficient evidence of present value was introduced by parties). *But cf. Miller v. Miller*, 97 N.C. App. 77 (1990) (where court held that trial court's obligation to classify, value, and distribute property "necessarily exists only when [proper] evidence is presented to the trial court . . ."). Recognizing the additional burdens placed on an overworked trial bench, Judge Greene set out a bright-line rule in *Grasty v. Grasty*, holding that if the party having the burden of proof does not meet that burden by offering credible evidence of value, the trial court has the option to appoint an expert. If the court chooses not to appoint an expert, and is thereby unable to value the asset, the asset is not subject to distribution under the Act. 125 N. C. App. 736, *review denied*, 346 N.C. 278 (1997).

## H. Options Where the Parties Do Not Meet Their Burdens of Proof

1. Expert Witnesses and Referees. Rule 706 of the North Carolina Rules of Evidence provides the mechanism for appointment and compensation of court-appointed experts, the court having long had the inherent authority to appoint its own experts. *See State v. Horne*, 171 N.C. 787 (1916); *Danville Tobacco Assn. v. Bryant-Buckner Associates, Inc.*, 333 F.2d 202 (4th Cir. 1964). Although the power has been sparsely used in the past, the demands of complex valuations in equitable distribution cases may give rise to more frequent use. For example, in *Poore v. Poore*, the trial judge was faced with the valuation of Dr. Poore's dental practice, organized as a professional association. As might be expected, the doctor's expert testified that the business had a net value of only \$7,549 (the excess of assets over liabilities) and no goodwill of "significant value." The wife's expert opined that the business was worth \$232,000, its gross income during the year of separation. The trial judge found that the value of the business upon separation was \$73,561 "considering available evidence including the tangible assets and net income of the business." Apparently, the judge assigned no value to the goodwill. In vacating and remanding for, among other things, a new hearing on the valuation of the professional association, the Court of Appeals noted that the finding of the trial judge did not appear "to be based on a sound method of valuation nor is it supported by evidence. . . . In valuing the professional association, the court should clearly state whether it finds the practice to have any goodwill, and if so, its value, and how it arrived at that value. The court may appoint an additional expert witness under Rule 706 of the North Carolina Rules of Evidence if needed." 75 N.C. App. 414, 422, *disc. rev. denied*, 314 N.C. 543 (1985) (emphasis supplied). *Dorton v. Dorton*, 77 N.C. App. 667 (1985), also involved

valuation of a dental practice. The trial court valued the tangible assets but not the goodwill. No expert testimony was offered, the dentist testifying inconclusively about the value of his practice. The Court of Appeals held that failure to value the practice was error and stated that “[t]he trial court has the authority under G.S. 8C-1, Rule 706 to appoint an expert witness to appraise the goodwill and other value of plaintiff’s practice. Use of G.S. 8C-1, Rule 706 may be necessary in this type of case....” *Id.* at 676.

2. Additional Expert Appointed. Notice that the trial court may appoint an additional expert even though both parties offered an expert, where the court was not satisfied by the testimony of either expert. This is one of the available remedies available to the court. The court may also consider the opinions offered by the experts, but arrive at its own determination by considering the various factors that inform the valuation process, amending some factors and supporting that amendment by appropriate findings, and giving more weight to some factors than others. Thus, in *Offerman v. Offerman*, 137 N.C. App. 289, 527 S.E. 2d 684 (2000), the trial court properly used the expert’s approach, adjusted some of his figures, and recalculated the asset’s value. Where the court does so, however, it is essential that the court identify its methodology and make findings supporting its valuation. *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414 (2003).

3. Procedure. Under Rule 706, the court initiates appointment of an expert, whether upon its own motion or upon the request of a party, by issuing an order to show cause why an expert witness should not be appointed. Following appointment, the court must advise the expert of his or her duties. The expert, after completing the study, furnishes the findings to the parties, any of whom may take his or her deposition and call him or her to testify. The expert is to be compensated “by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.” Rule 706(b) (emphasis supplied).

4. Appointment of Referees. North Carolina Rules of Civil Procedure, G.S. 1A-1, Rule 53, provides both for reference by written consent of the parties and compulsory reference by the court in appropriate cases. As a matter of custom and practice, judges have typically ordered compulsory reference when the “trial of an issue requires the examination of a long or complicated account...” Rule 53(a)(2)a. The rule provides the machinery for appointment and compensation of one to three referees, with duties and powers to be fixed by the appointing court. This procedure may well be helpful to the trial judge in an equitable distribution matter in which the parties have an unusual amount of personal property, are collectors of art objects, or simply will not agree on what property they have, where it is, or what condition it is in. Furthermore, the availability of the remedy, with its attendant expense, might encourage stipulations between the parties, especially as to numerous, slightly valued items. The Court of Appeals, however, has questioned in one case the propriety of this procedure. In *Vick v. Vick*, 80 N.C. App. 697, 699 (1986), one panel commented that a compulsory reference “may be inappropriate in equitable distribution actions,” reasoning that the Act requires that the *trial court* classify the marital property and distribute it. A review of the compulsory reference procedure, however, suggests that the trial court would not be impermissibly delegating its duties.

## II.

### Evidence and Proof of Value

A. Non-Expert Owners. As a general rule, the owner of property is entitled by reason of that relationship to estimate its value. Annotation, *Admissibility of Opinion of Nonexpert Owner as to Value of Chattel*, 37 A.L.R.2d 967 (1954); 3 J. Wigmore, *Evidence* §716 (3d ed. 1970); 31 Am. Jur. 2d, *Expert and Opinion Evidence* §142 (1967). North Carolina has freely admitted value testimony by an owner. 1 H. Brandis, *N.C. Evidence* §128 (2d rev. ed. 1982). Thus, in *Simmons v. C.W. Myers Trading Post*, 56 N.C. App. 549 (1982), the plaintiff trailer-owner testified that she had “lived in the trailer at issue for three years and that she had previously purchased another trailer from defendant.” *Id.* at 554. The Court of Appeals held that the testimony “was sufficient to show that plaintiff possessed the familiarity, knowledge and experience to testify about the trailer’s value,” and that the trial court erred in excluding her testimony. *Id.* The Supreme Court agreed that the exclusion was error. *Simmons v. C.W. Myers Trading Post*, 307 N.C. 122 (1982). Application of the North Carolina rule is perhaps best illustrated in *Allen v. Allen*, 61 N.C. App. 716, 720 (1983), where the COA upheld the defendant’s opinion testimony as to the fair market value of his television set, boat trailers, lumber, and electrical equipment, based on evidence that defendant had purchased, collected, or built all of these articles and was familiar with their condition and use. The court pointed out that defendant did not show that he knew the market for similar items, but his knowledge of and familiarity with the items involved enabled him to make an intelligent estimate of their values; the weight to be given his testimony was for the jury. *See State v. Harper*, 51 N.C. App. 493 (1981); *Harrelson v. Gooden*, 229 N.C. 654 (1948).

In a recent case from Haywood County, defendant husband testified as to his opinions about date-of-separation value and date-of-trial value of his residence, and explained the basis for his opinions. The Court of Appeals affirmed the trial court’s findings as to value of the home based on husband’s testimony, wife offering no testimony, and stated that defendant’s testimony “showed that he did have a basis for his valuation in that he had been engaged in a good faith effort to sell the home and his valuation was based on conversations with his real estate agent about the proper price for the house given market conditions.” *Finney v. Finney*, \_\_\_ N.C. App. \_\_\_ (15 January 2013) (page 6 of Slip Opinion).

The court should also bear in mind that the testimony of an expert witness is not necessarily entitled to more weight than that of a lay owner-witness. In *Hunt v. Hunt*, 85 N.C. App. 484 (1987), the defendant asserted as error on appeal that the trial court gave too much credence to the testimony of the plaintiff and her only witness and insufficient weight to the testimony of the CPA. The Court responded by saying that “[t]he credibility of a witness... is a matter to be resolved by the trier of fact. *Laughter v. Lambert*, 11 N.C. App. 133 (1971).

B. Non-Expert Third Parties. Lay witnesses who are not owners of the property being valued may be qualified to give opinion testimony that is reasonably based upon their observations, even if the witnesses do not enjoy such a specialized knowledge as to be considered “experts.” in the usual sense of the word. They do not share the same presumptive ability to give valuation testimony enjoyed by owners. Counsel bear the burden of establishing “that they have special knowledge gained by experience, information, or observation that renders them capable of rendering a reliable opinion as to an asset’s worth.” *Asset Valuation by Lay Witnesses*, 3 Equit. Dist. J. 121, 124 (1986). See also 1 H. Brandis, *N.C. Evidence* § 128 (2d rev. ed. 1982).

This general rule was applied in *Harrelson v. Gooden*, 229 N.C. 654, 657 (1948). There, a lay witness was permitted over objection to give an opinion concerning the values of two tracts of land. “[T]he witness had testified he was living on the Gooden land in 1944, and had lived there four years, that he knew both tracts of land and had an opinion satisfactory to himself as to their values at the time the deed to Alden Gooden was made.” See, also, *Harris v. Harris*, 51 N.C. App. 103 (1981), a partition proceeding in which farmer Cleve Harris was permitted to testify as to his opinion about whether apportioning a tobacco allotment among the individual tracts would increase or decrease the value of the entire property.

C. Valuation of Debts. G.S. 50-20(c) provides, in part: “(c) There shall be an equal division by using net value of marital property and net value of divisible 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 and divisible property equitably. The court shall consider all the following factors under this subsection: (1) The income, property, and liabilities of each party at the time the division of property is to become effective; . . . .”

A marital debt is defined as a “debt incurred during the marriage for the joint benefit of the parties.” *Geer* at 475. The party claiming the debt is marital has the burden of proving its value on the date of separation. *Pott v. Pott*, 126 N.C. App. 285 (1997). Where debt may be barred by statute of limitations, or is questionable “family” debt, court may treat as distributional factors. *Mrozek v. Mrozek*, 129 N.C. App. 43 (1998). Separate debt must, of course, be considered in making a distribution.

### III.

#### Valuation of Specific Assets

A. Real Estate. It is not unusual for the court to be asked to value real estate without the benefit of expert testimony. The parties may feel they know the value of their land, or may desire to avoid appraisal fees. In pre-trial discussions, the assessed value of the land for tax purposes will often be mentioned as a way to avoid the hiring of an expert. The court should be aware that in North Carolina tax valuation is not admissible over objection to prove value. In *Bunn v. Harris*, 216 N.C. 366, 373 (1939), the COA held that



“[T]he tax list is hearsay evidence and incompetent. Even though it is a public record, the owner takes no part in the valuation of the land. The assessed value is merely the opinion under oath of the assessor. It is well understood that it is the custom of the assessors to fix a uniform, rather than an actual, valuation” The statement seems to be true, even though G.S. 105-283 requires that real property be appraised for tax purposes “at its true value in money ... [which] shall be interpreted as meaning market value . . . .” Thus, assessed value may bear little resemblance to true fair market value. The North Carolina position accords with the majority American view.

1. Approaches to Real Estate Valuation. In *Redevelopment Commission v. Denny Roll and Panel Co.*, 273 N.C. 368 (1968), a condemnation proceeding, the North Carolina Supreme Court set forth the general principles of valuation:

There was evidence that, in the appraisal of property, there are three standard approaches, namely, (1) the cost approach, (2) the income approach, and (3) the market comparison approach; that the cost approach involves a determination of the fair market value of the (vacant) land, the cost of reproduction of the buildings or replacement thereof by new buildings of modern design and materials less depreciation; and that the income and market approaches include a consideration of the rentals and prices obtained from the lease or sale of comparable properties reasonably related in respect of location and time. Expert witnesses for respondent and for petitioner were in substantial accord that all of these approaches should be considered in forming an opinion as to the fair market value of the subject property as of November 8, 1965.

There was conflicting evidence as to each of the elements involved in the cost approach. The income approach was stressed by petitioner’s evidence. It was minimized by respondent’s evidence on the ground the buildings on the subject property were for a special purpose and therefore not readily rentable. Expert witnesses for respondent and for petitioner testified that, with reference to the market approach, they had taken into consideration the sale prices of comparable properties

*Id.* at 370–71.

2. The Market Comparison Approach. When a marital home is being valued, the appraiser will often submit evidence of both similar recent sales (the market-comparison approach) and replacement costs (the cost approach). In the market-comparison approach, the “appraiser will investigate the market for sales of reasonably similar properties, i.e., similar in location, type, zoning, desirability, amenities, conditions and size. The appraiser will make adjustments for any differences. Those sales are generally deemed to be a reliable basis upon which to gauge market value.” *McCahey, supra*, § 21.07(1).

The standard attack on a market-comparison-based appraisal is to question the similarity of properties relied upon by the appraiser. The legal principles governing the

admissibility of evidence as to sales of comparable properties are set forth fully in prior decisions. As appears obvious, no two parcels of land are exactly alike. The appraiser may compare only those parcels where the dissimilarities are reduced to a minimum and allowance is made for such dissimilarities. *Barnes v. North Carolina State Highway Commission*, 250 N.C. 378. Locating similar properties to compare in valuing commercial properties is often difficult, especially in smaller communities.

3. Income. When property is generating income, the income approach is often used. That approach is criticized as not being the most favorable indication of value because it is based upon a formula and fails to consider other appropriate criteria, such as the age of the building; assessed valuation; continuation of present use; actual income as opposed to square foot rental; location of property; single special value; and absence of viable market. The court must understand the factors relied upon by the appraisers and parties in order to fulfill its function of determining the credibility of the witnesses and the weight to be afforded their testimony. *Mayo v. Mayo*, 73 N.C. App. 406 (1985). After considering the factors involved in the appraisals, the court may arrive at a “middle figure,” but may not guess at such a figure. *Nix v. Nix*, 80 N.C. App. 110, 115, (1986).

B. “Active” Appreciation in Separately Owned Real Estate. North Carolina courts are frequently required to value real property owned by one of the parties prior to marriage, or acquired by one of them by “bequest, devise, descent, or gift during the course of the marriage.” Although labeled “separate” property by G.S. 50-20(b)(2) and thus not subject to distribution, the Court of Appeals early recognized that the marital estate is entitled to a fair return on its investment when it invests labor and funds in improving “separate” real estate. *Turner v. Turner*, 64 N.C. App. 342 (1983) (when husband acquired title to home before marriage, and wife contributed to improvements and mortgage payments during marriage, the resulting increase in value could be marital property). The Court stated that, although the statute defines an increase in the value of separate property as separate property, the statute refers “only to passive appreciation of separate property, such as that due to inflation, and not to active appreciation resulting from the contributions, monetary or otherwise, by one or both spouses.” *Wade v. Wade*, 72 N.C. App. 372, 379. “To hold otherwise would create incentive for a sophisticated spouse to divert marital funds into improving his or her separate property thereby depriving the other spouse of any possible return of the marital investment upon the dissolution of the marriage. In *Lawrence v. Lawrence*, 75 N.C. App. 592, *disc. rev. denied*, 314 N.C. 541 (1985), husband contributed his labor and wife paid for material and hired labor to make repairs, alterations, and additions to the wife’s separately owned house. On these facts, the Court said, “. . . that part of the real property consisting of the unimproved property owned by defendant [wife] prior to marriage should be characterized as separate and *that part of the property consisting of the additions, alterations and repairs provided during marriage should be considered marital* in nature.” *Id.* at 595. (emphasis original).

C. Tangible Personal Property. G. S. 105.317.1 outlines the factors a tax appraiser must consider in valuing personal property:(1) The replacement cost of the property;(2) The sale price of similar property; (3) The age of the property;(4) The physical condition of

the property; (5) The productivity of the property; (6) The remaining life of the property; (7) The effect of obsolescence on the property; (8) The economic utility of the property, that is, its usability and adaptability for industrial, commercial, or other purposes; and (9) Any other factor that may affect the value of the property.

The evidence most often relied upon by the parties in support of their opinions on value relates to the purchase price of an item. The weight to be given the purchase price varies directly with the age of the item and its remaining useful life. Evidence should be introduced describing the condition of the property and its need for repairs on the date of separation. Evidence of the sale price later received for the property is certainly admissible but not conclusive. The court must determine that the sale was an arm's length *bona fide* transaction and be wary of any "sweetheart" deals involving friends, relatives, or even a "straw man" purchaser, who merely holds title for a party until the conclusion of the court case.

Counsel may obtain copies of a party's loan applications containing statements about the value of items of property. Values given in applying for insurance policies, especially riders on homeowner policies, can be obtained. Both are clearly admissible as admissions. *See The Use of Loan Applications in Valuation*, 1 *Equit. Dist. J.* 9 (1984). *See also Patton v. Patton*, 78 N.C. App. 247 (1985), *rev'd on other grounds*, 318 N.C. 404 (1986) (insurance application); *Harris v. Harris*, 84 N.C. App. 353 (1987) (financial statement). Although it is generally true that offers to buy or sell are not competent as evidence of value, the rule has been relaxed when the offer to sell constitutes an admission against interest. *N.C. State Highway Comm. v. Helderman*, 285 N.C. 645 (1974). In *Lawing v. Lawing*, 81 N.C. App. 159 (1986), the trial court valued certain real property at "the offering price less the amount of a note secured by the property." Although the defendant contended the offering price merely represented an initial negotiating position, the Court of Appeals held that the trial court did not err, "absent objection by defendant and given the self-serving and unsupported nature of his testimony." *Id.* at 170.

D. Household Goods. Because the court will not usually have the benefit of expert testimony when ordinary household goods are involved, and the opinions of the parties may vary widely, the judge must consider the above factors in determining a fair value. While the court need not indicate its valuation method in valuing personal effects and household property, it may not merely "split the difference" between the estimates. *Lawing; Nix v. Nix*, 80 N.C. App. 110 (1986). Human nature being what it is, one party may tend to overvalue property the other party wants to retain. The judge should make it clear that distribution of specific items is in the court's discretion, and that either spouse may become the owner of the item in question. Ultimately, however, the judge will usually have to weigh sharply divergent estimates. In *Lawing v. Lawing*, 81 N.C. App. 159 (1986), plaintiff valued a ring at \$5,000, and defendant valued the same ring at \$750. The parties' valuations were set out in their affidavits, and no other evidence was introduced. The court valued the ring at \$5,000 and awarded it to defendant. Defendant argued on appeal that since the trial court selected the higher of two widely diverging

values, it should have cited its reasons, but the court declined to apply the rule to personal effects and household property. *Id.* at 164.

The same reasoning was followed in *Lawing* with regard to valuation of a 1978 Lincoln automobile Plaintiff contended the automobile was valued at \$5,000, while defendant assigned it a value of \$2,500.00, testifying that it was “falling apart.” No other evidence being before the court, the court did not err in adopting the \$5,000.00 value. *Id.* at 170–71.

E. Automobiles. The market for automobiles, other than “classic” and antique/restored types, may be easily established by referring to such valuation guides as the “Blue Book.” The guides are widely used by North Carolina tax appraisers, and are easily available on the internet. This publication, widely regarded as authoritative, is admissible as an exception to the hearsay rule. *In re McLean Trucking Co.*, 281 N.C. 375 (1972), *cert. denied and appeal dismissed*, 409 U.S. 1099; 1 H. Brandis, *N.C. Evidence* § 165 (2d rev. ed. 1982). See *Patterson v. Patterson*, 81 N.C. App. 255 (1986).

F. Antiques and Collectibles. Americans have always been collectors. In the 1960s a nostalgia and collecting craze began, fueled by books such as *A Fortune in the Junk Pile*, by Dorothy H. Jenkins (1963). In equitable distribution cases, the parties may have a smattering of collectibles. They will often have wildly inaccurate ideas of their value, and the court is not likely to reach a fair value without expert help. Unlike many items of personalty, the purchase price of such items often has little relation to the present fair market value. This is true both because fledgling collectors often pay unrealistic prices for something that catches their fancy, and because the market for collectibles varies a great deal depending on what is in vogue at appraisal time.

G. Valuation of Business Interests. When one of the spouses owns an interest in a corporation whose stock is publicly traded, valuation of the shares may be determined by reference to certain newspapers and trade journals widely regarded as accurate. The *Wall Street Journal* was often used for this purpose. 1 H. Brandis, *N.C. Evidence* § 165 (2d rev. ed. 1982). The Internet now provides accurate closing figures for the stock in question, and the history for each publically-traded company allows easy access to the closing price on the date of marriage; the date of separation; and the date of trial; in addition to a history of dividend payments on the stock.

Problems for the trial court arise in valuing the stock of a closely held corporation whose shares are not actively traded and in valuing a professional practice. Valuing the fixed assets of these entities presents no new problems for the court; the intangible assets, which we will call “goodwill,” present a complex evaluation. Although there are common elements, the two entities are discussed separately below.

## 1. Valuing the Professional Practice.

[T]here is no single best approach to valuing a professional association or practice, and various approaches or valuation methods can and have been used. See *L. Golden, Equitable Distribution of Property*, § 7.10, at 221 (1983). B. Goldberg, *Valuation of Divorce Assets*, § 8.3, at 203 (1984). It is generally agreed that in valuing a professional practice, or an interest therein, for equitable distribution, it should not make any significant difference whether the practice is conducted as (1) a corporation or professional association, (2) a partnership, or (3) a sole proprietorship. See Goldberg *supra*, at 201; 2 J. McCahey, *Valuation and Distribution of Marital Property*, § 22.08, at 22–99 (1984). valuation of each individual practice will depend on its particular facts and circumstances. See Golden, *supra*, §7.09, at 216. In valuing a professional practice, a court should consider the following components of the practice: (a) its fixed assets including cash, furniture, equipment, and other supplies; (b) its other assets including accounts receivable and the value of work in progress; (c) its goodwill, if any; and (d) its liabilities. \* \* \* .

Among the valuation approaches courts may find helpful are: (1) an earnings or market approach, which bases the value of the practice on its market value, or the price which an outside buyer would pay for it taking into account its future earning capacity; and (2) a comparable sales approach which bases the value of the practice on sales of similar businesses or practices. See McCahey, *supra*, § 2208. Courts might also consider evidence of offers to buy or sell the particular practice or an interest therein. See Goldberg, *supra*, at 205. If the practice is conducted as a partnership, and the value of the practice or an interest therein is set in a partnership or redemption agreement, then the value set in the agreement should certainly be considered but should not be treated as conclusive. See Weaver, *supra*.

*Poore v. Poore*, 75 N.C. App. 414, 419–20, *disc. rev. denied*, 314 N.C. 543 (1985).

The *Poore* case stresses the importance and difficulty of valuing “goodwill,” an “intangible asset which defies precise definition and valuation.” *Id.* at 420. Goodwill is discussed in detail below. As *Poore* points out, a partnership agreement giving a method for calculating the interest of a partner upon retirement or withdrawal furnishes a *presumptive* value, which may be attacked. This method of valuing an interest in an accounting partnership was used in *Weaver v. Weaver*, 72 N.C. App. 409 (1985). The partnership agreement provided that upon withdrawal Mr. Weaver would be entitled to the value of his capital account (\$32,000), plus a percentage based on the partner’s prior contributions to fees (which amounted to \$80,986), the total of \$112,986 to be paid in quarterly installments over a five-year period. The court then discounted that sum to its present value, which it calculated to be \$100,986. The Court of Appeals found that the method of valuation was fair and reasonable, involving no clear abuse of discretion. However, the trial judge used a rate of 4.5 percent in calculating the present value of the

interest and that rate was found by the Court to be low, well below the “going or market rate in 1983.” *Id.* at 4159. When the trial court was called upon to value Mr. Fox’s interest in an accounting partnership, it properly considered the withdrawal formula set out in the firm’s partnership agreement. The court considered Fox’s contributions to the cash basis capital account and the accrual basis capital account, his drawing account balance on the valuation date, and his share of the goodwill of the firm by considering his years of service and his peak earnings as set out in the withdrawal formula. The Court of Appeals held that the approach used by the lower court “reasonably approximate[d] the net value of defendant’s interest in the partnership . . . [and] meets the factors set out in *Poore*, 75 N.C. App. It considers fixed assets, other assets including accounts receivable and the value of work in progress, goodwill, and liabilities.” *Fox v. Fox*, 103 N.C. App. 13, 20 (1991).

There is no single best approach to valuing an interest in a partnership. If the trial court adopts an approach that *reasonably approximates* the net value of the partnership interest, the decision will be affirmed on appeal. In order for the appellate courts to perform their function of determining “from the record whether the judgment—and the legal conclusions that underlie it—represent a correct application of the law,” the trial court must make specific findings of fact. *Coble v. Coble*, 300 N.C. 708, 712, (1980). The court should note the valuation method or methods it relies upon. *Poore*, 75 N.C. App. at 422. In *Poore*, the court valued Dr. Poore’s dental practice at \$73,561.00, a figure with which both parties disagreed. Dr. Poore’s expert testified that the practice had a net worth of \$7,549, the excess of assets over liabilities, but no goodwill of significant value. Mrs. Poore’s expert opined that the practice was worth \$232,000, a figure equal to its gross income for the fiscal year in which the Poores separated. This expert relied entirely on gross receipts, without considering net income, assets, or liabilities. The trial judge rejected both opinions and valued the practice based on “available evidence including the tangible assets and net income.” *Id.* at 417. Apparently, the trial court found the practice had no goodwill. “However, the court’s valuation of the practice does not appear to be based on a sound method of valuation nor is it supported by the evidence. . . . In valuing the professional association, the court should clearly state whether it finds the practice to have any goodwill, and if so, its value, and how it arrived at that value.” *Id.* at 422. *See also McLean v. McLean*, 88 N.C. App. 285 (1987), where the trial court attempted to use a “return on investment” approach in valuing defendant’s law practice. The Court of Appeals vacated the trial court’s findings, however, reasoning there was no evidence before the court to support the rate of return used by the court in making its calculations or to indicate that such a method would yield an accurate valuation.

## 2. Valuing the Closely Held Corporation.

The familiar starting point for valuing interest in a closely held corporation is found in Revenue Ruling 59-60 (1959-1, C.B. 237), which sets forth the factors to be considered in valuing a business interest. Closely held corporations are defined to be those whose shares “are owned by a relatively limited number of stockholders,” often “held by one family.” There is usually no active trading in the shares. In trying to reach a

reasoned judgment as to their value, the fact-finder should consider the following fundamental factors:

- (a) The nature of the business and the history of the enterprise from its inception.
- (b) The economic outlook in general and the condition and outlook of the specific industry in particular.
- (c) The book value of the stock and the financial condition of the business.
- (d) The earning capacity of the company.
- (e) The dividend-paying capacity.
- (f) Whether or not the enterprise has goodwill or other intangible value.
- (g) Sales of the stock and the size of the block of stock to be valued.
- (h) The market price of stocks of corporations engaged in the same or a similar line of business having their stocks actively traded in a free and open market, either on an exchange or over-the-counter.

The Ruling examines each of the factors and discusses the weight that might be accorded them. The factors are not exclusive and are interrelated. It has been suggested that their evaluation might require the use of various experts, including an accountant, an economist, and an expert in stocks. *See* B. Goldberg, *Valuation of Divorce Assets* § 6.3 at 136 (1984).analyzing the factors and the available literature, *See also* Shannon Pratt, *Valuation Methodologies*, in *Advanced Equitable Distribution: Making the Case for Business Evaluation* (N.C. Bar Foundation Seminar 1992) [basic approaches are (1) Capitalized Earnings Approach, (2) Discount Future Returns Approach, (3) Guideline Company method (approach based on comparisons with other companies), and (4) the excess earnings approach]. Although these approaches are sometimes referred to by other names, they represent the basic methods of valuation and are discussed in some detail below.

To allow meaningful appellate review of the result reached by the trial court in valuing a closely held corporation, the judgment must contain findings as to the valuation method adopted by the court, and must separately value goodwill. *Locklear v. Locklear*, 92 N.C. App. 299 (1988). The trial court in *Locklear* listed a number of factors considered in making its valuation decision, but erred in failing to indicate the specific valuation method used or assign a value to corporate goodwill.

3. Liquidation Value. This approach toward valuation assumes that all the assets of the business will be sold and the debts paid. This approach will often be urged upon the court by solo practitioners who take the position that, without them, their businesses have little value except for the tangible assets. Only a minority of courts have adopted the view that goodwill should not be considered in valuing a professional practice, and North Carolina is squarely in the majority, which considers goodwill a divisible asset. *See* Annotation, *Accountability for Good Will of Professional Practice in Actions Arising from Divorce or Separation*, 52 A.L.R. 3d 1344 (1973). It is not likely that the liquidation approach will be often used or given much weight.

4. Book Value. This is the preferred accountant's method for valuing a corporation, familiar to the reader of annual reports and balance sheets. It involves taking the assets at their "book" value, which will be their depreciated value in most cases, and subtracting liabilities. This is similar to the liquidation approach and will generally be urged by the professional practitioner. It ignores goodwill, but this type of calculation is accepted by some courts as *prima facie* evidence of the value of a corporation.

5. The Minority Stockholder's Interest. In *Hartman v. Hartman*, 82 N.C. App. 167, the trial court valued plaintiff's interest in a closely-held cemetery corporation. Based on the testimony of plaintiff's expert (a CPA, experienced in valuing stock of small, closely held corporations), the court found that the minority stock interest of the plaintiff had "limited marketable capacity," that the corporation had not made a dividend payment in years, and that it had experienced cash-flow difficulties. The expert felt that a discount factor of at least 50 percent should be applied, the normal discount rate in small corporations being 30–50 percent. The shares in the corporation were worth \$156 each, if they could be sold as a whole. The court elected to apply a discount rate of 36 percent, making each share worth \$100, a finding upheld on appeal as being supported by - "competent evidence." For a general discussion on discount rates, see Shannon Pratt, *Valuation Methodologies, in Advanced Equitable Distribution: Making the Case for Business Evaluation* (N.C. Bar Foundation Seminar 1992)

6. Necessity for Specific Findings. Just as in the case of professional practices, the trial court's valuation must be supported by specific findings when a closely held corporation is being valued. *Patton v. Patton*, 318 N.C. 404 (1986) (reversing 78 N.C. App. 247 (1985)). In *Patton*, the defendant-husband owned a 96 percent interest in an industrial equipment supply company. The court made the following finding as to value:

That in evaluating the defendant's/husband's share of Patco, Inc., the Court has considered the estimate of the defendant himself as given in an insurance application approximately six months prior to the separation of the parties (plaintiff's Exhibit 10), the book value of the business in 1980 through November 1984, the relative ownerships of the stock in the company in 1980 through 1984 (it being noted that the defendant is the sole (or 96%) stockholder of the company, having purchased the interest of his brother with the company redeeming his stock by treasury stock), has considered the capitalization of earnings of the company, has considered the earning capacity of the company as demonstrated in the last four-to-five year period of time, the present economic outlook for the business and industry, the good will which has been accumulated to the business through the hard work and competent efforts of the defendant, and the financial position of Patco, Inc., as demonstrated by its unaudited statements for 1980 through April 30, 1984. The value of the defendant's interest in Patco, after consideration of all of these factors, at the relevant time for evaluation for equitable distribution in this matter was at least \$85,000.00. *Id.* at 405–06, 348 S.E.2d at 594–95. The Court of Appeals, with Chief Judge Robert Hedrick dissenting, affirmed the valuation. The Supreme Court reversed this ruling, stating that the finding of fact



to be merely an enumeration of the factors considered by the trial court in determining the value of defendant's interest in Patco, lacking any indication of what value, if any, the trial court may have attributed to each of the enumerated factors. The trial court's conclusion that the value of defendant's interest in Patco "was at least \$85,000" is nebulous, if not meaningless. The finding of fact is not clear as to how much more than \$85,000.00 the interest may be worth. Distributions of this nature require more precise findings and determinations of ultimate facts. Therefore, in our view, [the finding] is too vague and conclusory to permit appellate review. *Id.* at 407, 348 S.E.2d at 595.

7. "Active" Appreciation in a Separately Owned Close Corporation. When one spouse owns an interest in a closely held corporation prior to marriage, problems arise as to both classification and valuation. The Act provides that the increase in value of separate property remains separate property. G.S.50-20(b)(2). It was established in *Wade v. Wade*, 72 N.C. App. 372, *disc. rev. denied*, 313 N.C. 612 (1985), that the statute refers only to increases due to "passive" appreciation, such as that caused by inflation, and that increases in value resulting from contributions of time or money of one or both spouses is "active" appreciation, and thus marital property. The *Wade* holding was a crucial policy decision essential for the integrity of the North Carolina Equitable Distribution Act. A purely mechanical reading of the statute would result in an obvious injustice in the situation in which one person's spouse "is a businessman or entrepreneur, who brings considerable corporate property into the marriage, and acquires most of the assets used in the marriage by profit-making manipulation of corporate funds." *Phillips v. Phillips*, 73 N.C. App. 68 (1985). "To hold otherwise would create incentive for a sophisticated spouse to divert marital funds into improving his or her separate property thereby depriving the other spouse of any possible return of the marital investment upon dissolution of the marriage." *Id.* at 74, *quoting Wade v. Wade*, 72 N.C. App. 372, 380.

In *Phillips*, the plaintiff owned 98 percent of Pak-a-Sak Food Stores prior to his marriage to defendant. After marriage, he borrowed or withdrew substantial sums from his corporation to finance purchases of land and two airplanes. The loans were repaid, at least in part, by income earned during the marriage. The trial court held that the assets acquired with loans from the separately owned corporation were therefore separate property. Reversing and remanding, the Court of Appeals directed that, on retrial, the trial court should attempt to determine the "active" appreciation of the corporation during the marriage of the parties and to find the "increase in net value due to the contributions in personal effort or money earned during the marriage by either or both of the spouses." *Id.* at 74 (emphasis supplied). That increase in net value would be marital property, so that the marital estate could have a fair return on its investment of time and money. The court should then trace that marital property into the assets acquired with the corporate loans, and determine "the degree to which those assets increased in value due to plaintiff's or defendant's personal managerial efforts or investment of earnings." *Id.* (emphasis supplied). It seems, then, that in a *Phillips*-type situation, the court must first determine the net value of the corporation at the time of marriage and again at separation; the court

must then determine what portion of the difference between the two values represents property “acquired” during marriage.

8. Goodwill and Intangible Assets. In *Poore v. Poore*, Judge Jack Cozort summarizes the applicable law with regard to goodwill, explaining that it is “the component of a professional practice which is the most controversial and difficult to value. . . .” Goodwill is usually defined as the expectation of continued public patronage, but is an intangible asset defying precise definition and valuation. According to Judge Cozort, “it is clear . . . that goodwill exists, that it has value, and . . . limited marketability.” Although some courts have declined to consider goodwill in valuing a professional practice, . . . our Court of Appeals held in *Poore* that goodwill is an asset that must be valued and considered in determining the value of a professional practice for purposes of equitable distribution..

As there is no set rule for determining the value of the goodwill of a professional practice, each case must be determined on its own facts. The determination of the existence and value of goodwill is a question of fact and not of law, and should be made with the aid of expert testimony. Courts are cautioned to value goodwill “with great care, for the individual practitioner will be forced to pay the ex-spouse ‘tangible’ dollars for an intangible asset at a value concededly arrived at on the basis of some uncertain elements.” Among the factors which may affect the value of goodwill and which therefore are relevant in valuing it are the age, health, and professional reputation of the practitioner, the nature of the practice, the length of time the practice has been in existence, its past profits, its comparative professional success, and the value of its other assets. Any legitimate method of valuation that measures the present value of goodwill by taking into account past results, and not the postmarital efforts of the professional spouse, is a proper method of valuing goodwill. One method that has been widely accepted in other jurisdictions is to determine the market value of the goodwill, i.e., the price that a willing buyer would pay to a willing seller for it. Another method that has been received favorably is a capitalization of excess earnings approach. Under this approach, the value of goodwill is based in part on the amount by which the earnings of the professional spouse exceed that which would have been earned by a person with similar education, experience, and skill as an employee in the same general locale. *Poore*, 75 N. C. App. at 421-22.

It has also been suggested that the value of goodwill be based on one year’s average gross income of the practice, or a percentage thereof, and that evidence of sales of comparable practices is relevant to the determination of its value. Courts should bear in mind that professional practices may not have goodwill. See *Sonek v. Sonek*, 105 N.C. App. 247, 412 S.E.2d 917 (1992) (where a doctor was an employee of a professional association in which he had no ownership interest, the trial court erred in finding that his practice had personal goodwill for equitable distribution purposes).

The *Poore* guidelines apply to the valuation of a solely-owned business. *Draughon v. Draughon*, 82 N.C. App. 738 (1986). In *Draughon*, which involved

valuation of a solely owned landscaping business, the trial court listed and valued the tangible property owned by the business, finding that the net value of the business was equal to the net value of said assets. As to goodwill, the court found that, apart from the “personal labor and management of the plaintiff, the Court is unable to designate any value to ‘Good Will’ of the business and as a result, the Court is unable to place a value on the business except for the tools and equipment . . . .” *Id.* at 740. Defendant’s evidence was that the business had goodwill, and that its value, including goodwill, was \$61,500. That valuation was done by an accounting firm using a capitalization of earnings approach. The Court of Appeals remanded, finding that it could not determine from the trial court’s findings “what method it used in determining that the business had no goodwill and whether their [sic] determination was based on a sound method of valuation.” *Id.* at 741.

An example of the court’s recognition of intangible benefits to the operator and president of a closely-held corporation is found in *McManus v. McManus*, 76 N.C. App. 588 (1985). The defendant had paid for 35 shares of stock in an auto parts company having a total of 500 shares outstanding at a cost of \$14,000. He had an option to purchase 215 additional shares by paying \$200 per week until the shares were paid for. While making payments, he could vote the entire 250 shares. In addition, he had the “preemptive right” to buy the remaining 250 shares if the other owner ever wanted to sell. Defendant was receiving an average annual dividend of \$15,865, and the court valued his interest by adding the \$14,000 purchase price plus one year’s dividends of \$15,865, for a total of \$29,865. In affirming the trial court’s valuation, the Court of Appeals also noted that defendant’s purchase plan enabled him to be president of the corporation at a higher salary than before the purchase. \* \* \* . “The way that the court determined the value of the stock interest involved, which was distributed to defendant, was permissible in our opinion.” *Id.* at 593.

9. Approaches to Valuing Goodwill. At least four methods of valuing goodwill in a business or professional practice are mentioned in *Poore*. Even expert witnesses often disagree about the proper approach. Common methods include:

a. Capitalization Approaches:

i. Straight capitalization. The average net profit of the subject business over a period of years is multiplied by a capitalization factor to arrive at a total value for the business. When the value of the tangible assets is subtracted from the total value figure, the result is the value of the intangible assets, or goodwill. Unfortunately, there is no simple rule for determining the capitalization factor. It is sometimes defined as the rate of return that would attract investors; thus, when a business is risky, so that an investor risks his capital, a higher rate of return is expected to offset the risk.

ii. Excess earnings. The earnings of a business or practice that are in excess of those normally earned by a similar business or practitioner are multiplied by a definite capitalization rate to yield the value of goodwill..

iii. Excess earnings—IRS variation. This variation, sometimes known as the “income tax method,” begins with the average net income of a business over the prior five years. From that figure, a reasonable expected rate of return based on the tangible assets of the business and a comparable net salary are subtracted. The remainder is then capitalized at a definite rate to determine goodwill..

b. Market value approach. The familiar market value approach seeks to determine the price a willing buyer would pay, and a willing seller accept, for goodwill. Unless evidence of comparable sales is available, or unless the business or practice in question has been recently sold, is being sold, or is the subject of an offer to purchase, this method is neither useful nor accurate.

c. Corporate or partnership buy/sell agreement. A partnership or corporate agreement often sets forth a formula so that the interest of a withdrawing or deceased partner or stockholder can be easily determined. Such an agreement will be considered by the court, but is not conclusive. Other pertinent evidence must be considered.

d. Year’s income. In some cases, goodwill has been based on a year’s average gross income or a percentage of that figure.

The above methods of valuation—with variations—are used in combination and viewed in light of all other evidence in the case to determine the value of goodwill. Unfortunately, subjective factors yield varied, inconsistent, and sharply disputed results.

#### IV.

##### Valuation of Pension and Retirement Rights

A. General. Both vested and nonvested pension rights were excluded from the definition of “marital property” in the original version of the North Carolina Equitable Distribution Act. In 1983 the legislature amended the Act to include “vested pension and retirement rights” as marital property; later, “nonvested” pension, retirement, and other deferred compensation rights were added, in accordance with the overriding public policy of enlarging the marital estate. Although the term “pension and retirement rights” is not defined in the statutes, some programs, such as vested and nonvested military pensions eligible under the federal Uniformed Services Former Spouses’ Protection Act, are specifically included. G. S. 50-20 (b)(1). Our Court of Appeals has broadly interpreted the statute, holding that it includes any “deferred compensation plan, whether structured as a pension, a profit sharing, or retirement plan.” *Poore, supra*.

The court must determine the present value of the retirement benefits in order to fulfill its duty to determine the total net value of the marital estate, regardless of the manner in which the court eventually distributes the pension plan. *Seifert v. Seifert*, 319 N.C. 367 (1987). We are concerned here only with valuing those benefits determined by

the court to be marital property and not with the difficult issues of classification and distribution.

B. Types of Pension and Retirement Plans. In *Seifert*, the Court of Appeals described the two main types of retirement plans:

Most pension and retirement plans can be described as falling within two categories: defined contribution plans and defined benefit plans. \* \* \* .A defined contribution pension is essentially an annuity funded by periodic contributions. At retirement the funds purchase an annuity for the rest of the employee's life or an actuarially reduced pension for the lives of the employee and spouse. \* \* \* . A defined contribution pension may be nominally funded by the employee, the employer, or both. Realistically, the employee funds his own pension whether he or his employer is the nominal payor because the burden of the employer's contribution is passed directly to the employee in the form of reduced wages. \* \* \* . Accordingly, pensions are characterized as "deferred compensation," for without the pension it is assumed that the employee would have received a commensurately greater salary during his working years. In a defined benefit plan the employee's pension is determined without reference to contributions and is based on factors such as years of service and compensation received. \* \* \* . Some plans combine both defined contribution and benefit elements. For example, federal and many state civil service pensions are often nominally funded by both employer and employee. If the employee terminates the employment before retirement, he receives a refund of his contribution. If he remains until retirement, he receives benefits based on his preretirement salary. *Seifert.v. Seifert*, 82 N.C. App. 329, 332–33 (1986) (internal citations omitted).

C. Valuation of Defined Contribution Plans

As discussed above, the funds in a defined contribution plan are usually obtained by withholding a fixed percentage of an employee's compensation, along with some contribution by the employer. The contribution of the employer may be linked to the company's profits. Each employee's account is invested, with the rate of return dependent on the type (and success) of investment. "It would appear that the value of such contributions and the associated interest or returns on the contributions would best represent the value of a defined-contribution plan at any given point in time." Lee, *Valuation of Employee Benefit Plans*, in *Equitable Division of Pension and Retirement Benefits* (N.C. Bar Foundation Seminar May 1984). Judge Joe John's paper on pension and retirement benefits, presented at that same seminar, states that:

Courts have generally found the value of an employee's interest in a defined contribution plan to be the face value of his individual account at the date of valuation. *See Freeman v. Freeman*, 497 S.W.2d 97 (Tex. 1973). The court, therefore, upon examining the separate account balance maintained for the individual participant, would consider the contributions to the plan during the

marriage and until separation (pursuant to G.S. 50-20 (b)(3)), plus earnings or interest, the participant's vested percentage, and would then award to the participant's spouse any appropriate percentage, up to 50%, of the "present" value, at the date of separation.

When employees may withdraw funds or borrow against their balances, it seems clear that the balance on the date of separation is the correct value. After all, continued participation in the plan is voluntary. Many profit-sharing, stock-purchase, and stock-bonus plans fall into this category, and early withdrawals are permitted. A second type of defined contribution pension plan does not allow the employee to withdraw funds in a pension account prior to retirement.

D. Tax Consequences. The value of the account on the date of separation may not be reduced by considering speculative tax consequences. Thus, where the balance of Mr. Smith's BASF 401(k) retirement plan was some \$103,000 on the date of separation, the trial court properly refused to reduce its value to \$78,000 by assuming a total withdrawal on the date of separation and applying the maximum tax rates. *Smith v. Smith*, 104 N.C. App. 788 (1991). The Court of Appeals reasoned that there was no evidence in the record that Mr. Smith planned or would be required to withdraw all or any part of the funds in order to comply with the distribution ordered by the court, and the "possible tax consequences [were] purely speculative." *Id.* at 790.

E. Valuation of the Defined Benefit Plan. Unlike the situation in the defined contribution plan, the benefits are determined in advance in a defined benefit plan. Employer contributions are treated as a variable, are calculated based on an "array of assumptions," and are commingled rather than being assigned to a specific account. Therefore, the actual amount shown in an employee's account is not likely to reflect the true value of a plan to the employee. For example, an analysis of the retirement plan of a district court judge reveals that it contains elements of both defined benefit and defined contribution plans. The contributions of the state are not allocated to any specific account, causing the amount in the account to reflect only the contributions of the judge plus accrued interest. These plans cannot be valued based only on the amount in the account on the date of separation. Thus, even though the parties did not offer sufficient evidence of the present worth of their future expected retirement benefits, the trial court may not base its valuation of those benefits on the "withdrawal value" of the parties' vested pensions. The Court of Appeals held in *Stiller v. Stiller*, 98 N.C. App. 80 (1990), that such an approach does not "reasonably approximate" the net values of the interests of the parties and the case was remanded for additional evidence and findings.

1. The generally accepted approach to valuing a defined benefit plan is first to determine the periodic amount the employee will receive at retirement. The next step is to determine the "present value" of that periodic amount of benefits over the recipient's lifetime. A "present value" will represent an amount of money that (assuming a certain rate of return) will yield an annuity in the amount guaranteed by the plan. An example of how this method works in practice is shown in the case of *Seifert v. Seifert*, 319 N.C. 367

(1987). There, the defendant had certain vested benefits based on his military service and was eligible to retire on the date of separation. The judge found that he would have been entitled to a monthly benefit of \$1,112.50 on the date of separation, and that his life expectancy was 25.5 years (306 months). Through the date of separation, he had served 24 years and 11 months in the army, and he had been married to the plaintiff for 22 years and 3 months of that time. Thus, the trial judge calculated that 87.5 percent of the retirement rights were earned during marriage and were marital property. The trial judge found that 10 percent would be a reasonable rate of investment return and calculated the present value of the plan at \$108,491.60. Although other aspects of the trial court's decision were found to be error, requiring a remand, neither the Court of Appeals nor the Supreme Court questioned this method of valuation.

2. The two important assumptions in the Seifert-type calculation of value are: (1) the life expectancy of the recipient, and (2) a reasonable rate of investment return.

a. Life Expectancy. For many years, bench and bar wrestled with computing life expectancy in determining wrongful death damages. A mortuary table that may be used in determining life expectancy is provided in G.S. 8-46. A court may take judicial notice of the tables. *Thomas v. Dixon*, 88 N.C. App. 337 (1988); *Chandler v. Chemical Co.*, 270 N.C. 395 (1967). The most common criticism of mortuary tables is that neither the health or gender of the individual is considered, nor are other factors bearing on life expectancy, such as life-style. The North Carolina statute anticipates the problem, for it directs that the table "shall be received . . . with other evidence as to the health, constitution and habits" of the person in question. *See also* North Carolina Pattern Instructions (hereinafter N.C.P.I.)—Civil 106.75.

Both court and counsel should be aware that G.S. 8-46 was last amended in 1997. Medical advances and other factors have increased life expectancy since that time, and there are significant differences between life expectancy for men and women that are not reflected in the unified North Carolina table. Amendment of G.S. 8-46 to adopt one of the sets of tables published annually by the insurance industry would mitigate such problems. Trial judges in North Carolina may use a different life expectancy than that yielded by the mortuary tables in G.S. 8-46, but should make findings from the record supporting such an alternative figure.

b. Rate of Return. To determine the "present value" of any amount of money, the valuer must assume that the invested funds will earn a reasonable average annual rate of return. Obviously, projecting future interest rates over a period of years is speculative, and experts disagree as to their movement. Thus, the court can consider a number of factors in determining an appropriate rate of return, including: (1) the legal rate of interest on judgments, now 8 percent; (2) calculation of the Reference Interest Rate in G.S. 58-201.1(d), based on Moody's Corporate Bond Yield Average—Monthly Average Corporates, as published by Moody's Investors Service, Inc.; (3) the projected rate of return used by actuaries for the pension plan in question; (4) interest rates used by the Pension Benefit Guaranty Corporation (29 U.S.C. § 1301-1318 (1976)); and (5) the return

on U.S. Treasury obligations. *Weaver*, 72 N.C. App. 409, 415 (1985), established that the rate must be “reasonably in keeping with the fair market value of the money. Reasonable rates of comparison, for example, might include the rate used by the Internal Revenue Service in determining assessments and refunds, Treasury bill rates, or the prime rates charged by banks.” The Court of Appeals took notice that the 4.5 percent rate used by the trial court was “far below the going or market rate in 1983 . . . .” *Id.* Pattern Jury Instructions give this definition: “. . . the applicable rate of interest or return on investment is the rate of return that you find from the evidence can be fairly expected from reasonably safe investments.” N.C.P.I.—Civil 810.90.

c. Factors. Each plan presents a separate and difficult problem. The court may be faced with a myriad of variables, including—but by no means limited to—such considerations as: The solvency of the plan, including consideration of the manner in which the plan assets are invested.. The effect of taxes and inflation on benefits received. See *Mishler v. Mishler*, 90 N.C. App. 72, 78 (1988). Cost-of-living increases that may be built into the plan.. The age at which the employee spouse can, or will, retire. If the employee spouse is retired, or eligible to retire, on the date of separation, present value is normally calculated based on the assumption that retirement occurred on that date. The best reasoning seems to be that, when the deferred jurisdiction, or “fractional share,” method of distribution is elected by the court, the employee spouse may not postpone the date of retirement, although the states differ sharply on this issue. The problem is obviated in great part by the enactment of the Retirement Equity Act of 1984 (REA), which provides in part that a spouse is entitled to payments of pension benefits under a qualified domestic relations order (QDRO) at the employee spouse’s earliest retirement age, even if he or she does not elect to retire then. The Division of Private Pensions in Divorce Actions Since the Retirement Equity Act of 1984, 20 Clearinghouse Rev. 9 (1986). In North Carolina, the court may not order payments to be made by the administrator of the fund or plan involved until the party against whom the award is made actually begins to receive the benefits, except where the plan in question specifically permits an earlier distribution. G.S. 50-20.1(c). Policy and practical considerations militate toward valuing a retirement plan by using the date of separation or the earliest retirement date. Otherwise, the employee spouse can distort the present value of his or her plan by claiming a later date of retirement. It is important to note that, in *Seifert*, the trial judge valued the unretired defendant’s military pension as of the date of separation because he was eligible to retire on that date.

d. The Pension Benefit Guaranty Corporation Tables. The Pension Benefit Guaranty Corporation (PBGC) is an agency of the United States government that guarantees payment of pension benefits if a covered plan terminates without enough assets to make such payments. In order to calculate benefits due under a variety of plans, the PBGC has formulated sophisticated actuarial tables that incorporate such variables as interest (discount) rates, mortality factors, health status and sex of the employee, and the age at which benefits will be payable (deferment age).about the tables and related publications is available from the PBGC Office of Public Affairs, 2020 K Street, N.W., Washington, D.C. 20006.



e. Valuation Computation. For pre-trial and settlement negotiation purposes, you might use one of the many pocket-size sets of mathematical tables to roughly estimate the value of a defined benefit plan without expert testimony. First, the court must determine the benefit to be paid to the recipient, the life expectancy of the recipient (considering all available information), and the rate of return to be used. Suppose that a male with a life expectancy of 20 years was eligible to receive a monthly benefit of \$900.00 on the date of separation. Suppose further that a reasonable annual rate of return would be 9 percent compounded monthly. The entire pension was earned during marriage. The monthly compounding table showing the present value of \$1 per month at 9 percent reveals a value of 111.1449540. Multiplying that value by the monthly rate of \$900.00 yields a present value of \$100,030.45. To show the importance of fixing the reasonable rate of return, compare the amount yielded in the above problem by use of different discount rates. For example:

Rate of Return	Present Value
8%	\$107,598.86
9%	\$100,030.45
10%	\$ 93,262.15

Note that the *higher* rate of return projected equals a *lower* present value. By the same token, a change in life expectancy produces a similar change in present value. An astute lawyer will be ready to give the court information in setting the interest rate and calculating life expectancy. The judge may need to find facts supporting the final choices. A factor that might be considered by the court is that the employee's estate may be entitled to few benefits upon the employee's untimely death. For example, in *Seifert*, Sgt. Seifert's military pension would cease upon his death. That is a distributional factor, however, rather than a valuation factor. In addition, if some service occurred prior to marriage, the present value will need to be reduced by a fraction in which the numerator represents the service during marriage, and the denominator represents total service. The balance would be separate property, earned before marriage.: The above simplistic method ignores many factors an expert may consider in forming an opinion. It is designed to help the trial judge understand the nature of the valuation process.

## V.

### Miscellaneous Assets

A. Injury Settlements and Awards. North Carolina law in the area of classification and valuation of proceeds of personal injury settlements was settled in *Johnson v. Johnson*, 317 N.C. 437 (1986). There, Mr. Johnson was injured during marriage, but received a \$95,000 settlement after separation and before divorce. The Supreme Court rejected the Court of Appeals "mechanistic" holding that the proceeds were separate property in favor of an "analytic" approach. Simply stated, a lump-sum settlement amount may represent

payment for a number of things, including pain and suffering, permanent injury or disfigurement, medical bills, and lost wages. The court must determine which items represent loss to the separate property of the injured spouse, such as: (1) pain and suffering, (2) loss of earning capacity, (3) disfigurement, (4) wages lost after separation, and (5) medical bills incurred after separation. The non-injured party may contend that part of the settlement represents payment for loss of services or loss of consortium. The party claiming a portion of the settlement as separate property has the burden of showing his or her entitlement by a preponderance of the evidence. To the extent that the proceeds are not shown to be separate, they are considered marital property. *Accord Dunlap v. Dunlap*, 85 N.C. App. 324 (1987). See also *Lilly v. Lilly*, 107 N.C. App. 484 (1992) (where wife met burden of establishing that auto accident settlement proceeds received during marriage were compensation for her pain and suffering and, therefore, her separate property). In order to value the various elements of the award, the parties will need to introduce evidence of medical bills and proof of lost wages submitted to the insurance carrier. Correspondence, the settlement documents, and testimony of the insurance adjuster may help in valuation. Under the analytic approach, the proceeds from personal injury sustained and loss incurred prior to marriage are separate property, even if the settlement is made after marriage. Logically, if the separate portion of an accident settlement is invested in property, that property retains its separate character.

See the excellent discussion of *Johnson* and its many aspects in Note, *The North Carolina Supreme Court Revokes the Marital Presumption and Adopts the Analytic Approach to the Classification of Personal Injury Settlements*, 22 Wake Forest L. Rev. 931 (1987).

Likewise, where a lump sum workers' compensation award was received by the husband prior to separation for injuries sustained during marriage, the proceeds were presumed to be marital property. *Freeman v. Freeman*, 107 N.C. App. 644 (1992). The husband then had the burden of proving by a preponderance of the evidence that a portion of the award was separate property. The court held that he could do so by proving that portions of the award were compensation for loss of future earning capacity, pain and suffering, or medical expenses occurring after separation. *Id.* at 654.

B. Insurance Policies. Generally, the net value of life insurance policies with cash surrender values is obtained by subtracting any outstanding loans to arrive at net cash value. Some argument can be made that term life insurance policies have some "economic" value, but it is likely to be negligible and not included in the marital estate. However, see *Surles v. Surles*, 154 N.C. App. 170 (2002), indicating that a life insurance policy is valued at its fair market value, rather than cash surrender value.

C. Bonds, and Other Evidence of Debt. The actual value of a note, bond, or other evidence of debt is the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell. It is synonymous with the "market value," or the "true value." See G.S. 105-283 (market value equals true value); *United States v.*

North Carolina Granite Corporation, 288 F.2d 232 (4th Cir. 1961). In re Memorial Park, 41 N.C. App. 278 (1979).

D. Stock Options. A stock option is the right, or option, to buy a certain number of shares of corporate stock within a specified period at a fixed price. Stock options are often part of an executive employee's benefit package. As such, they are akin to pension rights: both are a type of compensation. Insofar as they are earned during marriage, they are marital property and thus distributable. Valuation of stock options is deceptively simple: the option is valued at the market price of the stock on the valuation date (date of separation in North Carolina) less the cost of exercising the option. See Annotation, Valuation of Stock Options for Purposes of Divorce Court's Property Distribution, 46 A.L.R. 4th 689 (1986). This seemingly simple valuation procedure is complicated by many other factors, including the following: (1) if the optionee exercises the option, he or she may be prevented from selling the shares for an immediate profit by SEC "insider trading" rules; (2) there may be some tax liability to the optionee; (3) the optionee may have to borrow money to exercise the options; (4) all the options may not be "vested" on the date of separation; and (5) there may be other contingencies, such as a requirement that the optionee continue to be employed by the company. The stock option plan itself should be studied in detail by the court. A recent decision of the Court of Appeals places North Carolina in the mainstream in valuing stock options:

We believe that the approach most consistent with North Carolina's equitable distribution statute is to classify stock options granted an employee by his or her employer which are exercisable upon the date of separation or which may not be cancelled, and which may, therefore, be said to be vested as of the date of separation, as marital property. Options which are not exercisable as of the date of separation and which may be lost as a result of events occurring thereafter, and are, therefore, not vested, should be treated as the separate property of the spouse for whom they may, depending upon circumstances, vest at some time in the future. In our view, this rule more closely recognizes the purpose of stock options granted an employee which are designed so that they vest and become exercisable over a period of time; such options represent both compensation for the employee's past services and incentives for the employee to continue in his employment in the future. Those options which have already vested are clearly rewards for past service rendered during the marriage, and, therefore, are marital property; options not yet vested are in essence, an expectation of a future right contingent upon continued service and should be considered separate property.

*Hall v. Hall*, 88 N.C. App. 297, 307 (1987) (citations omitted). Unfortunately, the case only touches on the question of valuation: "[S]ince the value of those options which were exercisable on the date of the parties' separation may be easily ascertained, the trial court must determine their value as provided by G.S. 50-21(b) and provide for their distribution in a manner approved by G.S. 50-20." *Id.* While North Carolina has not adopted one mandatory valuation approach, the appellate court will affirm a sound method that

“reasonably approximates” the net value based on competent evidence. *Fountain v. Fountain*, 148 N.C. App. 329 (2002) [upholding use of “intrinsic value method.”]

E. Vehicle Leases. Where the husband returned a vehicle to the leasing company after separation, and received no money because there was no equity in the vehicle, the trial court did not err in failing to classify, value, or distribute the leased car. *Fox v. Fox*, 103 N.C. App. 13 (1991). Where, however, a vehicle which was marital property was leased to a third party, the lease could be valued as a marital asset. *Black v. Black*, 94 N.C. App. 220 (1989). In *Black*, the husband owned a 1982 Ford truck with a gross fair market value on the date of separation of \$34,500 and a valid lien of \$34,300, resulting in a net fair market value of only \$200.00. Husband had leased the truck to a corporation. The trial court found that the lease had a fair market value of \$29,444.00 and the finding was affirmed on appeal. The appellate court agreed with the trial court’s conclusion that the truck and the lease were “two separate items of property,” and further found that the trial court’s findings concerning value were supported by competent evidence in the record.

F. Timber Rights. Whether standing timber has a value separate and apart from the underlying land which can be included in the marital estate depends on whether the timber is mature and ready for harvest at the time of separation. In *Cobb v. Cobb*, 107 N.C. App. 382 (1992), the evidence showed that 130 acres of timber was planted in 1972, during the marriage of Mr. and Mrs. Cobb, and projected to mature in 2007. Although the projected future earnings were substantial, the Court of Appeals ruled that the future value of the growing timber was “far too speculative” to be considered a vested marital property right. The Court reasoned that the growing trees might be destroyed by fire or insects, might be sold prior to the timber harvest, or might never actually be harvested.