



WHY YOU SHOULDN'T DIVORCE BEFORE PROPERTY IS SETTLED



The information provided in this document is meant for the sole use of Active Duty service members, retirees, their families, and those individuals eligible for legal assistance. The information is general in nature and meant only to provide a brief overview of various legal matters. Rights and responsibilities vary widely according to the particular set of circumstances in each case. Laws can vary across states, services, and civilian jurisdictions and laws are changed from time to time. Do not rely upon the general restatements of background information presented here without discussing your specific situation with a legal professional.

Property distribution in North Carolina is often by agreement of the parties in the form of a property settlement. If it becomes necessary to seek a court-ordered property distribution, the parties are required to work their way through numerous steps mandated by the court system. This process is called "equitable distribution." You can review the property distribution statutes for additional information.

Property Distribution can be settled out of court in the form of a separation agreement. The rights to equitable distribution ("ED") of marital property vest at the time of the parties' separation. The rights to ED are not, however, automatic, but must be specifically asserted by one or both of the parties. Upon application of a party, the court shall determine what is marital property and shall provide for an equitable distribution.

At any time after separation of the parties, either may file an action for ED, either as a separate action, or joined with another action brought pursuant to Chapter 50, or as a motion in the cause. A final ED judgment may be rendered either before or after the parties are divorced, at the discretion of a judge. If the judgment is being entered by consent, the parties themselves can stipulate to do so prior to the divorce.

Temporary orders and injunctive relief are available under statutory provisions to prevent disappearance, waste or conversion of property alleged to be marital or separate. The provisions also allow for entry of orders for dividing part of the marital assets. The partial distribution may provide for a distributive award. Injunctive relief to prevent disappearance, waste or conversion is available before or after an ED action has been initiated. An order partially distributing marital property may not be made until after an ED action has actually been filed.

In most ED actions, the statutes do not permit one party to recover legal fees from the other party. The exception to this rule allows the discretionary award of reasonable legal fees and costs to the owner of separate property who sues the other spouse to regain possession of separate property removed from the marital home or possession of its owner by the other spouse.

There are various defenses that can be asserted against a claim for equitable distribution.

Generally, an absolute divorce bars the assertion of a claim for ED that was not already pending at the time of the divorce. This bar has been interpreted relatively strictly in case law.

In addition to bar by absolute divorce obtained without preservation of an ED claim, the other common bar to ED is prior execution of a valid, comprehensive property settlement dividing the parties' property or otherwise releasing the right to ED. So long as the agreement is duly executed in accordance with formal statutory requirements, the agreement might bar a subsequent ED pursuant to the rules discussed below. Such a bar may arise not only from property settlements entered into at the time of separation but also from written premarital and postnuptial agreements.



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In general, under prior law reconciliation was deemed to void the executory or unperformed provisions of a separation agreement that contained property provisions. The courts now draw a distinction between pure separation agreements, in which separation is of the essence, and contracts in which the parties intend a complete property settlement, unrelated to whether they ever reconcile. Property settlements are to be construed according to the parties' intent and the language of the contract. A reconciliation would void a release only if the release of property rights in such a contract "necessarily" depended on the parties living separate and apart.

Another thing that can affect an ED claim is whether both parties are living. The timing of a spouse's death can make a critical difference in the viability of a pending ED action. The death of a spouse prior to the granting of an absolute divorce, but while the ED claim is pending, will bar ED. However, the death of the spouse following the grant of divorce while an ED claim is pending will not bar ED. In such a case, the administrator or executor of the decedent's estate and any heirs whose interests would be affected by the ED action must be joined in the pending action. If the heirs are not joined, then any order of sale of real property is void as to those heirs.

In a limited number of instances, federal law may preempt a State's right to make a party's property the subject of equitable distribution. For example, one case held that social security benefits are not distributable by North Carolina courts, as such distribution is precluded by the anti-assignment and the other comprehensive provisions in federal social security law. In another case, the U.S. Supreme Court held that state courts may not distribute, as marital or community property, any retirement pay that has been waived by a service member in favor of receiving veteran's disability benefits. Our Court of Appeals has recognized that military disability payments are not included within the definition under federal law of "disposable retired or retainer pay," and hence may not be classified as marital property and may not be distributed under state law.

In distributing marital property, the court conducts a three-step analysis. Only the parties' marital property, which includes both assets and debts, is to be distributed. An order distributing the parties' property must contain written findings of fact supporting the court's determination that the marital property has been equitably divided.