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Plott v. Plott: Use of a Formula to Determine Parental Child Support Obligations—A Continuation of Inconsistent and Inequitable Decisions?

In *Plott v. Plott*[1] the North Carolina Supreme Court noted that "[t]he employment by the trial judge of a formula based on a ratio established by the parties' disposable income figures seems a fair method to apply so that parents can share equally the responsibility for supporting their children."[2] The court thus recognized the growing concern about the lack of consistent standards by which trial courts decide child support cases.[3] The principle the court established in *Plott* also reflects the viewpoint that because mothers now share with fathers the financial duty to support children following a divorce, courts need a means to fairly allocate child support liability.[4]

Although courts in other jurisdictions have mandated or approved the use of formulas in determining the relative child support liability of parents,[5] *Plott* is the first case in which the North Carolina Supreme Court has approved such a formula.[6] This Note examines case and statutory law prior to *Plott*, the appar-

1. 313 N.C. 63, 326 S.E.2d 863 (1985).

2. *Id.* at 79, 326 S.E.2d at 873.

3. *See, e.g.*, Hamilton v. Hamilton, 57 N.C. App. 182, 183, 290 S.E.2d 780, 781 (1982) ("total lack of consistency in the amount of child support awarded by courts"); Smith v. Smith, 290 Or. 675, 680, 626 P.2d 342, 345 (1981) ("uniformity among support orders is lacking"); L. WEITZMAN, THE DIVORCE REVOLUTION 263 (1985) ("[C]hild support cases are often subjected to broad and inconsistent interpretation, making a mockery of our judicial system.") (quoting *Child Support Enforcement Legislation: Hearing Before the Subcomm. on Public Assistance and Unemployment Compensation of the House of Representative Comm. on Ways and Means*, 98th Cong., 1st Sess. 275 (1983) (statement of Martha Mallard, Judicial Chair, Organization for the Enforcement of Child Support)); Hunter, *Child Support Law and Policy: The Systematic Imposition of Costs on Women*, 6 HARV. WOMEN'S L.J. 1, 1 (1983) (wide disparities among standards courts use to determine the awards); Note, Smith v. Smith: *No Magic Formula For Determining Child Support Payments of the Noncustodial Parent*, 18 WILLAMETTE L.J. 353, 353 (1982) (lawyers complain that there is no uniformity in the treatment of child support demands).

4. *See, e.g.*, Carole K. v. Arnold K., 85 Misc. 2d 643, 644, 380 N.Y.S.2d 593, 596 (1976) ("constitutional guarantee of equal protection . . . requires a uniform standard of parental liability"); Melzer v. Witsberger, 505 Pa. 462, 468-69, 480 A.2d 991, 994 (1984) (plurality opinion) (recognizing the critical need for introduction of some system to allocate child support obligations); Conway v. Dana, 456 Pa. 536, 540, 318 A.2d 324, 326 (1974) (courts must look at the financial capacity and ability of both parents); Bruch, *Developing Standards for Child Support Payments: A Critique of Current Practices*, 16 U.C. DAVIS L. Rev. 49, 54-55 (1982) (calling for a relative ability to pay standard, not a mathematical equality standard). *But cf.* Franks, *How to Calculate Child Support*, 86 CASE & COM. 3, 3 (1981) (calling for the use of mathematical formulas stating that present support tables and all rule-of-thumb formulas are predicated on the outdated premises that "women were witless, helpless creatures whose only role in life was raising children, and men were macho breadwinners who must pay the entire cost of raising those children").

5. *See, e.g.*, Rand v. Rand, 280 Md. 508, 517, 374 A.2d 900, 905 (1977) (trial courts should develop formulas in view of circumstances of each case); Smith v. Smith, 290 Or. 675, 684-85, 626 P.2d 342, 347 (1981) (formula based on parents' gross incomes and child's needs); Melzer v. Witsberger, 505 Pa. 462, 472-73, 480 A.2d 991, 996 (1984) (plurality opinion) (mandating the trial court's use of a formula based on each parent's disposable income and the children's needs).

6. *Plott* is a case of first impression in approving the use of a formula for allocating child support liability. North Carolina courts have previously disallowed the use of formulas in child support cases. *See, e.g.*, Fuchs v. Fuchs, 260 N.C. 635, 640, 133 S.E.2d 487, 492 (1963) (father attempted to set his support obligation by dividing his income by the number of his dependents); Gates v. Gates, 69 N.C. App. 421, 428, 317 S.E.2d 402, 407 (1984) (proportionately reducing child

ent rationale for the court's holding, and the use of a mathematical formula in alleviating inconsistencies in child support awards, and considers whether the formula in *Plott* gives due regard to the economic status of women.

Plaintiff in *Plott*, the father and custodial parent, brought suit to obtain financial contribution from the mother.[7] The statute governing child support in effect at the time of the first hearing placed primary support liability on the father unless there was "proof that circumstances of the case otherwise [warranted]."[8] At the first hearing, the trial judge determined that the father's net monthly income was 1800 dollars[9] and that his reasonable monthly living expenses were 1400 dollars, thus leaving him a disposable income of 400 dollars per month.[10] The mother's monthly net income was determined to be 850 dollars, with reasonable living expenses calculated at 850 dollars per month, leaving her no disposable income.[11] The court fixed the reasonable monthly needs of the child at 615 dollars.[12] The trial court ordered the mother to contribute 135 dollars a month in child support.[13] The father was given a writ of possession of the marital home including the couple's household and kitchen furnishings as part of the child support award.[14]

The mother appealed, and the North Carolina Court of Appeals, in an unpublished opinion, reversed on two grounds: first, the mother's net income equalled her reasonable expenses and negated any conclusion that she could provide any child support, and second, the order allocated an "inordinate proportion" of the parties' total resources to the father and the child.[15]

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support as children reached maturity), *aff'd per curiam*, 312 N.C. 620, 323 S.E.2d 920 (1985); Gibson v. Gibson, 68 N.C. App. 566, 570-71, 316 S.E.2d 99, 103 (1984) (support obligation based on percentage of time child spends with each parent); Evans v. Craddock, 61 N.C. App. 438, 441, 300 S.E.2d 908, 911 (1983) (custodial mother suggested determining child's needs by dividing total expenses by number of household members).

7. *Plott*, 313 N.C. at 65, 326 S.E.2d at 865. The couple was married on January 11, 1964, and divorced almost 17 years later on September 22, 1980. The one child of the marriage was born on September 14, 1969, and has continuously been in the custody of the plaintiff husband since the couple's separation on August 12, 1979. *Id.*

8. Act of July 6, 1967, ch. 1153, § 2, 1967 N.C. Sess. Laws 1772, 1773, *repealed by* Act of June 18, 1981, ch. 613, § 1, 1981 N.C. Sess. Laws 892, 892. The former law read: "In the absence of pleading and proof that circumstances of the case otherwise warrant, the father, the mother, or any person, agency, organization or institution standing in loco parentis shall be liable, in that order, for the support of a minor child." *Id.*

9. All numbers are rounded to the nearest dollar.

10. Plott v. Plott, 65 N.C. App. 657, 658, 310 S.E.2d 51, 52 (1983), *rev'd and remanded*, 313 N.C. 63, 326 S.E.2d 863 (1985). On September 26, 1980, plaintiff moved for a determination of child custody and support. The parties entered into a consent order on November 26, 1980, giving custody of the minor child to plaintiff. *Id.*

Disposable income has been defined as net income less reasonable personal expenses. *Plott*, 313 N.C. at 70 n.2, 326 S.E.2d at 868 n.2.

11. *Plott*, 65 N.C. App. at 658, 310 S.E.2d at 52.

12. *Id.*

13. *Id.* In determining the amount of the parent's child support obligation, the court must give due regard to the estates, earnings, conditions, accustomed standards of living of the child and the parties, and other facts of the particular case. *Id.* at 659 n.1, 310 S.E.2d at 53 n.1. The parties had stipulated that plaintiff should be awarded possession of the marital home including the household and kitchen furnishings. *Plott*, 313 N.C. at 71, 326 S.E.2d at 871; *see also infra* note 18 (discussing the apparent rationale for awarding possession of the marital home to plaintiff).

14. *Plott*, 65 N.C. App. at 658-59, 310 S.E.2d at 52.

15. *Id.*

At a second hearing, the judge determined that the father's net income was 1980 dollars and his reasonable living expenses were 1114 dollars, leaving him a net disposable income of 886 dollars.[16] The mother's net monthly income was 957 dollars, with reasonable living expenses set at 777 dollars per month, leaving her a net disposable income of approximately 180 dollars per month.[17] The court determined the child's reasonable monthly needs to be 625 dollars, and the father's homemaker services to be 130 dollars per month.[18] Again, the trial court held for the custodial father and increased the mother's child support obligation to 150 dollars a month.[19]

The trial judge determined the mother's child support obligations by using a formula based on the ratio between defendant's disposable income of 180 dollars and plaintiff's disposable income of 886 dollars.[20] The court also ordered the mother to pay 1688 dollars in retroactive child support.[21] The mother appealed once again, contesting the trial court's disallowance of some of her listed reasonable living expenses.[22] The mother also alleged that the court's conclusion of law was an abuse of judicial discretion.[23]

The North Carolina Court of Appeals vacated and remanded because the trial court did not duly regard the particular conditions and accustomed standard of living of the defendant mother.[24] The court also found that although the

16. *Id.* at 660-61, 310 S.E.2d at 53.

17. *Id.*

18. *Id.* at 661, 310 S.E.2d at 54. Although neither party presented evidence concerning his or her estate, Judge Tash nevertheless made detailed findings of fact based on the parties' oral testimony concerning the parties' ability to pay child support. *Plott*, 313 N.C. at 65, 326 S.E.2d at 865. Among Judge Tash's findings was that plaintiff had provided child care and homemaker services for the benefit of the child. *Id.* The supreme court felt that Judge Tash probably considered plaintiff's homemaker services as a contribution to child support, thus offsetting defendant's interest in the marital home and furnishings. *Id.* at 71, 326 S.E.2d at 871. Also, Judge Tash determined that the reasonable expenses of the parties and child were consistent with the standard of living of the parties prior to the divorce. *Id.* at 66, 326 S.E.2d at 865.

19. *Plott*, 65 N.C. App. at 666-67, 310 S.E.2d at 56-57.

20. Because defendant's disposable income was approximately one-fourth of plaintiff's disposable income (150/886), the trial court held defendant liable for one-fourth of the child's needs, or $150. *Id.*

21. *Id.* at 662, 310 S.E.2d at 54.

22. *Id.*

23. *Id.* The determination of the amount of child support a parent must pay is in the discretion of the trial judge. *Id.* at 663, 310 S.E.2d at 54-55. The defendant alleged, however, that Judge Tash's "findings of fact [were] . . . unsupported by the evidence." *Id.* at 662, 310 S.E.2d at 54. Although the trial judge did not accept defendant's itemized list of living expenses as reasonable, he failed to state the basis for his determination. *Id.* at 665, 310 S.E.2d at 56. Therefore, defendant argued that because Judge Tash erroneously determined the facts, his conclusion of law—that defendant was capable of funding one-fourth of the child support—was an abuse of judicial discretion. *Id.* at 662, 268 S.E.2d at 54.

In addressing the issue of judicial discretion in child support cases, the North Carolina Court of Appeals stated:

> [O]rders for child support must be based upon the interplay of the trial court's conclusions of law as to the amount of support necessary to meet the reasonable needs of the child and the relative abilities of the parents to provide that amount. These conclusions must, in turn, be based upon factual findings sufficiently specific to indicate to the appellate court that the trial court took due regard of the estates, earnings, conditions and accustomed standard of living of both child and parents.

Little v. Little, 74 N.C. App. 12, 20, 327 S.E.2d 283, 290 (1985).

24. *Plott*, 65 N.C. App. at 668-69, 310 S.E.2d at 57-58.

child support statute had been amended between the time of the first and second trials,[25] placing primary obligations for child support on both parents, the trial court "order requiring the [mother] to contribute one fourth of the amount necessary for the child's support [was] an abuse of [judicial] discretion."[26] In reaching this decision, the court specifically noted the "striking discrepancy in the parties' *respective abilities* to provide support"[27] and stated that the use of a formula could "hardly be considered an exercise of 'discriminating judgment within the bounds of reason.' "[28]

The North Carolina Supreme Court affirmed the order for remand because the method by which the trial court had determined the mother's reasonable living expenses was unclear.[29] The court, however, reversed the court of appeals' rejection of the trial court's use of a mathematical formula to determine the parties' relative child support obligations, stating that "the trial court's ratio established by the final disposable income figures should reflect the relative abilities of the parties to contribute to child care costs . . . ."[30] The supreme court explicitly rejected the court of appeals' contention that the "proportionate amount of defendant's disposable income to be contributed to child support places a greater hardship on her simply because the plaintiff's disposable income approximates the defendant's entire net income."[31] The court held that the use of a ratio "supported by logic and reason"[32] was better than allocating child support obligations by "simple guesswork."[33]

The ratio the trial court used was based on the parties' relative abilities to pay child support.[34] Each parent's ability to pay child support is based on his or her disposable income,[35] which is the difference between a parent's net income after taxes and reasonable living expenses.[36] In *Plott* the father's disposable income of $886 was almost five times that of the mother's disposable income of

25. *Id.* at 662, 310 S.E.2d at 54; *see also* Act of June 18, 1981, ch. 613, 1981 N.C. Sess. Laws 892 (codified at N.C. GEN. STAT. § 50-13.4 (1984)). The relevant part of N.C. GEN. STAT. § 50-13.4(b) (1984) states:

> In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child . . . . Such other circumstances may include, but shall not be limited to, the relative ability of all the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child.

26. *Plott*, 65 N.C. App. at 666, 310 S.E.2d at 56.

27. *Id.*

28. *Id.* at 667, 310 S.E.2d at 57 (quoting Muldrow v. Muldrow, 61 Cal. App. 3d 327, 332, 132 Cal. Rptr. 48, 51 (1976)). The trial court had determined that because defendant's available monthly income was one-fourth that of plaintiff's, defendant was liable for one-fourth of the child's needs. Citing Fuchs v. Fuchs, 260 N.C. 635. 133 S.E.2d 487 (1963), the court of appeals inferred that this was an arbitrary, unacceptable method of dividing child support liability. *See Plott*, 65 N.C. App. at 667, 310 S.E.2d at 57. In *Fuchs* the father simply divided his income by the number of dependents to determine his child support liability. *Fuchs*, 260 N.C. at 641, 133 S.E.2d at 492.

29. *Plott*, 313 N.C. at 74, 326 S.E.2d at 870.

30. *Id.* at 75, 326 S.E.2d at 871.

31. *Id.*

32. *Id.* at 79, 326 S.E.2d at 873.

33. *Id.*

34. *Id.* at 75, 326 S.E.2d at 870.

35. *Id.*

36. *Id.* at 79 n.3, 326 S.E.2d at 873 n.3.

$180.[37] The mother, therefore, would be liable for approximately one-sixth of the child support.

Plott is the first case to reach the North Carolina Supreme Court under the new North Carolina child support statute, which places primary liability for child support on both parents.[38] Prior to 1981 the primary duty for child support was placed on the father, with the mother liable only if the father was financially unable to support his child.[39] Therefore, North Carolina had no need for a formula to proportionately allocate child support responsibility between the mother and the father.[40] Although the law now places primary liability on both parents, the courts have determined that each parent is not necessarily obligated to make equal financial contributions.[41]

Placing primary obligation on both parents raises the problem of how to equitably apportion child support obligations between the parents. Because most jurisdictions now require mothers to share equally in the financial responsibility for their children,[42] jurists and commentators agree that there must be some means to apportion this responsibility fairly.[43] Some states have statutory[44] or judicial[45] guidelines mandating the use of formulas. There is strong

37. *Id.* at 79, 326 S.E.2d at 873.

38. *Plott*, 65 N.C. App. at 662, 310 S.E.2d at 54; *see also* N.C. GEN. STAT. § 50-13.4(b) (1984) (both the mother and father are primarily liable for child support).

39. *See, e.g., supra* note 8; *In re* Register, 303 N.C. 149, 277 S.E.2d 356 (1981) (a mother's duty to support may be imposed only after a showing that a father is unable to provide total support); Flippen v. Jarrell, 301 N.C. 108, 270 S.E.2d 482 (1980) (mother's duty to provide support is secondary); Coble v. Coble, 300 N.C. 708, 268 S.E.2d 185 (1980) (mother liable when father could not reasonably support child).

40. Prior to the 1981 amendment a court only needed to ascertain the reasonable needs of a child and the financial ability of the father. *See* 2 R. LEE, NORTH CAROLINA FAMILY LAW § 128 (4th ed. 1980).

41. *Plott*, 313 N.C. at 67, 326 S.E.2d at 867; *see also* Conway v. Dana, 456 Pa. 536, 540, 318 A.2d 324, 326 (1974) (Imposing equal responsibility on both parents for child support, the court held that both parents are required to support the children according to each parent's ability.).

42. H. KRAUSE, CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE 4-5 (1981) (equal duty to support is the rule rather than the exception in most jurisdictions); *see also* Spotts v. Spotts, 355 So. 2d 228, 230 (Fla. Dist. Ct. App.) ("Husband and wife now occupy a position of equal partners."), *cert. denied*, 361 So. 2d 835 (Fla. 1978); Rand v. Rand, 280 Md. 508, 516, 374 A.2d 900, 905 (1977) (parental child support obligation shared equally by both parents); Carole K. v. Arnold K., 85 Misc. 2d 643, 644, 380 N.Y.S.2d 593, 596 (1976) ("constitutional guarantee of equal protection . . . requires a uniform standard of parental liability regardless of sex").

43. *See supra* note 4.

44. *See* WIS. STAT. ANN. § 762.25(1j) (West Supp. 1986) (effective July 1, 1987). Section 767.25(1j) reads: "Except as otherwise provided . . . the court shall determine child support payments by using the percentage standard established by the department of health and social services under s. 46.25(9)(a)." Section 46.25(9)(a) states that the health and social services department "shall adopt and publish a standard for courts to use in determining a child support obligation based upon a percentage of the gross income and assets of either or both parents." *Id.* § 46.25(9)(a) (West 1985 & Supp 1986). Because the Wisconsin statute is relatively new, there appears to be no case law showing the percentage standard adopted by the department of health and social services.

45. *See* Rand v. Rand, 280 Md. 508, 374 A.2d 900 (1977); Smith v. Smith, 290 Or. 675, 626 P.2d 342 (1981); Melzer v. Witsberger, 505 Pa. 462, 480 A.2d 991 (1984); *see also* Lucy K.H. v. Carl W.H., 415 A.2d 510, 517-19 (Del. Fam. Ct. 1979). In Delaware the parents' child support liability is determined under what is commonly known as the "Melson" formula. Under this formula each parent is allowed to subtract from gross income required deductions such as taxes. The court then allows a standard minimum self-support deduction for each parent, resulting in available net income figures. Each parent's available net income is then divided by the total available net income. The resulting percentage is then applied against the child's primary needs to establish each parent's sup-

disagreement, however, not only regarding the use of formulas but also regarding what formula a court should use.[46]

Most commentators agree that strict adherence to an inflexible formula would cause more unfairness than it would alleviate.[47] Therefore, courts should consider modifying factors[48] such as consideration for extraordinary child care expenses, shared custody arrangements, and wide disparities between the parents' income.[49] Because of the many factors that courts must consider in determining child support, several commentators have suggested that even with formulas judges will still have to determine child support obligations on a case by case basis.[50]

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port obligation. After each parent's support obligation and self-support amounts are deducted, the court then applies a flat percentage to the remaining discretionary income of each parent to determine a standard of living allowance adjustment support obligation. The flat percentage varies from 5% to 15% depending on the number of dependent children. Thus, the child is assured of receiving a minimum of support plus a cost of living allowance, and each parent is allowed a minimum amount on which to live. It is in the discretion of the court to adjust the formula depending upon the individual case. *Id.* at 519 n.1.

46. *See, e.g.*, Bruch, *supra* note 4, at 54-55 (advocating relative ability to pay but recognizing that relative ability to pay is sometimes ignored when concrete formulas are used); Comment, *Child Support: His, Her or Their Responsbility?* 25 DE PAUL L. REV. 707, 723 (1976) (variations in factual situations would make it impossible to establish any general rules to determine child support contributions). *But cf.* Franks, *supra* note 4, at 3, 5 (author advocates the use of formula or tables but asserts that the ones presently in use are inherently sexist and not applicable to the 1980s when more women are employed, with some earning more than their ex-husbands).

47. Hamilton v. Hamilton, 57 N.C. App. 182, 183, 290 S.E.2d 780, 781 (1982) (court admitting that each domestic case is unique but that the use of a formula would provide a starting point for the courts); *see also* Cassety, *Emerging Issues in Child-Support Policy and Practice*, in THE PARENTAL CHILD-SUPPORT OBLIGATION 6 (1983) (formulas are often based on cost-sharing rather than a resource-sharing approach). Because most formulas are based on cost-sharing, by which only the minimum needs of a child are considered, the author asserts that adherence to formulas would lead to the acceptance that these amounts are all that are necessary, fair and reasonable. *Id., see also* Albano & Dennis, *Child Support Guidelines: A Necessary Evil?* FAM. ADVOC., Summer 1985, at 4-5 (1985) ("blind application of guidelines . . . will create the same evil they are designed to eliminate").

48. *See* Mason, *Child Support in North Carolina*, POPULAR GOV'T, Summer 1984, at 26, 32. Modifying factors would include very low or very high income, shared custody arrangements, extraordinary child care expenses such as medical, dental, and educational expenses, and support obligations to other children. *Id.*

49. The newly created Wisconsin statute also recognizes the need for modifying factors under certain circumstances. Section 767.25(lm) provides that "upon request by a party, the court may modify the amount of child support payments . . . if . . . the court finds by clear and convincing evidence that use of the percentage standard is unfair to the child or to any of the parties." WIS. STAT. ANN. § 767.25(lm) (West 1985 & Supp. 1986) (effective July 1, 1987).

Some factors courts may consider in determining whether the use of the percentage standard is unfair are: (1) "Maintenance received by either party." *Id.* § 767.25(bj) (West Supp. 1986) (effective July 1, 1987); (2) "The needs of each party in order to support himself or herself at a level equal to or greater than . . . [the official poverty line] established under 42 USC 9902(2)." *Id.* § 767.25(bp); (3) "The needs of any person, other than the child, whom either party is legally obligated to support." *Id.* § 767.25(lm)(bz); (4) "If joint custody is awarded . . . any physical custody arrangement ordered or decided upon." *Id.* § 767.25(lm)(ej); and (5) "Any other factors which the court in each case determines are relevant." *Id.* § 767.25(i) (West 1985 & Supp. 1986) (effective July 1, 1987).

50. Note, *Inflation-Proof Child Support Decrees: Trajectory to a Polestar*, 66 IOWA L. REV. 131, 135 (1980) (factual basis of each case is different, thus rendering precedent almost worthless in child support cases); *see also* Note, *supra* note 3, at 353 (even with a formula trial courts are still required to evaluate subjectively the needs of children). *But cf.* Franks, *supra* note 4, at 5, in which the author asserts that the child's needs should be determined by the amount paid by the Department of Social Services to foster parents. Use of this standard would eliminate the necessity of trial courts to evaluate the needs of children, but it would also deny children the opportunity to enjoy a standard of living as that enjoyed by the noncustodial parent. *See* McLeod v. McLeod, 43 N.C.

Another concern frequently voiced is the potential problem posed by the use of different formulas within the same jurisdiction.[51] Use of different formulas may result in wide variations in child support decisions and cause parties to view the judicial system as inconsistent, arbitrary, and unfair.[52] A standard formula applicable in all the judicial districts within a jurisdiction would ensure consistency in judicial decisions.[53]

Although jurists and commentators agree that well-defined guidelines are needed to determine child support obligations, there is a wide division regarding what formula courts should use.[54] The crux of this division is whether courts should use a cost-sharing formula or an income-sharing formula.[55] Under either formula the needs of the child are determined independently of the determination of the parents' reasonable needs.[56]

In a cost-sharing formula a ratio is computed by comparing one parent's gross income,[57] net income,[58] or, as in *Plott*, net disposable income,[59] to the parents' combined incomes. This ratio is then applied to the child's total needs to determine what percentage of support the parent is obligated to pay.[60] For example, if the custodial parent's annual gross income is 10,000 dollars and the noncustodial parent's annual gross income is 30,000 dollars, the combined income would be 40,000 dollars. The custodial parent's income constitutes one-fourth of the combined income (10,000 dollars/40,000 dollars), thus requiring the custodial parent to contribute one-fourth of the child's financial needs. If the child's annual needs are 3200 dollars, the custodial parent is deemed to have contributed one-fourth of this amount, or 800 dollars. The noncustodial parent, therefore, would have to contribute the balance, or 2400 dollars.

Proponents of cost-sharing argue that this formula recognizes the economic equality of women. It recognizes that most women are gainfully employed and are able to contribute proportionately to child support.[61] Also, the amount of

App. 66, 68, 258 S.E.2d 75, 77 (1979) ("Children of a man of plaintiff's income are entitled to live accordingly.").

51. *See* Mason, *supra* note 48, at 29, 32.

52. *See* Mason, *supra* note 48, at 29, 32.

53. *See* Mason, supra note 48, at 29, 32; *see also* Albano & Dennis, *supra* note 47, at 4 (guidelines would ensure consistent decisions and would also eliminate any motivation for forum shopping).

54. *See* Bruch, *supra* note 4, at 50-54 (discussing the basis of alternative formulas); *see also* Hunter, *supra* note 3, at 8-11 (analysis of the impact on custodial mothers and children under various formulas).

55. Hunter, *supra* note 3, at 9.

56. Hunter, *supra* note 3, at 8.

57. Gross income is income from all sources including unemployment benefits and social security payments. Lopez v. Lopez, 125 Ariz. 309, 310-11, 609 P.2d 579, 580-81 (Ariz. Ct. App. 1980) (social security benefits held to be part of gross income).

58. Net income is gross income less deductions required by law and deductions that directly benefit the children. Emsley v. Emsley, 467 A.2d 700, 702 (Del. Fam. Ct. 1983) (allowing a deduction for life insurance premiums when children were the named beneficiaries).

59. Net disposable income equals gross income minus taxes and an allowance for reasonable living expenses. *Plott*, 313 N.C. at 72-73, 326 S.E.2d at 869 (reasonable living expenses include loan repayment but not savings).

60. *Id.* at 77, 326 S.E.2d at 872.

61. *See, e.g.*, Franks, *supra* note 4, at 3 (majority of mothers are gainfully employed); *Survey of*

child support obligation is readily determinable with the use of this formula.[62] Critics of cost-sharing, however, argue that its use is an inequitable allocation of limited resources resulting in a lower standard of living for the mother and children with a relative increase in the father's disposable income.[63] This criticism is based on the underlying assumption that the woman is generally the custodial parent.[64]

Under an income-sharing formula the goal is to equalize the financial burden that results when one household becomes two after a divorce.[65] The parents' net income figures are combined, the child's needs are then deducted, and the remaining income figures are divided between the parents. After division, if the figure is greater than a parent's net income, that parent will not have to contribute to child support. Conversely, if the resulting figure is less than the parent's net income, then the parent will contribute the difference between this figure and his or her net income.[66] In contrast to a cost-sharing formula based

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Developments in North Carolina Law, 1981—Family Law, 60 N.C.L. REV. 1379, 1394 (1982) (1981 amendment recognizes the reality that more mothers are now financially able to share support responsibilities).

62. *See, e.g.*, Franks, *supra* note 4, at 4 ("[J]ustice can better be achieved by simple math than by simple guesswork."); Hunter, *supra* note 3, at 9 (conceding that an advantage of the cost sharing formula is that amounts are predictable, thus decreasing litigation expenses).

63. *See, e.g.*, L. WEITZMAN, *supra* note 3, at 269 ("The cost approach . . . typically results in lower amounts and assumes a welfare-like basic-needs approach to raising children."). In arguing that the custodial parent bears a disproportionate amount of the costs of raising children, Professor Weitzman cited data showing that although the typical child support award for two children is $3,000 a year, the cost of raising these two children, including the cost of day care service if the custodial parent is working, is $10,300 a year. *Id.* at 271-72. These figures are based on a moderate standard of living. *Id.* The custodial parent, therefore, is shouldering over 70% of the child raising costs. *Cf.* Hunter, *supra* note 3, at 9 (major disadvantage is that cost-sharing gives a minimum amount to children's subsistence); Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1240 (1981) (typical awards do not reflect actual costs of raising a child, thus the custodial parent shoulders a disproportionate share of the costs); Williams, *Child Support and the Costs of Raising Children: Using Formulas to Set Adequate Awards*, JUVENILE & FAMILY COURT JOURNAL, Vol. 36, No. 3 (Fall 1985) (average court ordered level of support for two children was $2,041 a year, representing a little more than 60% of the poverty level established for children in 1981).

64. *See, e.g.*, Fineman, *Implementing Equality: Ideology Contradiction and Social Change*, 1983 WIS. L. REV. 789, 832 n.147 (90% of the 20.1 million children living with one parent live with their mothers); Weitzman, *supra* note 63, at 1244 (women more likely than men to have dependent children in household).

65. Hunter, *supra* note 3, at 9 (purpose of equalization is to ensure that each family member's reduction in lifestyle after a divorce will be shared proportionately).

66. A variation of the income-sharing formula can be summarized in the following equation:

1. $X = C$ if $F\text{-}R \geq C$ and $M\text{-}R \leq 0$.
2. $Y = C$ if $M\text{-}R \geq C$ and $F\text{-}R \leq 0$.
3. $X = F\text{-}R$ if $0 < F\text{-}R < C$.
4. $Y = M\text{-}R$ if $0 < M\text{-}R < C$.

Where: F = Father's net income.
M = Mother's net income.
C = Child's needs.
X = Father's child support obligation.
Y = Mother's child support obligation.

$$R = \frac{F + M - C}{2}$$

The first step in determining a parent's child support obligation is to determine each parents share of

on net disposable income, which requires courts to determine not only the reasonable needs of the child but also the reasonable living expenses of each parent,[67] under an income-sharing system the court need only determine the reasonable needs of the child.[68]

The claimed advantage of income-sharing is that it prevents one parent from experiencing a disparate decrease in his or her standard of living after a divorce.[69] Typically, the custodial parent's standard of living decreases following a divorce,[70] and these custodial parents are usually women.[71] Critics of the income-sharing formula argue that income-sharing will provide an incentive for custodial mothers to avoid paid employment because a custodial parent with no income under this formula will not be obligated to contribute to child support.[72]

The North Carolina statute is silent on the use of child support formulas[73] and until recently North Carolina courts did not condone using formulas to determine child support.[74] In 1982 the North Carolina Court of Appeals, in

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the combined net income after deducting the child's needs. Using the data from *Plott*, 313 N.C. at 68, 326 S.E.2d at 868, each parents share is $1156, determined as follows:

$$F = 1981$$
$$M = 957$$
$$C = 625$$
$$R = \frac{1981 + 957 - 625}{2} = 1156$$

The second step is to determine which equation is applicable. Substituting the numbers for the variables in the different equations, it is evident that only equation one is applicable:

1. $X = 625$: $1981 - 1156 = 825 > 625$ and $957 - 1156 = -199 < 0$.

Therefore, the father in *Plott* would pay the total child support under this variation of the income-sharing formula; the mother would be allowed to retain her total net income. The father, although contributing the total support for the child, would retain $1356 of his net income ($1981 - $625), approximately $400 more than the mother.

67. *See Plott*, 313 N.C. at 75-76, 326 S.E.2d at 870-71.

68. *See* Bergman, *Setting Appropriate Levels of Child Support Payments*, in THE PARENTAL-CHILD SUPPORT OBLIGATIONS 116 (1983) (discussion of various income-sharing formulas).

69. *See, e.g.*, Hunter, *supra* note 3, at 9 (stating that it is women who bear the bulk of the costs when the household becomes two); Weitzman, *supra* note 63, at 1235-41 (in-depth analysis of several studies showing that fathers' standards of living actually increase after a divorce).

70. L. WEITZMAN, *supra* note 3, at 338-39 (ten year study shows that in the first year following a divorce the living standards of women and children decrease by 73% while the living standards of men increase 42%).

71. Fineman, *supra* note 64, at 832 n.147.

72. Bergman, *supra* note 68, at 116 (income-sharing formulas do not embody the presumption that mothers will seek paid work).

73. Both parents are liable unless circumstances warrant otherwise. "Such . . . circumstances may include, but shall not be limited to, the relative ability of all . . . parties to provide support or the inability of one . . . to provide support, and the needs and estate of the child." N.C. GEN. STAT. § 50-13.4(b) (1984). Factors to be considered in determining the amount of child support are "the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case." *Id.* § 50-13.4(c).

74. When parties have attempted to use formulas, the courts have disallowed them. *See, e.g.*, Fuchs v. Fuchs, 260 N.C. 635, 640, 133 S.E.2d 487, 492 (1963) (dividing income by number of dependents not allowed); Gates v. Gates, 69 N.C. App. 421, 426, 317 S.E.2d 402, 407 (proportionately reducing child support as children reached majority not allowed), *aff'd per curiam*, 312 N.C. 620, 323 S.E.2d 920 (1985); Gibson v. Gibson, 68 N.C. App. 566, 316 S.E.2d 99 (1984) (support obligation based on percentage of time child spends with each parent not allowed); Evans v. Crad-

Hamilton v. Hamilton,[75] approved and encouraged a trial court's use of a formula to determine each parent's child support responsibility. The court, in dicta, encouraged the use of formulas because of the "total lack of consistency in the amount of child support awarded by the courts."[76] Also, the court concluded that "employment of a standard formula . . . would result in fair apportionment of responsibility in the majority of cases."[77] Prior to *Plott*, several judicial districts in North Carolina had also adopted specific formulas to be used in allocating child support obligations.[78]

By imposing primary liability on each parent, the *Plott* court adhered to the amended statute,[79] recognizing that equal duty to pay child support is the rule rather than the exception in virtually all the states.[80] The court, however, also recognized that wide disparity in the financial resources of each parent would make it inequitable to require equal contributions from each parent.[81] Thus, "equal duty to support . . . does not impose upon both parties an equal financial contribution when such an allocation would be unfair or place too great a burden on a party."[82]

By adopting a mathematical formula to allocate child support proportionally, the *Plott* court recognized the inconsistencies in child support awards.[83] The court noted that use of a formula would be "a fair method to apply so that

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dock, 61 N.C. App. 438, 441, 300 S.E.2d 908, 911 (1983) (determining child's needs by dividing total expenses by number of household members not allowed).

75. 57 N.C. App. 182, 290 S.E.2d 780 (1982). Plaintiff, the custodial mother of one child, sought an increase in child support. The court had determined that the child's needs were $950 a month and ordered the father to contribute $400, reasoning that plaintiff's second husband was able to support her thereby freeing her income to help support the minor child. *Id.* at 183, 290 S.E.2d at 781. In her brief, plaintiff had submitted two formulas for determining child support on an objective basis. Because the formulas did not appear in the record, however, the court could not consider them on appeal. *Id.*

76. *Id.*

77. *Id.* The court of appeals subsequently rejected the use of a mathematical formula in *Plott*, finding that the trial court had "abused its discretion in basing the amount of defendant's contribution on a mathematical equation rather than her ability to provide support . . . ." *Plott*, 65 N.C. App. at 662, 310 S.E.2d at 58.

78. *See* Mason, *supra* note 48, at 26. A schedule used in Wake County employs a percentage of income formula that is dependent upon the number of children and the income of the supporting spouse. *Id.* at 29. The District Court in Mecklenberg County adopted the Wisconsin standard, discussed *supra* note 44, as its basis for determining child support. Mason, *supra* note 48, at 32. Both districts allow the consideration of modifying factors, such as a spouse's very low or very high income, to avoid the inequities inherent in strict adherence to a percentage standard. *Id.*

79. N.C. GEN. STAT. § 50-13.4(b) (1984) provides that "[i]n the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child."

80. *Plott*, 313 N.C. at 67 n.1, 326 S.E.2d at 86 n.1; *see, e.g.*, ARIZ. REV. STAT. ANN. § 25-320 (1976) ("In a proceeding for . . . child support, the court may order either or both parents . . . to pay an amount reasonable and necessary for [the child's] support . . . ."); COLO. REV. STAT. § 14-10-115 (1983) ("In a proceeding for . . . child support, the court may order either or both parents . . . to pay . . . support . . . ."); MONT. CODE ANN. § 40-4-204 (1985) ("In a proceeding for . . . child support, the court may order either or both parents . . . to pay . . . support . . . ."); Hunter, *supra* note 3, at 4.

81. *Plott*, 313 N.C. at 68, 326 S.E.2d at 867.

82. *Id.*

83. *Id.* at 78, 326 S.E.2d at 872 (citing Hamilton v. Hamilton, 57 N.C. App. 182, 290 S.E.2d 780 (1982)).

parents can share equally the responsibility for supporting their children."[84] Although recognizing that "[n]o precise formula has been hailed as a panacea,"[85] the court nonetheless stressed that the use of a formula is an effective means of allocating the burden of child support proportionately between the parents.[86] By approving the use of a formula, *Plott* is consistent with other jurisdictions[87] and is an attempt to set guidelines for the trial courts to use in removing the guesswork from child support awards.[88] Therefore, before the judge imposes liability for child support in North Carolina, the judge must now consider the relative ability of each parent to contribute.[89] In determining this relative ability, a judge must consider not only the earnings of each party but also each party's relative estates and may apply a formula to arrive at a proper child support figure.[90]

In addition to discussing the proportionate amount each parent must contribute to child support, the court discussed the reasonable needs of the child and parents.[91] In dispute in *Plott* was the trial court's rejection of certain listed expenses included by the noncustodial parent in her reasonable living expenses.[92] The trial court had rejected seventy dollars of the noncustodial parent's listed expenses as unreasonable, but had failed to state why the expenses were rejected.[93] Thus, because the supreme court could not rule on the trial court's decision in the absence of adequate factual findings by the trial court,[94] the supreme court remanded the case on this issue.[95]

Plott offered the supreme court a unique opportunity to establish specific guidelines for trial courts to use in determining a parent's proportionate amount

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84. *Id.* at 79, 326 S.E.2d at 873.

85. *Id.* at 78, 326 S.E.2d at 872.

86. *Id.*

87. *See, e.g.*, Rand v. Rand, 280 Md. 508, 374 A.2d 900 (1977); Smith v. Smith, 290 Or. 675, 626 P.2d 342 (1981); Melzer v. Witsberger, 505 Pa. 462, 480 A.2d 991 (1984).

88. *Plott*, 313 N.C. at 79, 326 S.E.2d at 873.

89. *Id.* at 68-69, 326 S.E.2d at 867.

90. *Id.* Although the record states that neither party presented evidence regarding his or her estate, *see id.* at 65, 326 S.E.2d at 865, the record does disclose each party's net disposable income and the value of the marital home including household and kitchen furnishing, *id.* at 66-67, 326 S.E.2d at 866. The record also discloses that the noncustodial parent had $2500 in savings and owed her attorney $5276 for legal services. *Plott*, 65 N.C. App. at 660, 310 S.E.2d at 54.

91. *Plott*, 313 N.C. at 68-69, 326 S.E.2d at 867. Although the reasonable needs of the child were not in dispute, the court did state that the reasonable needs of the child included expenses for " 'health, education, and maintenance, having due regard to the . . . accustomed standard of living of the child and the parents . . . .' " *Id.* at 68, 326 S.E.2d at 867 (quoting N.C. GEN. STAT. § 50-13.4(c) (1984)).

92. *Id.* at 70, 326 S.E.2d at 868. The determination of reasonable living expenses is a two step process. First, the court must determine whether the parties' affadavits of financial status reflect actual expenditures and the trial judge must resolve any conflicts in the factual evidence. Second, the trial judge, in an exercise of judgment, must determine whether the monthly expenditures are reasonable. *Id.* at 74, 326 S.E.2d at 870.

93. *Id.* at 73-74, 326 S.E.2d at 869-70.

94. *Id.* at 74, 326 S.E.2d at 870. *But cf.* Hamilton v. Hamilton, 57 N.C. App. 182, 183, 290 S.E.2d 780, 781 (1982). In *Hamilton* the trial court had decreased the reasonable needs of the child from $1275 a month to $950. The court of appeals held that although it could not determine how the trial court arrived at its figures, it would assume the court relied on the evidence to make its determination. *Id.*

95. *Plott*, 313 N.C. at 80, 326 S.E.2d at 873.

of child support obligation. By adopting a precise mathematical formula based on the combined net disposable income of the parents, the court attempted to alleviate inconsistencies in child support cases and to ensure that each parent's obligation is a fair representation of his or her relative ability to pay.[96]

The decision in *Plott* falls far short of its apparent objective of creating uniformity and fairness. The formula the court adopted is a cost-sharing formula based on net disposable income. An inherent problem in applying this formula is that the trial court must first determine each party's reasonable living expenses. Absent from the court's decision are any guidelines for trial courts to use in ascertaining reasonable living expenses. A study of case law in North Carolina reveals that the most frequently litigated issue in child support cases involves the determination of the reasonable needs of both a parent and child.[97] Most of these cases were remanded because the judge, in rejecting certain expenses, failed to support his or her decision on factual findings.[98]

Another problem with the formula adopted in *Plott* is that courts generally do not hold that each parent's reasonable needs are the same.[99] In effect, the courts have allowed the higher wage earner to maintain a much higher standard of living than the lower wage earner, implicitly recognizing that a higher wage earner has higher reasonable needs. Assuming that this premise is acceptable, guidelines need to be established regarding what percentage of a parent's income, at a given level, should be allowed for basic necessities such as housing, food, clothing, and transportation. Basic economics dictate that a person in a higher income bracket will spend a lower percentage of his or her income on basic needs,[100] thereby increasing the percentage of disposable income available for child support. In *Plott* the custodial parent, although earning three times as much as the noncustodial parent, had about five times as much disposable in-

96. *Id.* at 79, 326 S.E.2d at 873.

97. *See generally* Beall v. Beall, 290 N.C. 669, 228 S.E.2d 407 (1976) (reasonable needs of custodial parent and child in excess of accustomed standard of living enjoyed prior to divorce not allowed); Fuchs v. Fuchs, 260 N.C. 635, 133 S.E.2d 487 (1963) (reasonable needs of child not predicated upon increase in supporting spouse's income); Newman v. Newman, 64 N.C. App. 125, 306 S.E.2d 540 (when husband voluntarily assumed the obligations of new family, such needs are not included in determining his reasonable needs), *disc. rev. denied*, 309 N.C. 822, 310 S.E.2d 351 (1983); County of Stanislaus v. Ross, 41 N.C. App. 518, 255 S.E.2d 229 (1979) (supporting father's reasonable needs cannot preclude him from supporting his child).

98. *See generally* Beall v. Beall, 290 N.C. 669, 228 S.E.2d 407 (1976) (court failed to consider husband's reasonable needs); Fuchs v. Fuchs, 260 N.C. 635, 133 S.E.2d 487 (1963) (no evidence of child's needs); Brower v. Brower, 75 N.C. App. 425, 331 S.E.2d 170 (1985) (no specific findings of child's needs); Newman v. Newman, 64 N.C. App. 125, 306 S.E.2d 542 (no fact finding of parties' reasonable expenses), *disc. rev. denied*, 309 N.C. 822, 310 S.E.2d 351 (1983).

99. *See, e.g.*, *Plott*, 313 N.C. at 74, 326 S.E.2d at 870 (father's reasonable needs, not including the needs of the child, were approximately $350 more than the mother's); *see also* Walker v. Walker, 63 N.C. App. 618, 620, 306 S.E.2d 485, 487 (1983) (husband's needs were approximately $1500 a month more than the wife's and approximately $1100 more than the combined reasonable needs of the wife and the child). In L. WEITZMAN, *supra* note 3, at 266, the author determined that judges rarely order a divorced man to part with more than one third of his income. Professor Weitzman contends that the California courts have adopted a "father first" principle and the "the bottom line is that he comes first and his 'right' to build a new life comes first, even if his new life is built at the expense of his children and his former wife." *Id.* at 267.

100. Weitzman, *supra* note 63, at 1241-46.

come as the noncustodial mother.[101] This was so even though his reasonable needs were about 350 dollars more than the accepted reasonable needs of the mother.[102]

To fairly apply the cost-sharing formula adopted in *Plott*, there must be specific guidelines established to determine a parent's reasonable living expenses. Examination of the erratic decisions of the trial judges in *Plott* makes clear that no apparent guidelines exist to determine whether a parent's listed expenses are reasonable.[103] Until definite standards are set for determining a party's reasonable expenses, there will be no uniform imposition of child support obligations even with the use of a cost-sharing formula.

Another potential problem inherent in the cost-sharing formula based on disposable income is that parties may inflate their reasonable living expenses, which would decrease net disposable income and decrease the amount available for child support.[104] To alleviate this potential problem, one state, in adopting a mathematical formula, sets a specific amount allowed each parent for his or her cost of living. The trial courts in that state therefore do not have to determine whether the parent's listed expenses are reasonable.[105]

In *Plott* the court stressed that the use of a formula would fairly apportion the parental child support responsibility.[106] It is apparent, however, that in upholding the use of a formula, the court justified the fears of several commentators that strict adherence to a formula will produce more inequities than it will alleviate.[107] Although the father's standard of living was much higher than the mother's, the father was allowed to retain approximately 50%, or 411 dollars a month, of his net disposable income whereas the mother was allowed to retain only 17%, or 30 dollars, of hers.[108] The mother was also required to pay almost 1700 dollars in retroactive child support.[109] Strict adherence to a formula dictated this inequity. As Judge Johnson stated, "[S]uch a calculation can hardly

101. *Plott*, 313 N.C. at 79, 326 S.E.2d at 873 (father had a monthly disposable income of $886 whereas the mother's was $180).

102. *Id.* at 74, 326 S.E.2d at 870.

103. The first trial judge found the mother's reasonable living expenses to be $850, the amount the mother had claimed. *Plott*, 65 N.C. App. at 658, 310 S.E.2d at 52. On remand, however, the next trial judge decreased the mother's reasonable living expenses to $777. *Id.* at 661, 310 S.E.2d at 53. At the third trial, after remand by the supreme court, another trial judge increased the mother's reasonable living expenses to $797. Telephone interview with David F. Tamer, Defendant's Attorney (Sept. 30, 1985).

104. County of Stanislaus v. Ross, 41 N.C. App. 518, 255 S.E.2d 229 (1979) (father stated that his reasonable living expenses exceeded his net income).

105. *See supra* note 45 (discussion of the Melson formula adopted by the courts of Delaware).

106. *Plott*, 313 N.C. at 75, 326 S.E.2d at 870-71.

107. *See* Albano & Dennis, *supra* note 47, at 5 ("guidelines may lead to slavish adherence, having a chilling effect on a case's factual analysis").

108. *See Plott*, 313 N.C. at 77, 326 S.E.2d at 872. The father's obligatory share of the child's needs was $475, thus, deducting this amount from his disposable income of $886 left him a net of $411. The mother had to contribute $150 of her disposable income of $180, leaving her a net of $30.

109. *Id.* at 66, 326 S.E.2d at 866. Because the trial court failed to base its findings on fact, these figures may change on retrial. Although the trial court had ordered the mother to make payments of $135 a month for 12 months to satisfy her retroactive child support liability, *Plott*, 65 N.C. App. at 662, 310 S.E.2d at 54, the court did not comment on how the mother was to make these payments and the regular child support payments of $150 a month when her disposable income was only $180.

be considered an exercise of 'discriminating judgment within the bounds of reason.' "[110]

An alternative route the court could have taken to alleviate inconsistencies and to impose a standard of fairness on all parties involved, including the children, would have been to implement the income-sharing formula.[111] The income-sharing formula would alleviate any need for standards based on the reasonable living expenses of the parents. After deducting the child's needs from the parents' joint net income figures, the remaining income would then be divided between the parents and they would be free to maintain whatever standard of living they choose within the constraints of this residual income.[112]

The income-sharing formula is preferable to the cost-sharing approach for two reasons. First, the income-sharing formula recognizes the primary reason for child support laws—financial responsibility for the children rests with the parents.[113] Deducting the child's needs first from the parents' combined net income gives credence to the premise that consideration of the parents' standard of living should be secondary to the needs of the child.[114] Second, by requiring the lower wage earner to contribute financially only when his or her income reaches a certain level gives credence to the economic realities of divorce. Family resources that once supported one household must support two households after a divorce, and, as a result, the standard of living of *all* parties should decrease in most cases.[115] Under present law, however, including formulas such as that advocated by *Plott*, the standard of living of all parties involved does not decrease proportionately. In reality, the father, who is typically the higher wage earner and noncustodial parent, often enjoys a much higher standard of living after a divorce than when the family was a unit.[116] The reverse is true for the lower wage earner and custodial parent, usually the mother. Thus, the standard of living of mothers and children typically is drastically decreased after a divorce.[117]

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110. *Plott*, 65 N.C. App. at 667, 310 S.E.2d at 57 (quoting Marriage of Muldrow, 61 Cal. App. 3d 327, 332, 132 Cal. Rptr. 48, 51 (1976)).

111. *See supra* note 66.

112. *See supra* note 66.

113. *See* N.C. GEN. STAT. § 50-13.4(b) (1984) (primary liability to support minor child is on both parents).

114. *See* County of Stanislaus v. Ross, 41 N.C. App. 518, 255 S.E.2d 229 (1979). In *Ross*, the father claimed he could not contribute to child support because his expenses exceeded his income. In holding that the reasonable needs of the child must be considered first, the court said, "if . . . the defendant is required to survive with less clothing, less convenient transportation or less desirable housing, then so be it. He may not avoid his duty to support his minor child simply by spending all of the money he earns." *Id.* at 521, 255 S.E.2d at 232.

115. Williams v. Williams, 299 N.C. 174, 185, 261 S.E.2d 849, 858 (1984) (alimony case in which court recognized that dissolution of a family as an economic unit creates a hardship on both parties).

116. For a discussion indicating that the higher wage earner enjoys a higher standard of living even when he or she is the custodial parent, see *infra* note 117.

117. *See* L. WEITZMAN, *supra* note 3, at 338-39. In *Plott* had the child lived with the mother, the inequities are even more glaring. The mother and child would have a combined income of $1433 a month (mother's income of $958 plus father's share of child support of $475) or $716 a month each, a decrease of $263 each from pre-divorce income. The father, however, would have income of $1505, or an increase of $526 from pre-divorce income.

Because the higher wage earner in *Plott* was also the custodial parent, the fact situation differs from most support cases.[118] The underlying economic principle, however, should still be applicable. Subsequent to the divorce, both parents' standards of living should have decreased. But the facts in *Plott* show that the father's accepted reasonable living expenses were approximately 350 dollars more than the mother's,[119] thus indicating a relatively higher standard of living for the father *before* the court ordered the mother to contribute to child support. The court order requiring the mother to contribute to child support effectively increased the father's standard of living even more, while substantially decreasing the mother's already lowered standard of living.[120] If an income-sharing formula had been used, both parents' standards of living, by necessity, would have decreased subsequent to the divorce. But the father's standard of living would not have been increased at the expense of lowering the mother's standard of living.[121]

Although it attempted to alleviate the inconsistencies and inequities of child support awards by choosing a cost-sharing formula to determine child support liability, the *Plott* decision instead mandates a continuance of inconsistent decisions that will cause even more inequities to be suffered by the lower wage earner. By not setting standards for reasonable living expenses, *Plott* requires that cases continue to be decided on an individual basis. Thus erratic decisions of trial court judges, such as those in *Plott*, will continue. In essence, what one judge considers a reasonable living expense may not necessarily be considered reasonable by another judge even in the same fact situation.[122] Thus, the only consistency a cost-formula's use will ensure will be the application of the formula to inconsistent disposable income figures. The final result, therefore, will be dictated by what a particular judge feels are reasonable living standards for the parties.

By adopting a cost-sharing formula in *Plott*, the court ignored the economic realities regarding the status of women. Although it is true that most women are employed,[123] it is also true that women's incomes are substantially lower than those of men.[124] Thus, a woman spends a greater proportion of her income on

118. *See, e.g.*, Fineman, *supra* note 64, at 832 n.147; Weitzman, *supra* note 63, at 1244 (women more likely than men to have dependent children in household).

119. *See Plott*, 313 N.C. at 74, 326 S.E.2d at 870.

120. The father will in effect increase his net disposable income by $150—the amount the mother is to contribute—because he will be spending $150 less on child support.

121. Before the divorce, if the income was the same, the combined income to be shared by three people equalled $2938, or $979 each. Had the court used income-sharing, *see supra* note 66, the mother could have retained her $958 and the standard of living of the parties involved would have been about equal. The holding in *Plott*, however, required the mother to lower her standard of living to $777 a month and increased the standard of living of the father and child to $2161, or $1080 each, and thus gave the father a higher standard of living than the standard he enjoyed before the divorce.

122. Although the record does not disclose which of the mother's expenses the trial judges found unreasonable, it does reveal that the judges were not in agreement on what constituted reasonable expenses. *See supra* note 103.

123. In 1980, 44,700,000 women were employed. This is a 47% increase since 1970. BUREAU OF THE CENSUS, U.S.DEPT. OF COMMERCE, Pub. No. PC80-1-C1, GENERAL SOCIAL AND ECONOMIC CHARACTERISTICS, 1-10m (December 1983) [hereinafter cited as BUREAU OF THE CENSUS].

124. In 1980, a woman, working full time, earned an average salary of $10,380, whereas a man's

the basic necessities of life than does a man. The crux of the problem is that there is a disparity between what constitutes basic necessities for the man and for the woman. Invariably, the higher wage earner, usually the man, is allowed a higher amount for his or her basic necessities than is allowed for the lower wage earner, usually the woman.[125] By adopting a cost-sharing formula, the *Plott* court effectively continues the erroneous principle that it is fair to allow the higher wage earner of a divorced couple to enjoy a much higher standard of living subsequent to a divorce. By requiring the lower wage earner to contribute proportionately, the court condones an even greater disparity in the standard of living between the parties.

In *Plott*, because the mother was the noncustodial parent, the harsh inequities of applying the cost-sharing formula and the failure of the court to set reasonable living expense guidelines affected only one person. The court, however, should have looked beyond the facts in *Plott* and recognized that most children live with their mothers, the lower wage earner.[126] Therefore, in a more realistic fact situation, use of a cost-sharing formula will work a harsher result than the result achieved in *Plott*. By lowering the standard of living of the custodial mother, the use of this formula will impose a lower standard of living on the person that the child support laws are supposed to protect—the child.

In essence, if a child of a divorced couple lives with the mother, he or she is being penalized by the court's decision to require the mother to contribute to child support. Although relative ability to pay, based on a cost-sharing formula, sounds equitable, the harsh results show that the court is willing to widen the gap between the noncustodial father's standard of living and that of his child's.

The disparity between the standard of living goes beyond mere economics. First, the custodial mother, to meet the newly acquired financial obligation, must seek a higher paying job or possibly work two jobs. She is then left with less time to spend with her children. Also, because she is now a single parent, the mother bears virtually all the child raising responsibility but has less time to devote to her children. Thus, not only are the children deprived of a full-time father, they are also deprived of a full-time mother.

Second, the diminished income of the mother usually requires that she and the children seek more affordable housing. This forces the children to move into unfamiliar neighborhoods, acquire new friends, and transfer to new schools. This disruption in a child's life occurs simultaneously with the loss of a parent

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salary was $17,363, thus revealing that women earn approximately 40% less than men. BUREAU OF THE CENSUS, *supra* note 123, at 1-10t. The data also reveals that in 1969, 27% of the families with children living beneath the poverty level in the United States were headed by a female. This percentage increased to 39% by 1980. *Id.*, at 1-10w.

125. This is a valid inference when one considers that the average child support award for moderate income households is less than one-third of the needs of the child, L. WEITZMAN, *supra* note 3, at 266, and that women earn substantially less than men. BUREAU OF THE CENSUS, *supra* note 123, at 1-10t. The bottom line, therefore, is that courts are allowing noncustodial fathers to retain a greater portion of their incomes. In a 10 year study of California courts, Professor Weitzman discovered that the noncustodial father's needs were taken care of first and the custodial mother and children got what was left. L. WEITZMAN, *supra* note 3, at 267.

126. Fineman, *supra* note 64, at 832 n.147.

from the home and by necessity, compounds the psychological loss a child must feel at the time of divorce.

Third, the wide disparity in the standards of living between the noncustodial parent and that of the child creates an emotional chasm between a child and his or her noncustodial parent. If a child has any contact with his or her noncustodial parent, it is only natural for the child to compare the standard of living between the two households and to resent the noncustodial parent's enjoyment of a much higher standard of living than that enjoyed by the child.[127]

In its quest to find a fair method to allocate parental liability for child support subsequent to a divorce, the court in *Plott* failed to recognize that the mother is usually the custodial parent, and it also failed to recognize the economic reality regarding the status of women. More importantly, however, the court failed to consider the repercussions of its decision on the lives of the children of divorced parents. Further, because *Plott* failed to establish specific guidelines for trial courts to use in determining the parties' reasonable living expenses, decisions regarding child support amounts and each parent's proportionate liability will continue to be inconsistent.

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127. The problem with the lack of specific guidelines for determining child support amounts may soon be alleviated. Under recent federal legislation, in order for states to qualify for certain federal funds, states must develop specific guidelines for determining child support awards. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, § 18(a), 98 Stat. 1305, 1321 (codified at 42 U.S.C. § 667 (1982)). These guidelines must be developed by October 1987 and made available to the judiciary. *Id.* These guidelines, however, are not binding. Therefore, courts may or may not follow them. For a critique of this "escape clause" in the federal legislation, see Bruch & Wikler, *The Economic Consequences*, JUVENILE & FAMILY COURT JOURNAL, Vol 36, No. 3 at 5, 26 (Fall 1985).

North Carolina's Equitable Distribution Statute: Recent Developments

On October 1, 1981, North Carolina became the fortieth common-law state to adopt a form of equitable distribution for dividing property upon divorce.[1] Passage of the "Act for Equitable Distribution of Marital Property"[2] (Act) marked "the greatest change in the domestic law of the state since at least the turn of the century."[3] The Act replaced the common-law title theory method of property allocation[4] with a method grounded on the same basic premises as those underlying community property systems.[5] Because the Act changed the common law of the State so dramatically, and because of the statute's unusual complexity,[6] the law of equitable distribution in North Carolina has been the subject of much legislative and judicial clarification and interpretation since its enactment.[7]

During 1985 and the early part of 1986, the North Carolina Supreme Court and the North Carolina Court of Appeals decided a number of cases that further interpreted the statute. In addition, the North Carolina General Assembly enacted several amendments to the Act. This Note summarizes the most significant of these developments. The discussion traces steps taken by a trial judge in an equitable distribution proceeding.[8] This Note first surveys further attempts

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1. Stephens & Wenige, *Procedural Aspects of Equitable Distribution*, in EQUITABLE DISTRIBUTION I-1 (North Carolina Bar Foundation 1985); *see also* Freed & Foster, *Family Law in the Fifty States: An Overview*, 17 FAM. L.Q. 365, 379 (Winter 1985) ("There are now forty-one common-law property states in which courts have equitable power to distribute property upon divorce, either in the form of property distribution or maintenance.").

2. Act of July 3, 1981, ch. 815, 1981 N.C. Sess. Laws 1184 (codified at N.C. GEN. STAT. §§ 50-20 to -21 (1984 & Supp. 1985)).

3. Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C.L. REV. 247, 247-48 (1982).

4. Under the common-law title system, "property followed legal title on divorce, unless a constructive trust or gift could be established." Note, Hinton v. Hinton: *Equitable Distribution Without Consideration of Marital Fault*, 63 N.C.L. REV. 1204, 1207 (1985); *see also* Freed & Foster, *supra* note 1, at 379 (discussing the title theory).

5. "The major premise of the community property system is that marriage is an economic and financial partnership of the husband and wife wherein each spouse owns a present, vested, and undivided one-half interest in the earnings and assets acquired by either spouse during the marriage." G. MCLELLAN, EQUITABLE DISTRIBUTION LAW AND PRACTICE § 1.2, at 4 (1984). The laws of the eight community property states have served as models for equitable distribution. *Id.* Community property laws, however, have served only as a foundation; equitable distribution statutes introduce additional systematic flexibility to achieve their goal of an equitable distribution between the parties. Rather than giving each spouse an automatic one-half interest in the marital assets, equitable distribution attempts to value the contributions of each spouse to the partnership and to distribute property according to the particular circumstances of each case. *Id.* § 6.1, at 3; *see also* L. GOLDEN, EQUITABLE DISTRIBUTION OF PROPERTY §§ 1.01-.02 (1983) (discussing the development of equitable distribution and its relationship to the community property system).

6. Sharp, *supra* note 3, at 248; *see also* L. GOLDEN, *supra* note 5, at v (discussing the changes brought about in family law by the complexities of equitable distribution).

7. This Note discusses only those judicial decisions and legislative amendments that took place in 1985 and early 1986. For a complete survey of legislative action taken before 1985, see Stephens &Wenige, *supra* note 1, at I-3 to -11.

8. *See* Herring, *An Equitable Distribution—Now Showing at a Theater Near You*, 32 N.C. BAR ASS'N BAR NOTES, No. 7, at 8-9 (1981). The court first decides what property is marital and thus

by the courts and the general assembly to define marital property in accord with the espoused public policy underlying the Act and reviews the efforts of the courts to provide trial judges with proper methods by which to value the particular property involved in an action. This Note then discusses the courts' treatment of the actual division phase of the process and the various factors employed to determine what constitutes an equitable distribution in a given case.[9]

Equitable distribution is based on the notion that marriage is an economic partnership or "shared enterprise" between husband and wife[10] to which both

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subject to division. The court must then establish the net value of the marital property and make a distribution that is equitable under the circumstances.

9. Equitable distribution proceedings can be lengthy and expensive. L. GOLDEN, *supra* note 5, § 3.41, at 56. Extensive discovery, lengthy hearings, and the use of experts for complex valuation problems can be avoided by the use of separation agreements, property settlements, and other forms of contracts between spouses. *Id.* at 57.

N.C. GEN. STAT. § 50-20(d) (1984) provides:

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

N.C. GEN. STAT. §§ 52-10 to -10.1 (1984) require that any such agreements "(a) be in keeping with public policy, (b) be in writing, and (c) be acknowledged by both parties before a certifying officer who is not a party to the contract." *See* Hough, *Marital Agreements*, in EQUITABLE DISTRIBUTION VI-2 (North Carolina Bar Foundation 1985).

During 1985 the North Carolina Court of Appeals repeatedly reaffirmed the proposition that a valid agreement between the parties bars an equitable distribution action. *See* McKenzie v. McKenzie, 75 N.C. App. 188, 189, 330 S.E.2d 270, 271 (1985) (Phillips, J., concurring) ("[J]udicial settlement of marital suits on almost any terms agreeable to the parties is strongly encouraged by public policy."); Freed & Foster, *supra* note 1, at 366 ("In general, the former notion that antenuptial or premarital agreements are contrary to public policy as inconsistent with the status of marriage is being steadily eroded. Statutes have greatly expanded freedom of contract in this area."). In Knight v. Knight, 76 N.C. App. 395, 333 S.E.2d 331 (1985), the court held that if such an agreement has been validly executed and there is no charge of collusion or fraud, the agreement bars any equitable distribution proceeding regardless of the perceived fairness or unfairness of the agreement. The court noted, "[A] separation agreement should be viewed today like any other bargained-for exchange between parties who are presumably on equal footing. Thus, we hold that a trial judge is not required to make an independent determination as to whether the agreement is fair." *Id.* at 398, 333 S.E.2d at 332. In Case v. Case, 73 N.C. App. 76, 325 S.E.2d 661, *disc. rev. denied*, 313 N.C. 597, 330 S.E.2d 606 (1985), the court held that a brief reconciliation of the parties before the final divorce did not terminate any provision of an agreement concerning the distribution of marital property so long as those agreements were executed rather than merely executory. *Id.* at 79-80, 325 S.E.2d at 664. For further explanation of the difference between an executed and an executory contract, see Carlton v. Carlton, 74 N.C. App. 690, 692-94, 329 S.E.2d 682, 684 (1985).

If, however, the statutory requirements are not strictly followed, the court will disregard the agreement completely. In Morton v. Morton, 76 N.C. App. 295, 332 S.E.2d 736, *disc. rev. denied*, 314 N.C. 667, 337 S.E.2d 582 (1985), the court held an agreement invalid because only one spouse acknowledged the execution before a notary public, and in McIntosh v. McIntosh, 74 N.C. App. 554, 328 S.E.2d 600 (1985), the court refused to recognize oral, informal stipulations between parties as a bar to equitable distribution. *See also* Weaver v. Weaver, 72 N.C. App. 409, 418, 324 S.E.2d 915, 921 (1985) (trial court's reliance on parties' oral agreement as to the division of household furnishings held to be error). Further, the court in Cox v. Cox, 75 N.C. App. 354, 330 S.E.2d 506 (1985), indicated that an agreement signed under duress or fear will not be recognized. The *Cox* court held that a summary judgment based on the existence of a separation agreement was improper when one spouse claimed that the agreement was induced by the other spouse's wrongful acts and threats. *Id.* at 356, 330 S.E.2d at 507-08. *See generally* Hough, *supra* (explaining marital agreements and their treatment under the North Carolina Equitable Distribution Act).

10. L. GOLDEN, *supra* note 5, § 1.01, at 1-2.

spouses make economic and noneconomic contributions. These contributions entitle each spouse, upon divorce, to a share of the property acquired during the relationship.[11] The North Carolina Equitable Distribution Act requires the trial court, on application of a party to an action for divorce, to make an equitable distribution of marital property following a decree of absolute divorce.[12] The legislative intent of the statute was "to eliminate, or at least reduce," the inequities of the common-law system[13] that tended to reward only the spouse "directly responsible" for the acquisition of the property and to overlook the "contribution of the homemaking spouse."[14] To effectuate the new economic partnership theory of contribution, judges are required to determine what property is subject to division and then to distribute "such property in a manner that is, in accord with a number of statutory factors to be considered, equitable."[15]

Section 50-20(a) of the Act requires that only "marital property" be divided between the spouses.[16] "Separate property" is not subject to distribution.[17] Classification of property as marital property or separate property is the first and most vital aspect of equitable distribution proceedings.[18] One commentator has suggested that "[n]either the statutory distributional factors nor judicial wisdom can effectuate a fair division of marital property unless the property is fairly

11. White v. White, 312 N.C. 770, 775, 324 S.E.2d 829, 832 (1985).

12. N.C. GEN. STAT. § 50-21(a) (1984).

13. Herring, *supra* note 8, at 8.

14. White v. White, 312 N.C. 770, 774, 324 S.E.2d 829, 831 (1985). *See also* G. MCLELLAN, *supra* note 5, § 1.4, at 5 (The title theory left a housewife dependent on a "precarious and perhaps unenforceable claim for alimony" because traditionally the majority of marital assets were purchased with the husband's salary. Equitable distribution seeks to avoid this one-sided result by providing a more balanced distribution.).

15. Sharp, *supra* note 3, at 248. For a list of the statutory factors, see *infra* note 59.

16. N.C. GEN. STAT. § 50-20(a) (1984). Marital property is defined in the statute as:

> [A]ll real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of separation of the parties, and presently owned, except property determined to be separate in accordance with subdivision (2) of this section. Marital property includes all vested pension and retirement rights and other deferred compensation including military pension eligible under the federal Uniformed Services Former Spouse's Protection Act.

Id. § 50-20(b)(1) (1984 & Supp. 1985).

17. *Id.* § 50-20(c); Loeb v. Loeb, 72 N.C. App. 205, 209, 324 S.E.2d 33, 37 (1985). Separate property is defined by the statute as:

> [A]ll real and personal property acquired by a spouse before marriage or acquired by bequest, devise, descent, or gift during the course of the marriage. However, property acquired by gift from the other spouse shall be considered separate property only if such an intention is stated in the conveyance. Property acquired in exchange for separate property shall remain separate property regardless of whether title is in the name of the husband or wife or both and shall not be considered to be marital unless a contrary intention is expressly stated in the conveyance. The increase in value of separate property and the income derived from separate property shall be considered separate property. All professional licenses and business licenses which would terminate on transfer shall be considered separate property. The expectation of nonvested pension or retirement rights shall be considered separate property.

N.C. GEN. STAT. § 50-20(b)(2) (1984 & Supp. 1985).

18. For a more thorough evaluation of this process and for a complete discussion of the methods of classification in other states, see L. GOLDEN, *supra* note 5, § 5, at 94-147; G. MCLELLAN, *supra* note 5, § 7; Gailor, *Separate and Marital Property*, in EQUITABLE DISTRIBUTION II-1 (North Carolina Bar Foundation 1985); Sharp, *supra* note 3, at 248-70.

defined in the first instance."[19] To best accomplish the Act's goal of determining what division is equitable under the particular circumstances, as much property as possible should be deemed marital.[20] A restricted pool of assets substantially reduces the flexibility that is necessary to enable the court to fashion an equitable division.[21]

Decisions reached by the North Carolina Court of Appeals in 1985 reflect an acceptance of this general principle.[22] In *Loeb v. Loeb*[23] the court established a presumption that all property acquired during marriage is marital property.[24] The *Loeb* court addressed the question whether gifts from third parties to a couple during the marriage relationship should be classified as separate or marital property. The court held that North Carolina General Statutes section 50-20(b)(2), which specifies that property acquired by *one* spouse by gift or bequest is the separate property of that spouse, evidences a legislative intent to exclude similar gifts made to *both* spouses from the statutory definition of separate property.[25] The court stated that because there is a presumption that property acquired during the marriage is marital property, a party seeking to establish property as separate has the burden of "proving by clear, cogent, and convincing evidence" that the property comes within the statutory definition of separate property.[26]

In *Wade v. Wade*[27] the court of appeals adopted a flexible "source of funds" approach for characterizing property acquired during marriage.[28] This approach recognizes that property can have a dual nature. That is, property can have both separate and marital characteristics.[29] For example, plaintiff husband in *Wade* owned a tract of land prior to marriage. The marital home was constructed on this land while the parties were married. Plaintiff claimed the entire improved real property as his separate property, arguing that the house merely constituted an increase in the value of his previously owned property and as

19. Sharp, *supra* note 3, at 248.

20. L. GOLDEN, *supra* note 5, § 2.01, at 18-19; Sharp, *supra* note 3, at 249.

21. Sharp, *supra* note 3, at 249.

22. *See, e.g.*, Wade v. Wade, 72 N.C. App. 372, 379, 325 S.E.2d 260, 267, *disc. rev. denied*, 313 N.C. 612, 330 S.E.2d 616 (1985), in which the court defined N.C. GEN. STAT. § 50-20 as a "remedial statute enacted to ensure a fairer distribution of marital assets than under common-law rules." The court stated, "A remedial statute must be construed broadly, in light of the evils sought to be remedied and the objectives to be obtained." *Id.* at 379, 325 S.E.2d at 268.

23. 72 N.C. App. 205, 324 S.E.2d 33 (1985).

24. *Id.* at 209, 324 S.E.2d at 38.

25. *Id.* at 210, 324 S.E.2d at 38.

26. *Id.* The court admitted that the likelihood of overcoming this presumption and proving that a gift was intended for only one spouse was small. *Id.* at 211, 324 S.E.2d at 39. *See also* McManus v. McManus, 76 N.C. App. 588, 591-92, 334 S.E.2d 270, 273 (1985) (party seeking to have property classified as separate has the burden of rebutting the presumption and credibility of testimony is left to the trial judge's determination and is not a proper subject for review).

27. 72 N.C. App. 372, 325 S.E.2d 260, *disc. rev. denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).

28. *Id.* at 381-82, 325 S.E.2d at 269; *see also* L. GOLDEN, *supra* note 5, § 1.07, at 10 (use of the source of funds doctrine makes more property available for distribution by the court and gives the judge more flexibility to fashion an equitable award); Sharp, *supra* note 3, at 255-56 (discussing the source of funds doctrine).

29. Diehl, *Significant Family Law Cases in the Last Twelve Months*, in FAMILY LAW SECTION ANNUAL WORKSHOP I-22 (North Carolina Bar Foundation 1985).

such must also be considered separate property under section 50-20(b)(2).[30] The court found that substantial sums of money belonging to the marital estate had been used in constructing the home and therefore concluded that a proportionate share of the value of the real estate should be returned to the marital estate.[31] The court stated that to be consistent with the policy underlying the equitable distribution statute, the portion of the unimproved real estate owned by the defendant before marriage should remain separate property but the portion on which improvements had been made during the marriage, as well as the improvements themselves, were to be considered marital property.[32]

By adopting the source of funds doctrine, the court recognized that a "dynamic rather than static interpretation of the term 'acquired' as used in North Carolina General Statutes section 50-20(b)(1) will best serve to prevent inequity."[33] As with the purchase of a marital home or of a family automobile, acquisition sometimes "must be recognized as an ongoing process of making payment for property or contributing to the marital estate rather than being fixed on the date that legal title to the property is obtained."[34] The *Wade* court also effectively limited the definition of separate property when it concluded that section 50-20(b)(2), which classifies increases in the value of separate property during marriage as separate property, referred only to *passive* appreciation of those assets.[35] Passive increases in value, such as those attributable to inflation or to market fluctuations, will be considered as part of the separate property, whereas active appreciation in the value of the property, such as that resulting from economic or noneconomic contributions by one or both of the spouses, is to be treated as part of the marital property.[36]

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30. *Wade*, 72 N.C. App. at 378-79, 325 S.E.2d at 267.

31. *Id.* at 380, 325 S.E.2d at 268. The court stated, "[W]hen both marital and separate estates contribute towards the acquisition of property, each estate is entitled to an interest in the property in the ratio its contribution bears to the total investment in the property." *Id.*

In addition to dealing with such questions as the classification of a marital home that was purchased by one party prior to marriage but paid for over the term of the marriage, the source of funds doctrine is also used to justify the inclusion of assets acquired by one spouse after separation if the funds used to acquire the property were marital funds. *See* Talent v. Talent, 76 N.C. App. 545, 334 S.E.2d 256 (1985), in which, after separation, defendant used $10,000, representing the repayment of a loan made by defendant during the course of the marriage and therefore considered to be marital funds, to pay for a mobile home and lot. The court held the acquired property to be marital. *Id.* at 554-55, 334 S.E.2d at 262-63. In Mauser v. Mauser, 75 N.C. App. 115, 120, 330 S.E.2d 63, 66 (1985), the court held that the conversion of marital property by one spouse between the date of separation and the date of divorce has no effect on its character as marital or separate.

32. *Wade*, 72 N.C. App. at 382, 325 S.E.2d at 269.

33. *Id.* at 380, 325 S.E.2d at 268.

34. *Id.*; *see* L. GOLDEN, *supra* note 5, § 5.07, at 99-102; Sharp, *supra* note 3, at 256.

35. *Wade*, 72 N.C. App. at 379, 325 S.E.2d at 268.

36. *Id.*; Diehl, *supra* note 29, at I-22 to -23; *see also* Lawrence v. Lawrence, 75 N.C. App. 592, 331 S.E.2d 186 (marital funds and the labor invested in separate property entitled the marital estate to a proportionate share in the total value of the property upon distribution), *disc. rev. denied*, 314 N.C. 541, 335 S.E.2d 18 (1985); Phillips v. Phillips, 73 N.C. App. 68, 72-74, 326 S.E.2d 57, 59-61 (1985) (Although the husband claimed that all his interest in a closely held corporation acquired before marriage was separate property, it was up to the trial court to determine the increase in net value due to contributions of personal effort or money by either or both spouses during the marital relationship, because such increase was active appreciation and therefore part of the marital estate.). *But see* Brown v. Brown, 72 N.C. App. 332, 336, 324 S.E.2d 287, 289 (1985) (trial court erred in treating spouse's separate property as marital merely because it was deposited in a joint bank ac-

In 1983 the North Carolina General Assembly expanded the class of property that is characterized as "marital" by changing the classification of "vested pension and retirement rights, including military pensions eligible under the federal Uniformed Services Former Spouses' Protection Act," from separate to marital property.[37] In 1985 the general assembly further expanded the class of marital property by adding "and other deferred compensation" to the phrase "pension and retirement benefits."[38] Issues concerning the classification of pensions and other deferred compensation have produced much legislation throughout the country.[39] As these compensation packages become more widely used, the likelihood increases that pension benefits will be among the parties' most significant assets at the time of divorce.[40]

Several other specific types of assets were also characterized as marital by the North Carolina Court of Appeals in 1985. In *Weaver v. Weaver*[41] the court held that a "spouse's interest in a professional partnership [was] a marital asset,"[42] and in *Little v. Little*[43] the court held that personal injury proceeds received by one spouse for injuries sustained during the marriage were marital assets and thus subject to division.[44]

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count; interest earned on this portion of the account was also the spouse's separate property). *Accord* Manes v. Manes, 79 N.C. App. 170, 172, 338 S.E.2d 815, 817 (1986) (depositing separate funds into a joint account does not convert the funds to marital property).

37. Act of July 14, 1983, ch. 758, 1983 N.C. Sess. Laws 787 (codified as amended at N.C. GEN. STAT. § 50-20(b)(1) (1984 & Supp. 1985)). Under the Act as originally passed, these interests had been classified as separate. Act for Equitable Distribution of Marital Property, ch. 815, 1981 N.C. Sess. Laws 1184 (codified as amended at N.C. GEN. STAT. § 50-20(b)(1) (1984 & Supp. 1985)).

38. Act of July 9, 1985, ch. 660, 1985 N.C. Sess. Laws 847 (codified at N.C. GEN. STAT. § 50-20(b)(1) (Supp. 1985)).

39. L. GOLDEN, *supra* note 5, § 6.09, at 167; *see also Pensions—Current Issues*, 2 EQUITABLE DISTRIBUTION J. 85, 85-86 (1985) (the great majority of states have recognized vested pensions as marital property; there is much more debate over nonvested pensions and other types of retirement or disability plans).

40. L. GOLDEN, *supra* note 5, § 6.09, at 167. The North Carolina Court of Appeals has had only one opportunity to classify pension and retirement rights as marital property since the 1983 amendment. In Morton v. Morton, 76 N.C. App. 295, 332 S.E.2d 736, *disc. rev. denied*, 314 N.C. 667, 337 S.E.2d 582 (1985), the court upheld an award of "whatever percentage of the husband's 'disposable' military pension yields 35% of his gross military pension." *Id.* at 296, 332 S.E.2d at 737; *see also* Poore v. Poore, 75 N.C. App. 414, 424, 331 S.E.2d 266, 273 (although decided before the amendment, court stated that on remand the trial court should consider the wife's contributions of homemaking services which allowed the husband to reduce his salary and to put away amounts each year toward his pension and profit sharing plan), *disc. rev. denied*, 314 N.C. 543, 335 S.E.2d 316 (1985). For a complete discussion of pensions and other forms of deferred compensation and the treatment of these assets in other states, see L. GOLDEN, *supra* note 5, § 6, at 148-81. For a thorough review of North Carolina's treatment of these assets, see Bost & Woodruff, *Pension and Retirement Rights in Equitable Distribution*, in EQUITABLE DISTRIBUTION IV-1 (North Carolina Bar Foundation 1985). *See generally* G. MCLELLAN, *supra* note 5, at § 7 (discussion of pensions, securities, closely held stock, and various forms of deferred compensation subject to division under equitable distribution statutes throughout the country); Davis & Witmer, *Evaluation and Division of Pension and Retirement Benefits Under the North Carolina Act for the Distribution by Court of Marital Property Upon Divorce*, in FAMILY LAW SECTION ANNUAL WORKSHOP VI-1 (North Carolina Bar Foundation 1985) (defining "pension" and the effect of federal legislation on state classifications of this type property).

41. 72 N.C. App. 409, 324 S.E.2d 915 (1985).

42. *Id.* at 411, 324 S.E.2d at 917.

43. 74 N.C. App. 12, 327 S.E.2d 283 (1985).

44. *Id.* at 16-17, 327 S.E.2d at 287-88. *But see* Johnson v. Johnson, 75 N.C. App. 659, 331 S.E.2d 211 (1985) (recovery by plaintiff husband after the parties separated for personal injuries

After identifying all property owned by the spouses and distinguishing separate from marital property, a trial court must determine the net value of the marital property as of the date the parties separated.[45] "Net value" is defined as the market value, if any, less the amount of any encumbrance on the property.[46] This step in the equitable distribution proceedings has led to significant "changes in the preparation and trial of . . . divorce [cases]."[47] More extensive discovery is needed and the use of experts to aid in valuation decisions has become more widespread.[48] The method of valuation may vary depending on the type and nature of the particular property involved. Because there often is no specified valuation formula, the trial court's findings regarding value generally are given considerable weight on appeal.[49]

In 1985 the court of appeals decided several equitable distribution cases in which the value of professional associations was at issue. In *Weaver v. Weaver*[50] the two principal assets of the parties seeking equitable distribution were the equity in the marital home and the equity in the husband's accounting partnership. After holding that the husband's interest in the partnership was a "marital asset subject to equitable distribution,"[51] the court faced the difficult task of determining the net value of the husband's interest. The court noted the usefulness of a partnership agreement in valuing the separate interest of each member

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sustained during the marriage constituted separate property), *disc. rev. granted*, 315 N.C. 588, 341 S.E.2d 26 (1986).

45. N.C. GEN. STAT. § 50-20(c) (1984 & Supp. 1985) states, "There shall be an equal division by using net value of marital property unless the court determines that an equal division is not equitable."

N.C. GEN. STAT. § 50-21(b) (1984 & Supp. 1985) provides:

> If the divorce is granted on the ground of one year separation, the marital property shall be valued as of the date of separation as determined under G.S. 50-6. If the divorce is granted on any other ground listed in G.S. 50-5, the marital property shall be valued as of the date the divorce action is filed or as of the date of last separation, whichever date is earlier.

Since the repeal of N.C. GEN. STAT. § 50-5, Act of June 24, 1983, ch. 613, § 1, 1983 N.C. Sess. Laws 548, 548, the only grounds for absolute divorce in North Carolina other than one year separation is incurable insanity under N.C. GEN. STAT. § 50-5.1 (1984). Riddle, *Valuation of the Marital Estate*, in EQUITABLE DISTRIBUTION IX-1 (North Carolina Bar Foundation 1985).

46. Poore v. Poore, 75 N.C. App. 414, 417, 331 S.E.2d 266, 269, *disc. rev. denied*, 314 N.C. 543, 335 S.E.2d 316 (1985); Talent v. Talent, 75 N.C. App. 545, 556, 334 S.E.2d 256, 263 (1985) (When there are no liens or mortgages on the property, net value is the same as market value.); *see also* Brown v. Brown, 72 N.C. App. 332, 336, 324 S.E.2d 287, 290 (1985) (trial court erred in using fair market value rather than net value).

47. L. GOLDEN, *supra* note 5, § 7.05, at 211.

48. L. GOLDEN, *supra* note 5, § 7.05, at 211 (noting that valuation issues lead to more complex and more expensive litigation).

49. For example, in Patton v. Patton, 78 N.C. App. 247, 255, 337 S.E.2d 607, 612 (1985), *disc. rev. denied*, 316 N.C. 195, 341 S.E.2d 585 (1986), the court held that a "trial court's findings concerning valuation . . . are . . . factual findings [that] are binding on appellate courts when supported by competent evidence." In Poore v. Poore, 75 N.C. App. 414, 419, 331 S.E.2d 266, 270, *disc. rev. denied*, 314 N.C. 543, 335 S.E.2d 316 (1985), the court stated that if, on appeal, it appears that the trial judge reasonably approximated the net value of the property involved, the judgment will not be disturbed. The court noted that a trial court should make specific findings of value and indicate the evidence on which its valuations are based, "preferably noting the valuation method or methods on which it relied." *Id.* at 422, 331 S.E.2d at 272; *see also* Weaver v. Weaver, 72 N.C. App. 409, 412, 324 S.E.2d 915, 917 (1985), in which the court stated that "there is no single best approach to valuing a partnership interest" and therefore various appraisal methods can be used.

50. 72 N.C. App. 409, 324 S.E.2d 915 (1985).

51. *Id.* at 411, 324 S.E.2d at 917.

of the firm, but also emphasized that value calculated by such an agreement is only a "presumptive" value subject to attack by either party as not reflective of the asset's true worth.[52] In *Poore v. Poore*[53] the court dealt extensively with the valuation of a solely owned dentistry practice that was subject to distribution and enumerated several factors to be considered by a trial court in valuing such a private practice.[54] The court of appeals concluded that, in valuing the business, a trial court should consider the value of the fixed assets of the practice, including cash, furniture, equipment, and supplies; the value of all other assets, including accounts receivable and work in progress; the goodwill value of the practice, if any; and the amount of any liabilities owed by the practice. The court also suggested that two valuation techniques could prove helpful in the valuation process: an earnings or market approach and a comparable sales approach.[55] Significantly, the court in *Poore* held that the goodwill of an ongoing business, although difficult to value because of the asset's subjective nature, nonetheless has a value that should be considered by the trial court.[56]

After determining which of the assets owned by the parties are available for distribution and the value of those assets, the court must divide the property "equitably" between the parties.[57] Because the goal of equitable distribution is to achieve a just result for each party and because the equities involved in spe-

52. *Id.* at 412, 324 S.E.2d at 917. The case was remanded to the trial court because the court of appeals concluded that the interest rate provided for in the partnership agreement seemed unreasonably low. The court noted that a trial court should use a rate "reasonably in keeping with the fair market value of money" and suggested looking to rates used by the Internal Revenue Service or to the prime rate set by banks at the time of separation. *Id.* at 415, 324 S.E.2d at 919; *see also* Poore v. Poore, 75 N.C. App. 414, 420, 331 S.E.2d 266, 270, *disc. rev. denied*, 314 N.C. 543, 335 S.E.2d 316 (1985) ("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.").

53. 75 N.C. App. 414, 331 S.E.2d 266, *disc. rev. denied*, 314 N.C. 543, 335 S.E.2d 316 (1985).

54. *Id.* at 419, 331 S.E.2d at 270; *see* McManus v. McManus, 76 N.C. App. 588, 593, 334 S.E.2d 270, 273 (1985) (when valuing a stockholder's interest in a close corporation, the trial court must consider the value of the ownership interest involved, as evidenced by the number of shares owned by the party, and not just the fair market value of the stock); Phillips v. Phillips, 73 N.C. App. 68, 74-75, 326 S.E.2d 57, 61 (1985) (In valuing an interest in a close corporation, the trial court should consider "plaintiff's response to interrogatories concerning gross sales, cost of goods sold, profit, operating expenses, and income and retained earnings" of the corporation.).

55. "An earnings or market approach . . . bases the value of the [business or] practice on its market value, or the price which an outside buyer would pay for [the asset] taking into account its future earning capacity." *Poore*, 75 N.C. App. at 419-20, 331 S.E.2d at 270. A comparable sales approach bases the value of the practice on the amount paid for similar businesses or practices. *Id.* For a more detailed analysis of valuation methods, see B. GOLDBERG, VALUATION OF DIVORCE ASSETS (1984); VALUATION AND DISTRIBUTION OF MARITAL PROPERTY (J. McCahey ed. 1985); Poindexter, *Business Valuation: Simple Theory, Complex Application*, in EQUITABLE DISTRIBUTION X-1 (North Carolina Bar Foundation 1985); Riddle, *supra* note 45, at IX-1.

56. "Goodwill is commonly defined as the expectation of continued public patronage" and is often the most valuable component of a professional association. *Poore*, 75 N.C. App. at 420, 331 S.E.2d at 271. Recognizing goodwill as "an intangible asset which defies precise definition and valuation," *id.*, the *Poore* court noted that determining "the existence and value of goodwill is [purely] a question of fact" to be decided on the particular business involved and with the aid of expert testimony. *Id.* at 421, 331 S.E.2d at 271. Very generally, the court should consider "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 comparative professional success, and the value of its other assets." *Id.*; *see also* L. GOLDEN, *supra* note 5, § 7.11, at 223 (listing similar factors to consider and suggesting various valuation methods for determining the value of goodwill).

57. *See supra* text accompanying note 15.

cific fact situations may vary widely, the trial court must be permitted great flexibility in dividing marital property.[58] The trial court must determine, in light of the thirteen factors listed in section 50-20(c) of the Act,[59] whether an equal division is, in fact, equitable. If an equal division of the marital property is shown to be unjust, the court may fashion an alternate remedy.[60] Any alternate division of property is subject to reversal on appeal only on a showing of clear abuse of discretion by the lower court.[61]

White v. White,[62] also decided in 1985, was the first case in which the North Carolina Supreme Court dealt specifically with the equitable distribution statute. After reviewing the history of equitable distribution and the public policy underlying the Act, the court concluded that an equal division of marital property is *mandatory* unless the trial court finds it to be inequitable.[63] The court stated:

> The clear intent of the legislature was that a party desiring an unequal division of marital property bear the burden of producing evidence

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58. L. GOLDEN, *supra* note 5, § 2.06. This flexibility in division is what distinguishes equitable distribution from community property systems which require an *equal* division. *Id.*

59. The statute provides:

> The factors the court may consider are as follows:
>
> (1) The income, property, and liabilities of each party at the time the division of property is to become effective;
>
> (2) Any obligation for support arising out of a prior marriage;
>
> (3) The duration of the marriage and the age and physical and mental health of both parties;
>
> (4) The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects;
>
> (5) The expectation of nonvested pension, retirement, or other offered compensation rights, which is separate property;
>
> (6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker;
>
> (7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse;
>
> (8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage;
>
> (9) The liquid or nonliquid character of all marital property;
>
> (10) The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party;
>
> (11) The tax consequences to each party;
>
> (11a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert such marital property, during the period after separation of the parties and before the time of distribution; and
>
> (12) Any other factor which the court finds to be just and proper.

N.C. GEN. STAT. § 50-20(c) (1984 & Supp. 1985).

For a discussion of the treatment of these and other factors by courts in other jurisdictions, see G. MCLELLAN, *supra* note 5, § 8.3, at 161-221.

60. N.C. GEN. STAT. § 50-20(c) (1984 & Supp. 1985) states, "If the court determines that an equal division is not equitable, the court shall divide the marital property equitably."

61. White v. White, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). The trial court, however, must clearly articulate its reasons for not giving an equal award. *See, e.g.*, Brown v. Brown, 72 N.C. App. 332, 333, 324 S.E.2d 287, 288 (1985) (case remanded to trial court for failure to specify the basis for determining that an equal distribution was not equitable under the circumstances).

62. 312 N.C. 770, 324 S.E.2d 829 (1985).

63. *Id.* at 776, 324 S.E.2d at 832.

> concerning one or more of the twelve factors in the statute and the burden of proving by a preponderance of the evidence that an equal division would not be equitable. Therefore, if no evidence is admitted tending to show that an equal division would be inequitable, the trial court *must* divide the marital property equally.[64]

Once such evidence is introduced, however, the trial court has broad discretion in distributing the property.[65]

The court of appeals has recently upheld several unequal awards. In *Andrews v. Andrews*[66] the trial court had awarded an unequal division after hearing testimony that the wife had custody of the children and was responsible for household services.[67] On appeal defendant argued that the trial court had erred in failing to consider all of the factors listed in section 50-20(c). The court of appeals affirmed the trial court's decision, noting that each factor will not necessarily be relevant in each case.[68] In *Appelbe v. Appelbe*[69] the court upheld an unequal division on the grounds that the marriage had lasted eighteen years, that the wife had "sacrificed her own career opportunities by being a homemaker," and that the "[husband's] earnings and retirement benefits greatly [exceeded the wife's]."[70] The *Appelbe* court reaffirmed the principle that if the trial judge indicates the basis of his or her division of property and no abuse of discretion is shown, the court's distribution will be upheld on appeal.[71] Further, the court noted, "[E]quitable distribution, as the term suggests, is not distribution according to some fixed schedule or formula; it requires the exercise of judgment and discretion according to the circumstances involved."[72]

In 1985 the court of appeals had several opportunities to define and clarify certain of the factors listed in section 50-20(c).[73] Upholding an unequal division of property based on a disparity in the parties' incomes, the court in *Bradley v.*

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64. *Id.*

65. The court stated, "The legislative intent to vest our trial courts with such broad discretion is emphasized by the inclusion of the catchall factor codified in N.C.G.S. 50-20(c)(12)." *Id.* at 777, 324 S.E.2d at 833. For more insight into the issue of the trial court's discretionary powers, see *Survey of Developments in North Carolina Law, 1982—Family Law*, 60 N.C.L. REV. 1379, 1399 (1983).

66. 79 N.C. App. 228, 338 S.E.2d 809 (1986).

67. *Id.* at 231, 338 S.E.2d at 811.

68. The court stated:

> It is clear, however, that not every factor will necessarily have relevance in every case . . . . In light of the lack of universal relevancy, the applicable burden of proof, and the standard of our review, it is clear that an order is not reversibly erroneous simply because it fails to expressly address every factor listed in G.S. 50-20(c).

Id. at 232, 338 S.E.2d at 812.

69. 76 N.C. App. 391, 333 S.E.2d 312 (1985).

70. *Id.* at 392-93, 333 S.E.2d at 312-13.

71. The court refused to increase the award given to the wife by the trial court, noting that the facts supported the unequal division and that nothing in the record indicated that the trial court should have awarded her an even larger share. *Id.*

72. *Id.* at 393, 333 S.E.2d at 313; *see also* Patton v. Patton, 78 N.C. App. 247, 257, 337 S.E.2d 607, 613 (1985) ("The weight to be assigned to any factor in a given case is within the discretion of the trial court," and review of unequal division is limited to a clear abuse of discretion.), *disc. rev. denied*, 316 N.C. 195, 341 S.E.2d 585 (1986).

73. *See supra* note 59 for a list of these factors.

Bradley[74] held that "income" under section 50-20(c)(1) was not intended to include assets such as child support payments received from the other spouse or governmental subsidies such as food stamps or Aid to Families with Dependent Children.[75] In *Talent v. Talent*[76] the court further defined section 50-20(c)(1) by stating that any debts or liabilities of a party considered in making an equitable distribution must be ones that will be outstanding at the time the property division is to become effective.[77] Similarly, the court in *Dorton v. Dorton*[78] concluded that the trial court was required to consider a spouse's liability on several notes and deeds of trust executed during the parties' separation and the liens and encumbrances on certain property classified as separate property.[79]

Much controversy has arisen over the consideration of marital fault under section 50-20(c)(12), the so-called "catch-all" factor of the Act.[80] This section permits the trial court to consider "[a]ny other factor which the court finds to be just and proper" in making its distribution.[81] The North Carolina Supreme Court addressed the issue of marital fault in two cases decided in 1985[82] and on both occasions reached the conclusion that marital fault that is unrelated to the economic condition of the marriage is irrelevant to the issue of equitable distribution.[83] In *Smith v. Smith*[84] the supreme court held that the trial court had erred in considering factors such as defendant's excessive use of alcohol and other, more specific instances of similar misconduct under section 50-20(c)(12) of the Act.[85] The court first examined the legislative intent behind equitable distribution and noted that the " 'goal of equitable distribution is to allocate to

74. 78 N.C. App. 150, 336 S.E.2d 658 (1985).

75. *Id.* at 152-53, 336 S.E.2d at 659-60. The court stated, "We presume since there is no indication to the contrary that the legislature used the word 'income' in G.S. 50-20(c)(1) to convey its natural and ordinary meaning." *Id.* at 152, 336 S.E.2d at 659. The court concluded that these assets should not be considered as income because they are "not derived from capital or labor and are not taxable [under the Internal Revenue Code] as are earned income and income derived from investments." *Id.* at 152, 336 S.E.2d at 660.

76. 76 N.C. App. 545, 334 S.E.2d 256 (1985).

77. *Id.* at 554, 334 S.E.2d at 262.

78. 77 N.C. App. 667, 336 S.E.2d 415 (1985).

79. *Id.* at 675, 336 S.E.2d at 421. Although separate property is not subject to division, the value of each party's separate assets is an important consideration in distribution. In Johnson v. Johnson, 78 N.C. App. 787, 338 S.E.2d 567 (1986), the court of appeals allowed consideration of the depreciation of a spouse's separate property during the marriage. In Poore v. Poore, 75 N.C. App. 414, 331 S.E.2d 266 (1985), the court noted that on remand the trial court must consider the value of a spouse's interest in a pension plan, even though at the time that the action was brought that interest was considered to be a separate property. *Accord* Dewey v. Dewey, 77 N.C. App. 787, 336 S.E.2d 451 (1985) (value of an annual sum that plaintiff would later receive was a proper factor to be considered). *See generally* L. GOLDEN, *supra* note 5, § 8.01-.26, at 233-82 (discussing the division stage of the equitable distribution process and noting repeatedly the flexibility allowed trial judges in this area and the court's ability to consider that property which it refused to classify as marital).

80. N.C. GEN. STAT. § 50-20(c)(12) (1984 & Supp. 1985); *see Marital Fault as a Factor in An Equitable Distribution Award*, 2 EQUITABLE DISTRIBUTION JOURNAL 92 (1985) (discussing the frequent litigation of this issue in other jurisdictions with a similar "catch-all" factor).

81. N.C. GEN. STAT. § 50-20(c)(12) (1984 & Supp. 1985).

82. Dusenberry v. Dusenberry, 314 N.C. 608, 335 S.E.2d 892 (1985); Smith v. Smith, 314 N.C. 80, 331 S.E.2d 682 (1985).

83. The court of appeals reached an identical conclusion in Hinton v. Hinton, 70 N.C. App. 665, 321 S.E.2d 161 (1984). For a thorough discussion of this case, see Note, *supra* note 4.

84. 314 N.C. 80, 331 S.E.2d 682 (1985).

85. *Id.* at 82-86, 331 S.E.2d at 684-86.

divorcing spouses a fair share of the assets accumulated by the marital partnership.' "[86] This underlying goal, along with the fact the other twelve factors listed in the statute deal only with the "economy"[87] of the marriage, led the court to hold that noneconomic fault considerations should be left to alimony proceedings and are not "just and proper" factors to be considered by the trial court in an equitable distribution proceeding.[88] Only that fault or misconduct of a spouse which dissipates or reduces marital property for nonmarital purposes may be considered by the trial court.[89]

In *Dusenberry v. Dusenberry*[90] the trial court had considered the defendant spouse's adulterous behavior and abandonment of plaintiff and their three children as bases for awarding plaintiff a larger share of the marital estate. The supreme court remanded the case for rehearing in light of its holding in *Smith*.[91] Justice Meyer, however, delivered an extensive dissenting opinion, significantly expanding his previous remarks made in response to the majority opinion in *Smith*.[92] Justice Meyer noted that a large number of jurisdictions have found that "serious moral or marital fault" may be relevant to the issue of equitable distribution.[93] He also stated that often "moral or marital fault diminishes the contribution of a spouse to the marriage and/or results in additional expenses and efforts on the part of the innocent spouse."[94] As in his dissent to *Smith*,[95] Justice Meyer stated in *Dusenberry* that the general assembly did not intend for moral misconduct to be precluded completely from a trial court's consideration. Justice Meyer relied on the fact trial courts have very broad discretion in distributing marital property and that, when the general assembly passed the Act, it did not expressly exclude fault as a factor even though such an exclusion had been suggested during the Senate's debate over the bill.[96]

86. *Id.* at 86, 331 S.E.2d at 686 (quoting *Dissipation of Assets*, 1 EQUITABLE DISTRIBUTION JOURNAL 73 (1984)). Other commentators have noted that the consideration of marital fault is inconsistent with the economic partnership theory of equitable distribution. This theory deals with distributing the economic fruit of the relationship upon divorce rather than focusing on the marital dispute itself. *See* L. GOLDEN, *supra* note 5, § 8.13, at 255; Note, *supra* note 4, at 1204-08.

87. The *Smith* court defined the economy of the marriage as "the source, availability, and use by a wife and husband of economic resources during the course of their marriage." *Smith*, 314 N.C. at 86, 331 S.E.2d at 686. The court continued, "By the principal of ejusdem generis, we must construe the statutory twelfth catchall factor consistently with the legislative purpose inherent in the first eleven statutory factors." *Id.* Justice Meyer in his dissent, however, asserted that some statutory factors, such as the duration of the marriage considered under § 50-20(c)(3) of the Act, do not deal with marital economy. *Id.* at 89, 331 S.E.2d at 688 (Meyer, J., dissenting).

88. *Id.* at 88, 331 S.E.2d at 687.

89. *Id.* "Such conduct might be, e.g., the conveyance by one spouse of marital assets in contemplation of divorce." *Id.*; *see also* N.C. GEN. STAT. § 50-20(c)(11a) (Supp. 1985), which requires that a court take into consideration a party's conversion or waste of a marital asset after separation.

90. 314 N.C. 608, 335 S.E.2d 892 (1985).

91. *Id.* at 608-10, 335 S.E.2d at 892-93.

92. *See supra* note 87.

93. *Dusenberry*, 314 N.C. at 615, 335 S.E.2d at 895 (Meyer, J., dissenting).

94. *Id.* at 616, 335 S.E.2d at 896-97.

95. *Smith*, 314 N.C. at 89, 331 S.E.2d at 688 (Meyer, J., dissenting).

96. *Dusenberry*, 314 N.C. at 613-14, 335 S.E.2d at 895; *see also* Wade v. Wade, 72 N.C. App. 372, 385, 325 S.E.2d 260, 271 (panel of appellate judges indicated that they might not agree with the decision in Hinton v. Hinton, 70 N.C. App. 665, 321 S.E.2d 161 (1984)—that noneconomic marital fault could not be considered in an equitable distribution proceeding—but noted that alimony proceedings are better suited for such issues), *disc. rev. denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).

During 1985 and the early months of 1986, the North Carolina courts and, to a lesser extent, the North Carolina General Assembly have made significant advances in interpreting and clarifying the Equitable Distribution Act of 1981. Because of the Act's complexity, it has been obvious from the time of its enactment that the North Carolina courts would eventually have to deal with the same difficult issues that have faced other states that have adopted this form of property distribution.[97] During 1985 the court of appeals further expanded the definition of marital property by creating a presumption that all property acquired by the spouses during the marriage can be distributed upon divorce and by adopting the more liberal "source of funds" doctrine. The court also provided much needed guidance in the area of valuation of marital property, and the North Carolina Supreme Court, in *White* and in *Smith*, addressed common problems that arise during the property division stage of the equitable distribution proceeding. Although there are many issues left to be resolved, the judicial opinions and the legislative amendments of 1985 have evidenced a firm commitment to the underlying principles of equitable distribution and to achieving a just division of assets upon divorce.

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97. *See* Sharp, *supra* note 3, at 271-73 (discussing the complexity of the statute and the issues that would have to be addressed by the courts or the general assembly for the policies underlying the Act to be fulfilled).