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COLOMBO KITCHIN

Legal *news*

ADDRESSING THE LEGAL NEEDS OF INDIVIDUALS AND BUSINESSES IN OUR COMMUNITY



The Process of Dividing Property

Author: Dallas C. Clark, Jr., Attorney at Law, Board Certified Specialist in Family Law

Prior to the enactment of the North Carolina Equitable Distribution of Property Law in 1981, when married couples separated the titled owner of property was not required by law to divide that property with the non-titled spouse. The North Carolina legislature, following a national trend, felt this situation did not recognize the contributions to the marriage's economic/financial welfare by the non-titled owner, so it enacted a law that required the distribution of marital property upon separation without regard to who was the titled owner. When couples are negotiating separation or have separated, the property division process involves the following four steps:

1. **Identify the Property.** Make an inventory of the property owned at the time of negotiation or separation;
2. **Classify the Property.** North Carolina follows a "source of funds" theory to classify property; in other words, where the money to acquire the property came from. There are four classifications of property:
 - (a) *Marital*, or property acquired between the date of marriage and the date of separation, even if the paycheck of one spouse was used to buy it and even if it is titled to just one spouse;
 - (b) *Separate*, or property owned before the marriage, inherited, or received from someone other than the other spouse;
 - (c) *Dual*, or property acquired by funds or assets from both an outside source and within the marriage; and
 - (d) *Divisible*, which occurs if the value of property changes passively between the date of separation and the date of distribution, the property value at the date of distribution is divided (a certificate of deposit that gains interest, for example); however, if the value changed due to the active efforts of one spouse, the increased value of the property belongs to the party who caused the increase in value.
3. **Value the Property.** It is easy to value a car or financial accounts, but the valuation of some assets, such as a business interest, can be very controversial and expensive. It is not unusual in such cases to have opposing appraisers have values very far apart, and often the appraisal for the spouse **not** receiving the property is higher than the appraisal for the

party who is receiving the property. The debt balances are deducted from the value of any property which is encumbered to arrive at a net fair market value, and unsecured debts must be considered in arriving at the net fair market value of the total marital estate that is to be divided. The courts have to decide differences in value, but they cannot simply "split the difference."

"The court may not consider marital misconduct in dividing marital property."

4. **Distribute the Property.** The law presumes that an equal division is equitable, so the net fair market value of the marital estate **must** be divided equally, unless the court determines that an equal distribution would not be equitable.

The court may not consider marital misconduct, such as adultery or abandonment, in dividing marital property. A spouse can commit adultery, but he or she will not receive less than one-half (1/2) of the net marital estate because of those actions. This law became thirty (30) years old on October 1, 2011. The statute has changed a great deal, and appellate court decisions about the law have evolved. Sometimes, those decisions are in conflict with one another. There are many nuances to this process, and it is unwise to divide property without the assistance of attorneys with experience in this area.

Dallas C. Clark, Jr. has more than forty years of experience in family law and focuses his practice on complex custody and support, property division, and alimony/spousal support cases.

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An Intro to Non-Compete Agreements

We routinely receive calls from employers who want to create a non-competition agreement with an employee or enforce a non-competition agreement against a former employee. Unfortunately, many employers do not put the appropriate effort into creating a non-competition agreement with an employee. Therefore, it becomes difficult, and often impossible, to enforce a non-competition agreement when an employee leaves. As a general rule, our courts do not like non-competition agreements as a matter of public policy because you are limiting the ability of your employee to find another job. However, if a non-competition agreement is drafted with several key factors in mind, it is possible to have the agreement enforced by our courts.

1. **Consideration:** The first and perhaps most important component to a well-drafted non-competition agreement is that the employee received adequate consideration for signing the agreement. The best way to prove adequate consideration is to have an employee sign a non-competition agreement at the time he is hired. Since signing the agreement was a condition of employment, the consideration for the non-competition agreement is his new job. If someone already works for you and you would like for them to sign a non-competition agreement, adequate consideration is often more difficult to establish. The courts have held that continued employment in exchange for a non-competition agreement is not adequate consideration. You will have to give the employee something to which he or she is not otherwise entitled, such as a bonus, a salary raise, or some other discretionary compensation.

2. **Limited Geographic Territory:** Another important component of an enforceable non-competition agreement is to make sure that you have limited the geographic territory of your restriction to an area which you legitimately need to protect. For example, if you have an employee that works with clients solely in eastern North Carolina, it would not be reasonable to ask him or her to sign an agreement which prohibits him or her from working anywhere in the State of North Carolina. It would be

best to limit the geographic territory to the eastern North Carolina counties where he or she will work because there is a legitimate business reason for prohibiting him or her from working in that territory.

3. **Limited Work Activities:** In order to enforce a non-competition agreement it is also important to insure that the agreement prohibits only the specific work activities which the employee performed for you. For example, if you employ a salesperson in your business, then any non-competition agreement you prepare should prohibit the employee from selling the product or products distributed by your company. It would not be reasonable to prohibit the employee from having another sales job in a completely different industry.

4. **Limited Duration:** Since our courts do not want to place unreasonable restraints on the right of an employee to find another job, a non-competition agreement cannot last forever. The purpose of a non-competition agreement is to give the employer time to replace the employee and preserve the customer relationship which had been handled by the former employee. As a result, it is important to evaluate each position to see how long it would realistically take to hire and train a replacement and have that person get up to speed with your customers. While there is no bright-line rule, a non-competition agreement which expires twelve (12) months after the termination of employment would be reasonable in most cases, and there may be some circumstances where that time period could be extended even longer.

Employers do not need non-competition agreements with every employee. There are some employees, however, who are a key part of your business. In those instances, a non-competition agreement can be a valuable tool to protect your legitimate business interests. If you choose to use a non-competition agreement, it is important to spend the appropriate amount of time on the agreement at the beginning of the process to be sure that each agreement meets your needs. Spending time on these matters at the beginning will greatly increase the chances of a court upholding your non-competition agreement if it is challenged by your employee at a later date.

Author: Christian E. Porter, Attorney at Law

Disaster Preparedness

Hurricane Irene reminded all of us how vulnerable and, in some cases, ill-prepared we are for natural disasters. While it is a good practice to review personal property and casualty insurance annually, for most of us this process is neglected until we have the misfortune of needing coverage. Likewise, we often overlook the necessity of updating other legal documentation, such as our wills and life insurance beneficiary forms, until we experience a life-altering event.

Personal Property and Casualty Insurance Annual Review

- Review your personal property and casualty insurance coverage, specifically coverage amounts on your home, personal property, and personal liability. Pay close attention to any personal property special limits or caps (e.g., jewelry, coins, firearms) and any policy exclusions.
- Review your policy deductible.
- Store important documentation, such as your insurance policy, in a water and fireproof location.
- Have your insurance agent's contact information readily available.

Author: Bill Ferrell, Legal Administrator

Estate Planning Annual Review

- Review your will, powers of attorney, and other estate documents to confirm that your wishes are being met.
- Update your documents as you experience life changing events such as marriage, divorce, adoption, or the addition of children.
- Review your life insurance policy terms and conditions and make sure the policy value meets your current financial goals.
- Review and update your beneficiary forms.
- Organize and catalog documents for easy retrieval. Store important documents in a water and fireproof location.
- Consult with a professional to make sure your estate planning documents take advantage of any updated laws or provisions.

This Edition's FEATURED ATTORNEY

TRACY H. STROUD



Tracy Stroud concentrates her practice in employment, administrative, and healthcare law. She has appeared on behalf of clients in federal court for the Eastern District of North Carolina, the North Carolina Office of Administrative Hearings, and district and superior courts around Eastern North Carolina. She also handles appeals to the North Carolina Court of Appeals and North Carolina Supreme Court.

In law school, Tracy was a finalist in the intramural moot court competition and a member of the Campbell Law ABA National Moot Court Team. She currently serves as a member of the Board of Directors for the East Carolina University Society of Law Alumni and is liaison for this organization to the East Carolina University Alumni Association. She is a 2011 graduate of the Greenville-Pitt County Chamber Leadership Institute. She is proud to have been named 2010-2011 Layperson of the Year at Ayden United Methodist Church for her leadership of their stewardship campaign and involvement in youth activities.

Tracy lives in Winterville, is married to Max Stroud, and has three children, Meredith, Ginny, and Max III.

Employer

Author: W. Walton Kitchin, Attorney at Law

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R In the current economic climate, many employees who have been terminated due to performance, conduct, or reduction in force will be filing claims with the North Carolina Employment Security Commission for benefits. It is important for employers to know which of these claims may be successfully defended.

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R Generally speaking, employees are disqualified for benefits if they quit employment without good cause attributable to their employer (this is a two-year disqualification). Good cause attributable to the employer would include such matters as substantial pay cuts, a substantial reduction in work hours, or a forced resignation. What might not be readily known to employers is that employees who leave work to accompany their spouse to a new location may not be disqualified. Employees who leave work because of domestic violence, stalking, or a sexual offense committed against them or close family members are likewise not disqualified.

Employees are disqualified for benefits if they are terminated for misconduct, including, but not limited to, being impaired by alcohol or drugs at work or theft of company property. Any willful or wanton disregard of an employer's legitimate interests may be considered misconduct. What constitutes misconduct is ultimately a factual determination made by the Employment Security Commission in a contested case. Upon a finding of misconduct, an individual will be considered disqualified for a period of two (2) years.

Employees who are discharged for acts which are not serious enough to constitute misconduct, but which are nevertheless detrimental to the interests of the employer, may have their benefits reduced by four (4) to thirteen (13) weeks. Whether to reduce benefits for "substantial fault" is often a difficult call for the Employment Security Commission to make at a hearing and requires solid evidence presented by the employer to compel such a finding. It is therefore important for all employers to maintain notes and warnings of unacceptable behavior on the part of their employees. It should be noted that minor violations of work rules in the absence of previous warnings, inadvertent mistakes, and simple performance issues will not provide the basis of a finding of substantial fault. Employers should be aware that when their employee is discharged on the basis of substantial fault, the reduced benefits are not charged to the employer's account.

If the initial adjudication of benefits is appealed and a hearing is set, there are several matters for employers to consider. The first thing to remember is that the intent of the law is to provide benefits to those workers who are unemployed due to no fault of their own. Therefore, employers have the burden of proving grounds for discharge due to misconduct. These grounds will normally have to be proved through non-hearsay evidence, meaning that the appropriate witnesses and documentation will have to be available for the hearing. It is also important to keep the focus of the hearing on the particular issues that have been appealed. The hearing officers are not interested in hearing irrelevant testimony, regardless of the importance assigned to it by the parties. Finally, if the adjudication of benefits is appealed, you must be aware of and observe the time limitations set out in the notices from the Employment Security Commission, or you risk the loss of your right to appeal.

Colombo, Kitchin, Dunn, Ball & Porter, L.L.P.

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