

What We Know

ARTICLES & INSIGHTS

ABOUT THE AUTHOR



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Paying on the Family Home After Separation

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As anyone involved in family law litigation knows, it can take two to three years or more following the date of separation before outstanding issues between the parties can be resolved by a court. In the urban counties of North Carolina, family courts are swamped with thousands of family law cases, many of which involving parties who cannot afford to hire attorneys. As a result, it is not uncommon for an equitable distribution trial to finally occur 12 to 24 months after the filing, and in many cases, the couples may not file until many months after their separation. During this time of delay, it is very common for one party or the other to continue making mortgage payments on the family home or pay for repairs to the family home, and perhaps even pay for repairs on other assets that were owned by the parties at the time of the separation.

Years later, when the case finally goes to trial it is reasonable and logical for the party who made those payments to seek credit for those payments when the Court enters the final order. For example, if the mortgage on the family home had a principal balance of \$100,000.00 on the date of separation, but now has a balance of \$90,000.00 when the case finally comes to trial, it makes sense to assume that the party who made the payments, should receive credit for that \$10,000.00 enhancement of equity in the family home. However, it is not that simple.

In the recent Court of Appeals case of *Cushman v. Cushman*, the husband paid for repairs and made mortgage payments on the family home between the time the parties separated in May of 2010 and the time the case went to trial in May of 2014. During the litigation leading up to the equitable distribution trial, the husband and wife had mutually agreed, both in writing and in testimony, that they both wanted the court to *equally divide their marital property and debts*. Despite having both made this statement several times in the filings with the court leading up to and during the litigation, the husband presented evidence at trial requesting an unequal share in his favor of the marital distribution because he had made substantial payments and repairs on the marital residence, where he had continued to reside since the date of separation. He requested a larger portion of the marital distribution to account for those improvements. Despite his evidence, the trial court declined to grant an unequal distribution of the marital property to the husband because it found that the husband had stipulated and agreed to wanting an “equal” division of the marital property and debts. Recognizing that he had made this agreement, the husband argued that the

increase in value should be awarded to him as separate property because he made the repairs and mortgage payments from his separate funds during the four post-separate years.

Both of these issues were taken up on appeal by the husband to the North Carolina Court of Appeals. On appeal, the Court of Appeals agreed with the trial court and affirmed the trial court's ruling.

In so doing, the Court of Appeals specifically stated that where there is undisputed evidence that the parties agreed "to an equal division of the marital estate" it is not necessary for the trial court to even consider distributional factors that are relevant to an unequal distribution. In essence, when the parties agree to an equal division they waive their right to have the court consider factors in the equitable distribution statute that justify an unequal distribution.

Yet, all was not lost for the husband, or so he thought. He still had the argument that he made the mortgage payments and paid the cost of repairs from funds that were his separate property. While the trial court did not like that argument, the husband still had hopes that the Court of Appeals would reverse the trial court. Regrettably for him, the Court of Appeals agreed with the trial court on this issue as well.

The Court of Appeals stated that the burden was on the husband to prove that the payments he made on the mortgage and repairs were from his separate funds. The court then went on to conclude that the husband failed to offer that proof because the mortgage payments came from his military retirement, which the court considered a marital asset since the retirement account had been acquired during the couple's marriage. In addition, the Court of Appeals pointed out that the husband did not present clear evidence at the trial as to exactly how much he paid to reduce the mortgage during the period of separation leading up to trial.

The lessons here are clear:

1 - There is almost no reason that a litigant in an equitable distribution case should stipulate or agree that an equal division of the marital assets and debts is appropriate. Once that stipulation is made, the court loses a lot of flexibility to adjust for events that occur after the date of separation.

2 - If post-separation payments are made to enhance the value of marital assets or reduce marital debt, it is critical that an accurate accounting be maintained of those payments, including clear evidence of the source of funds for those payments. If such payments are made, and the source of funds for payment is clearly the separate property of the payor, then this payment would be both a distributional factor and the separate property of the party who made the payment from his or her separate funds.

Under either theory, the party who made those payments should receive appropriate credit either by obtaining an unequal distribution of the marital property in his or her favor or by having the separate portion of the asset assigned to him or her as his or her

own separate property.

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